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Dealing with Wars and Dictatorships

Legal Concepts and Categories in Action

Liora Israël
Guillaume Mouralis *Editors*

Springer

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In collaboration with Valeria Galimi
and Benn E. Williams

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Chapter 1
General Introduction

Liora Israël and Guillaume Mouralis

Contents

The twentieth century saw an unprecedented number of major wars, conflicts, and massive human rights violations. From each emerged the desire to make sense of the recent past (and present) by imagining new ways of dealing with such events. Be it to prevent new forms of violence, or to punish the persons responsible of past horrors, various solutions have been imagined, deployed, implemented, and discussed, at different levels. The idea for this volume originated from a workshop organized by the authors in Paris in May 2008.[1] The workshop's aim was a

[1] The workshop organized by Liora Israël, Valeria Galimi and Guillaume Mouralis was entitled "Transitions, épurations, sorties de guerre. Retour sur les concepts et les catégories d'analyses."

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collective discussion on the categories and concepts used in a growing and multi-faceted literature devoted to legal and non-legal procedures intended to deal with the past in a post-conflict or post-authoritarian context.

The book is a reflection on the social and historical construction, appropriation, and circulation of categories, norms, and *savoir-faire* related to the way social groups and institutions—state, judiciary, professional organizations—confront traumatic events. First, since there is a robust literature on purges and other mechanisms intended to deal with an authoritarian or violent past, written by authors belonging to numerous disciplines and exploring different periods and topics with a variety of theoretical and methodological backgrounds, it is only prudent to sketch the main tendencies in this literature.

In the last few decades, two main fields of research devoted to these purge mechanisms have developed; however, they rarely enter into dialog with one another. They resort to different disciplines (put broadly, legal and political sciences vs. contemporary history and sociology), and refer, to some extent, to opposite conceptions of knowledge (theoretical, normative vs. empirical, comprehensive). In the fields of law and political science, the most recent development appeared at the crossroads of human rights, advocacy, legal expertise, and academic research at the beginning of the 1990s. This new trend is often called *transitional justice* (TJ). Quite neglected by the specialists of TJ is another research area, developing since the 1960s, devoted to purges following World War Two. Populated mainly by historians of contemporary history, *purges* have become, if not a disciplinary sub-field, at least a clearly delineated research topic. The subject has also been addressed, more or less directly, by specialists of other human and social sciences, including political sociology and political philosophy.[2]

By addressing a more general issue, despite disciplinary boundaries, our goal is not only to overcome excessive specialization, but also to normalize the research on socio-political phenomena that have often been analyzed in terms of their exceptionality. In line with a long established tradition in the social sciences (from Marc Bloch's account on the French defeat of 1940 to Michel Dobry's analysis of political crisis[3]), we question the postulate that unusual or extraordinary situations require specific methods and concepts. Rather than viewing a postwar era as a priori exceptional (as in the legal formula "state of exception"), we prefer to consider them as political and social "experiments" that often reveal ordinary tensions and dynamics more accurately than routine peacetimes. In other words, we propose the analysis of postwar or post-authoritarian situations with the ordinary tools and methods of the historical and sociological research.

Eschewing disciplinary boundaries, our objective is to open the conversation between different fields of research in order to better understand similar social phenomena in various social and historical contexts. Our aim is neither to build universal typologies nor to identify structural invariants. On the contrary, we

[2] More rarely in other social sciences such as sociology until the 1980s. In philosophy, see for example: Arendt 1963 and the recent critical account on Arendt's interpretation by Delpla 2011.

[3] Dobry 2009.

believe that these phenomena are to be analyzed with the usual tools of social sciences in order to take into account their exceptionality as well as their social embeddedness.

1.1 Uncertain "Transitional Justice"

The recent development of *transitional justice*, both as a phrase and practice, is a remarkable success story to the point of institutionalization in the academic world. Emergent thematic poles transcending traditional divisions, new graduate programs, and law school curricula are the landmarks of this achievement. Transitional justice tends to become a lexical rallying point for various approaches, some of them having ties with "transitology," an area of research constituted in the 1980s, partly inspired by economic theories, and mostly devoted to the study of democratic transitions in Latin America.[4] Since the late 1990s, part of the research programs claiming the banner of transitional justice are also rooted in older research traditions, either in history or in law.

In what can be described as its standard conception, "transitional justice" refers to a set of legal measures (laws, judicial decisions) aiming at the redress of inherited injustices during and immediately after a change of political regime.[5] These measures of justice primarily seek to achieve three main objectives: retribution of those responsible for human rights violations, reparation for the victims, and enlightenment or "truth telling." If the kind of events is clearly framed, the approach in terms of transitional justice makes it often difficult to know if the model is descriptive or prescriptive. The entanglement of the two postures is quite obvious in the literature written by experts on the ground and by some academics. The nature of the empirical findings is often questionable when the authors rely primarily on secondary sources and compare a range of national cases. In fact, the approach take by the promoters of transitional justice is rather theoretical and normative than empirical and explanatory. While seeking to achieve a universal model or a "grand narrative," they suggest a new way of delimiting research topics and questioning them. This approach, based on the building of general typologies, could only challenge all those working in history and sociology on purges: it led them to clarify the theoretical prerequisites of their own analysis, for example regarding the temporalities of the social practices at stake.[6]

It is useful at the beginning of this reflection to recall the genesis of "transitional justice." Its emergence as an academic field resulted from the encounter and dialog

[4] See Guilhot 2002 and Dobry 2000, pp. 49–70.

[5] According to the main publications on the subject since 1995: Kritz 1995, vol. 1; McAdams 1997; Teitel 2000, which is partly reworked version of an article published in 1997; Elster 2004.

[6] In this sense, they invite to "think against," fulfilling a classical function in social sciences. See Noiriel 2003.

between theoreticians of the "democratic transition" (Guillermo O'Donnell, Philippe Schmitter, Samuel Huntington) and specialists of international human rights law (Diane Orentlicher, Ruti Teitel) in the context of political upheavals, first in Latin America, then in Central and Eastern Europe as well as South Africa. The social sciences did not play an important role as such in the emergence of this new field. Questioning the relationship between the rule of law and transitions and renewing a declension of older discussions on the relationship between law and politics, the promoters of TJ—among them many professors of law—were, and often still are, advocating noticeably alternative forms of dispute resolution,[7] such as truth and reconciliation commissions.[8] Criminal justice was, in contrast, considered as an unsuitable means of dealing with an authoritarian past or mass violence in times of transition: it was seen as too slow, unpredictable in its results, unable to produce "reconciliation." This position has gained nuance since the beginning of the 2000s. Thus, TJ proponents increasingly support international criminal justice, but the desire to favor smooth transition and legal security often leads to favor the "restorative" function of justice to the detriment of a more retributive conception.[9] Moreover, since its first conceptualization, the field has expanded enormously, notably toward new questions, such as the role of emotions[10] and the impact of gender[11] in the conception and implementation of transitional justice policies.

Although little known and discussed in the English-speaking academic world, some serious critiques of these approaches have been noticeably—but not exclusively—addressed by European sociologists and historians.[12] To some extent, these critical accounts update traditional misunderstandings between social sciences and legal theory. These critiques were also encouraged by the highly theoretical ambitions of some TJ advocates, claiming no less than a new paradigm[13] in the context of its academic legitimization and its development as a professional activity.

Critics may also have expressed reservations about a new form of "instrumental positivism,"[14] by analogy with the dominant trend in American sociology since the 1920s. Yet, in the case of transitional justice, this positivism is far less empirical than its former manifestations, for the research on TJ, mostly based on secondary literature and seeking to develop a universal theory, is not particularly inductive.

From an historical and sociological point of view, the critical accounts on TJ insist on some empirical and theoretical weaknesses of these approaches.

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[7] Lefranc 2009, pp. 561–589.

[8] Hayner 1994 and idem 2002.

[9] Lefranc 2006, pp. 393–409.

[10] See for example Elster 2004, Chap. 8 (pp. 216–244).

[11] Buckley-Zistel and Stanley (eds) 2011.

[12] On this criticism, see Mouralis 2008, pp. 19–32; Lefranc 2008, pp. 61–69; Condé 2009, pp. 554–559.

[13] Teitel 2000.

[14] Bryant 1989 and Condé 2009, p. 552.

Empirically, the notion of transitional justice itself turns out to be inadequate or even misleading. It fails to explain the very peculiarities of a large range of national cases, such as the frequent disconnections between regime change and measures of justice. In some cases, these measures are adopted independent of political transition. For example, how does one explain how Argentina recently engaged in new trials, whereas Brazil,[15] despite a left-wing government,[16] is just beginning to address its dictatorial past on a limited scale? In other cases, the judicial measures are taken long after a transition, or even before, to cite the West German experience of dealing with human rights violations in Eastern Germany during the Cold War.[17] In addition, one observes the existence of similar processes in authoritarian regimes, e.g., in the territories recovered by the Red Army after Nazi occupation. More generally, the conceptualization of TJ itself is rather vague. From a social science point of view, a number of concepts including TJ are blindly taken for granted, instead of being treated as subjects of inquiry. The repeated use of terms such as "reconciliation" or "impunity," and the unquestioned reference to the "rule of law" or "civil society" tell us more about the normative and political horizon of those who borrow them than about the phenomena they are supposed to explain. Furthermore, the TJ literature is often based on implicit theoretical prerequisites and postulates that produce a set of biases, some of them inherited from the "transitology" framework as a situated knowledge.[18]

Most TJ specialists implicitly adhere to a liberal, formal-legal, conception of justice, rather than a social-redistributive one. They favor procedural justice rather than social justice. This observation echoes an evolution clearly underlined by Axel Honneth in his analysis of the moral grammar of social conflicts in contemporary societies.[19] Similarly, in most publications on TJ, the unique envisaged transition is that from an authoritarian regime to a liberal democracy. It is a one-way, politically oriented channel. Accordingly, most authors are tempted to rationalize a posteriori what they consider a set of "best practices," leading in the "good" direction.

Studies in this field tend to be elite-centered. They analyze how policy-makers from the old regime and representatives of the opposition negotiate both the democratic transition and the adoption of TJ measures. Thereby, they are often valorizing, implicitly or explicitly, rational choice theories and assuming that political elites can elaborate rational political decisions when it comes to a transition. Such a perspective is illustrated with renewed approaches aiming to systematize the underlying model of political action in the TJ literature, sometimes based on

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[15] The change in Brazil began in the summer of 2012. See "La caravane du pardon," Libération, 23 July 2012.

[16] The current President had been jailed and tortured, under the dictatorship, for being a member of a Marxist guerilla group.

[17] Mouralis 2008.

[18] Dobry 2000 and Guilhot 2002.

[19] Honneth 1995.

quantitative modeling, such as that of Monika Nalepa in her book on lustration laws in Central and Eastern Europe after the breakdown of real-socialism.[20]

Lastly, TJ approaches often reveal an implicit conception of historical time especially since the uncritical use of the term "transition" implies a short-term perspective. By insisting on the exceptionality of transitional contexts, specialists of TJ develop a kind of methodological exceptionalism, according to which transitions cannot be analyzed with the ordinary tools of social sciences, even if this shortage of analysis is criticized, to some extent, inside the field of TJ itself.[21] This conception of historical time is often linked to an implicit causal postulate[22]: if implemented, the measures of justice are viewed as a necessary step after a regime change. As Paul Veyne explained convincingly, this type of analysis often confuses succession and consequence.[23]

Without directly contesting these approaches, a growing number of academic specialists in sociology, law, and philosophy are engaged in direct or indirect debates with TJ analysis. They focus on connected questions, such as the manner in which criminal justice deals with mass atrocities (Mark Osiel,[24] Isabelle Delpla[25]), or they insist on the link between judicial cases and public causes (such as Elisabeth Claverie's reflection on the long history of "affair," from the seventeenth-century *forme affaire* to International Criminal Justice[26]).

Other social scientists keep a distance from the TJ paradigm while analyzing similar phenomena. For example, Inga Markovits, a specialist in socialist law and East German legal professions, wrote a stimulating critical account on the post-unification professional purges of Eastern judges and prosecutors, while distancing herself from both the apologetic discourse of West German legal and political officials and that of the advocates of TJ in America and elsewhere.[27]

More generally, the majority of historians working on post-World War II purges are reluctant to use the uncertain concept of "transitional justice," even if they may share some implicit postulates with TJ specialists. The historians' reserved attitude can also be explained by a professional tendency to neglect the literature in political sciences and sociology dealing with more recent cases.

This brief survey sheds light on a division in the postwar or post-dictatorship scholarship. Whereas the research focusing on the most recent events often refers, in a broad manner, to the TJ paradigm, scholars who deal with more distant historical periods, on the contrary, often neglect the important body of scholarship devoted to the subject under this different "tag." We believe that both attitudes are,

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20 Nalepa 2009.

21 Posner and Vermeule 2004.

22 Arthur 2009.

23 Veyne 2003 (1st French ed., 1971).

24 Osiel 1997.

25 Delpla and Bessone 2010.

26 Claverie 1994.

27 Markovits 1995 (1st German ed., 1993).

in part, misleading, because they neglect comparative insights both in terms of time and space.

1.2 The History and Sociology of Purges After WWII

Historians' relative reluctance to use the concept of "transitional justice" is partly due to the availability of preexistent notions (e.g., purge, *épuration*, political justice…), along with a professional distrust of overly general, or even anachronistic, categories and models, which constitute the worst of evils for historians.[28]

A first wave of historical research, beginning in the 1960s, dedicated to the judicial purges of collaborators during and after the Second World War focused on the political design of these policies and their practical implementation by the judiciary. Peter Novick's classic book on France, *The Resistance versus Vichy: The Purge of Collaborators in Liberated France* (1968),[29] illustrates this wave and he gave the first quantitative insight of the phenomenon, a tableau partly revised and completed by Henry Rousso 1992[30] and Claudia Moisel 2004.[31] In the same vein, Martin Broszat 1981 proposed the first survey of war crimes trials before German courts in occupied Germany after WWII,[32] a decade before Henke and Woller 1991[33] attempted to draw a European comparison of national purges in a book they co-edited. This exercise was followed by several publications, noticeably the work edited by Deák et al. 2000,[34] on the link between shared experiences of the German occupation (the "collaboration") and subsequent national purges.

The collapse of the iron curtain and the end of the cold war stimulated new orientations and perspectives in the research on the purges following the Second World War.

There have been several attempts to deepen the analysis of purges since the mid-1990s using other categories than transitional justice. The historical studies tend to situate purges in a wider framework of *sorties de guerre*, literally, "exits from war" or "postwar periods,"[35] widely used in the studies on World War I and then applied to other historical periods. The notion of "demobilization," developed by John Horne in a political and cultural sense, has also met some success in the

[28] Some specialists of post-WWII purges, such as Luc Huyse, have also been actively involved in the development of TJ as a new field of scholarship, too. Huyse and Dhondt 1993 and Huyse 1995.

[29] Novick 1968.

[30] Rousso 1992.

[31] Moisel 2004.

[32] Broszat 1981.

[33] Henke and Woller 1991. The latter is also the author of an analysis on purges in Italy, see Woller 1996.

[34] Deák et al. 2000.

[35] Cabanes and Piketty 2007.

field.[36] The purges could be considered by scholars as cultural and social phenomena that have led to the production of cultural artifacts, such as films or novels, which in turn contribute to our social understanding of the war and occupation. At the same time, the notion of "postwar" discussed by Tony Judt (2005) defined the second half of the twentieth century in Europe as a long postwar in which the legacy and effects of the Second World War lasted until 1989.[37]

Complementary to the latter perspective, and following the memory trend in historical studies,[38] other scholars have tried, since the 1980s, to include purges in larger policies related to the past. They consider the way professional purges and war crimes trials have contributed to shaping the public memory of the Second World War. The main publications resorting to this approach focused on different levels: some authors examine the legal and judicial practices and their political background (the *Vergangenheitspolitik*, or "politics of the past"[39]); others focus instead on the symbolic and discursive level (the "historical" or "memorial politics"[40]). In the last two decades, several studies on national cases—especially the French, German, American, and Israeli—have elucidated parallel mechanisms in the relationship between purges and public memory, as well as a more or less common chronology, from 1945 until today, consisting of the alternation of closing and reopening of postwar purges and trials.[41]

In the wake of the latter publications, historians have recently examined legal policies and judicial practices surrounding the postwar purges and trials, thanks to a closer dialog with legal history and/or sociology of law, focusing either on political and legal practitioners[42] or on famous trials.[43]

In the past decade, there has emerged a line of thought that focuses on the relevant scales of analysis in the research on postwar purges. For example, some recent publications take into account the transnational dimension of purges beyond a comparative approach of national cases, underscoring the role played by the transnational arena in purging processes and paying attention to the circulation of political and legal actors, practices, and ideas.[44]

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[36] Horne 1998.

[37] Judt 2005. In Italy, the historiography has long used the term "post-fascism" to indicate the transition from Fascism to the Republic for long time (see Chap. 12).

[38] For a critical account on this trend, see Rousso 2012.

[39] Frei 2002.

[40] Wolfrum 1999.

[41] Rousso 1994 (1st French ed., 1987); Segev 1993; and Novick 1999.

[42] See notably: Moisel 2004; Bloxham 2001; Weinke 2002; von Miquel 2004; Israël 2005, Chap. 7.

[43] For example, see Pendas 2006; Kaplan 2000.

[44] See the comparative study by Lagrou 2001. More recently, there are two collective books published in Germany: Frei 2006; Hammerstein et al. 2009.

There is, especially in France, a growing interest in professional purges[45]: purges are not only examined from a political and legal perspective, but also from that of social and professional history. Historians and—more recently—sociologists are indeed focusing not only on the target groups, but also on the actors of purges (civil servants, lawyers).[46] They are also deepening our understanding of the social mobilization required for purges or their gender dimension.[47]

In the recent research on purges, one notes a certain extension of the chronological framework beyond the traditional political timeline. Legal, professional, and political temporalities interfered in the concrete implementation of postwar purges and trials. One of the most noticeable evolutions lies in the interest toward legal and political categories. Anne Simonin posits *indignité nationale* as a key category in French political culture from the French Revolution until the *Libération*, at which point *indignité nationale* became a new crime in penal law.[48]

1.3 Blind Spots: Categories, Norms, Circulation

The idea to publish this book grew out of the observation that, although quite different in their questioning, subjects, and methodology,[49] both the literature on TJ and the scholarship on purges tend to underestimate some significant aspects of the respective examined topics.

In our view, the terminology itself is too often neglected. Academics belonging to various research fields employ multiple denominations. Besides a certain lack of reflexivity, there are few discussions about the status of the different categories mobilized by the scholars from a sociological and historical perspective. "*Épuration*," "*repression*," "*incivisme*," "*purges*," "*transitional justice*," "*Aufarbeitung*," "*Vergangenheitsbewältigung*," "*Vergangenheitspolitik*"…. Were these denominations coined and used by the actors of the purges themselves? In this case, the processes of their implementation within specific social groups and/or in the public space (e.g., through the mediation of journalists or political actors) have to be precisely reconstructed. Or, are these phrases intentionally forged by scholars in order to subsume either a variety of historical situations (working as ideal types)[50] or to characterize a specific, context-related process?[51] Furthermore, are these categories descriptive and

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45 Baruch 2003.

46 Bergère et al. 2009. On the purges of French lawyers, see Israël 2004.

47 Virgili 2000.

48 Simonin 2008.

49 The historical research on purges after the Second World War is generally far more empirical than the research on TJ, relying largely on primary sources such as public and private archives.

50 This is the ambition of "transitional justice." See Elster 2004.

51 "Vergangenheitspolitik," according to Norbert Frei, characterized the specific policy of Adenauer's government toward the Nazi past, from 1949 to 1955. See Frei 2002.

analytical, or, contrarily, normative and future-oriented? Finally, as shown by the tentative list, these categories belong to different linguistic and national traditions, corresponding to different historical experiences in terms of purges. This fact raises the question of the linguistic and cultural translation of these categories and their possible replacement by more general concepts developed within the global, mostly US-oriented, academic context.

To examine these important questions, the scholarship on purges and TJ could benefit from "socio-historical" approaches (in the French sense of the term), which rely mainly on sociology and social history. The focus on the social genesis of common and scientific categories and their articulation in actual political, social, and legal practices is at the core of the reflection, including a closer analysis of the social groups involved in these practices.[52] The dual role of categories in the framing of political action,[53] as well as in the ways actors represent their place and role in the social space (to themselves and to others),[54] is of interest when it comes to the post-conflict redefinition of groups and norms. In a way, postwar remedies imply new narratives of the past and new categorizations of the social space. Law is the major instrument of this redefinition. The forging and shaping of legal and administrative categories, and their implementation in concrete settings, renews our analysis of the politics of the past, as Sarah Gensburger demonstrates in her analysis of the "Righteous among the Nations."[55]

Second, these interrogations of denominations and categories raise, at a more general level, the question of the plurality of norms at work in the various processes analyzed as purges or transitional justice. These processes imply complex relationships between the actors and within legal, political, social, and professional pattern of actions. Different norms function as resources and constraints, while their production and reproduction is often at stake in the context of purges. The aim of this observation is not to raise anew the question of the normality or the exceptionality of purges, whose duration often exceeds that of a "regime change," but to approach them as being "fluid conjunctures," where the borders and the relationships between social sectors blur, favoring a dynamic of mobilization within a specific sector of activity or between different sectors.[56]

Finally, the present publication seeks to underscore another neglected aspect in the literature on purges and TJ. Since the aftermath of World War I, post-conflict trials are more (inter)connected than what is often said. Until recently, these processes were generally examined within their national framework. In the mainstream literature on transitional justice, the national cases are frequently compared, but the aim of these comparisons is precisely to isolate the features of

[52] See Buton and Mariot 2009.

[53] Desrosières 1998.

[54] Boltanski and Thévenot 1983.

[55] Gensburger 2011.

[56] Dobry 2000, pp. 49–70.

different cases, in time and space, in order to create universal typologies.[57] In the literature on post-WWII purges, some historians pay more attention to the role played by inter-allied policies and the Nuremberg international justice in liberated countries.[58]

Indeed, rather than relying on classical, term-by-term comparison, we might achieve a better understanding of post-conflict trials by relying on the growing scholarship on international "circulation," and to think in terms of "circulatory regimes"[59] and "transnational networks."[60] For a few years now, this scholarship has been challenging not only the classical comparative approaches, but also the approaches involving cultural "transfer," based on overly mechanical import/export postulates.[61]

In this perspective, at least two dimensions of purges were until recently underestimated: the transnational level (consisting of international organizations and supranational jurisdictions) and the circulation of actors, categories, and *savoir-faire* between the national and supranational levels, as well as between the different national spaces.

A last important point we would like to stress in this introduction, should it be muted in the book itself, is the importance of the sociological analysis of purges, trials, and postwar remedies. The types of social actors involved and the reasons for their commitment or their opposition to those processes have been often neglected, or even presupposed without adequate investigation. The neglect of professional actors as subjects of inquiry can be considered as the equivalent of the absence of reflexivity engaged by many scholars, at the price of a nonrealist approach of the trials or procedures. A good example of this neglect is the lack of research concerning legal practitioners, especially defense lawyers, active in international criminal courts or in other postwar trials. On the contrary, as it has been shown in a brief analysis of the International Criminal Tribunal for Rwanda,[62] such a court can be considered a social environment where judicial roles are embedded into a network of social and political relations between actors.[63] Despite the difficulties of gaining access to certain trials, the duration of others (many years for most of the post-Bosnian and Rwandese genocides), and the aridity of the transcripts when available for post-World War II trials, it is important to pay more attention, contrarily to the traditional legal approach, to the series of events between the writing of new laws and the issuing of a verdict. The difficulties at stake with translation issues, from Nuremberg to the Hague, the strategies of the defense lawyer when the objective of due process requires their commitment to the goals of the Tribunal, the weight of the procedure as opposed to the theoretical

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57 Teitel 2003.

58 See Frei 2006.

59 Saunier 2008.

60 Unfried (ed) 2008.

61 Werner and Zimmermann 2004.

62 Israël 2008.

63 Mouralis 2012a and Mouralis 2012b.

notions praised by jurisprudential analysis, are to be taken into consideration to decipher the social thickness of such judicial institutions. As in the legal realist approach and its various heirs, from *critical legal studies* to the *law and society* tradition, those insights may contradict both our certitudes concerning the power of law and our skepticism or faith related to its legitimacy in the future. Paying attention, between the victims and the perpetrators, the former leaders and the current powers, to those in charge of the legalization of the past and its redefinition in various institutions, is a key contribution to a better understanding of regime changes and their institutional forms.

1.4 Presentation of the Chapters

This collection brings together contributions from fifteen specialists, belonging to different academic fields, mainly history, sociology, and law. As evidenced by the book's structure, we did not aim to separate the chapters mainly focusing on categories from those devoted to case-studies. We also did not discriminate the contributions on post-WWII purges from those examining more contemporaneous cases. Our objective was rather to propose three main lines of thought: a social and conceptual history of notions and categories related to purges; concrete practices, i.e., to the implementation of categories, arguments and *savoir-faire*; and their circulation in time and space. However, each of these three lines of reflection is not exclusive of the others, and the corresponding questions are addressed in various proportions in nearly each chapter. In addition, we favored contributions based on thorough empirical research, using various sources, noticeably public and private archival records, interviews, and legal documents.

The volume is divided into three parts. The first one, entitled "Life and death of concepts and categories" proposes to examine several notions elaborated in various contexts (either national or international) and from different statuses (academic or profane), ranging from the recent category of "transitional justice" to the older Belgian notion of "*répression*." The second part of the book is devoted to the concrete "implementation of categories and *savoir-faire*," i.e., to their practical handling at a local or national level in different European countries after the Second World War. The last part focuses on the "transnational circulation and hybridization of categories" since the war.

The aim of the first section is to demonstrate that a historical and sociological analysis of purges and similar practices cannot be satisfactorily undertaken without reflection on the categories used by both the actors of purges and the scholars analyzing them. In this perspective, Alya Aglan and Emmanuelle Loyer trace the history of the French word "*épuration*"—whose imperfect translation would be "purge"—from the Revolution of 1789 to the aftermath of WWII (Chap. 2). Despite its medical and religious connotations, the notion met a quick success by the end of the war: "no doubt the replacement of the word 'punishment,' which retained a clearly individual coloration, with the word 'épuration,' which possesses

a more collective inflection, reflected the necessary adaptation of a vocabulary forged in combat to a more normative vision of a society to rebuild in its entirety."

In her contribution entitled "Humanity seized by international criminal justice" (Chap. 3), Sara Liwerant explores the introduction of the category of "humanity" into criminal law in the twentieth century. She argues that this category paradoxically serves to preserve the representations of both the world and the law strongly challenged by the occurrence of mass atrocities. Liwerant makes a convincing account of the interest of long-term approaches to put in perspective the uses of legal categories. By stressing the intermingling of moral, historical, and legal categories as evidenced by this innovation, she helps to understand this major turning point in legal history.

In the next chapter, Dirk Luyten examines a lexical change that occurred in Belgium after the Second World War by returning to the First World War. After the latter, collaboration with the occupant was called pro-German "activism"; after 1945, its punishment "was often called the repression of '*incivisme*'" (to be translated as political incivility).[64] At the same time, the word "collaboration" became common in Belgium as in other European countries.[65] This lexical change reflects a change in the practices: the post-WWII purge in Belgium differed from the post-WWI purge, not only in scale, but also in its peculiar legal features, namely the extensive use of criminal justice and the prominent role played by the military justice.[66] In addition, part of the special legislation adopted to punish collaborators was directly inspired from neighboring France. Neither totally unique, nor directly imported, the Belgian case is a good example of legal hybridization produced by the course of history.

In his chapter, Jon Elster, one of the most famous theorists of transitional justice, presents the main arguments of his famous *Closing the Books*. Developing a theoretical perspective from a very large comparison of cases, Elster seeks to isolate the main features of the various practices covered by the phrase "transitional justice," which are never strictly legal, but still have a distinct political dimension. In this sense, the categories referring to purges and similar practices are often a hybrid among historical and national cases. A number of these categories, originally belonging to the political lexicon, are transformed into more or less binding legal categories.

The last chapter (Chap. 6) of this section, written by Guillaume Mouralis, examines the invention of "transitional justice" as phrase and praxis in the 1990s. The author shows that the phrase itself can be historicized. The social conditions of its emergence can be described by retracing its genesis and diffusion. Originally launched by human rights activists, journalists, and officials from South America, South Africa, and Eastern Europe, who convened in a set of conferences in the

64 See Sect. 5.2.

65 See Gross 2000, pp. 15–35.

66 See Pieter Lagrou's contribution, Chap. 8.

beginning of the 1990s, the phrase met a first academic success after the publication of the three-volume book edited by Neil Kritz 1995. It was only after 2001 that it was popularized in the media, both as a normative category and as a label for a new professional activity. In addition, although conceived as an alternative to ordinary justice, TJ became a *quasi*-legal category, as evidenced by the increasing use of the phrase in national legislations.[67] Mouralis' analysis also refers to the symbolic struggle for imposing new denominations and classifications, and at the same time for promoting new practices.[68]

The contributions of the second section question how the categories, arguments, and *savoir-faire* related to purges and similar practices are concretely handled and implemented by the various actors involved.

In the first chapter of this section, Annette Weinke examines "the possible interactions and transfer effects between the Allied (…) prosecutions and the German defense strategies and societal responses."[69] She describes the reactions of different sectors of West German society to the Nuremberg trials, from the "grammar of exculpation" articulated by the churches, to the campaign in favor of amnesty discretely undertaken by lawyers belonging to the influential "Heidelberg circle." Weinke argues that the initial rejection of postwar trials and denazification was neutralized by the specific receptivity of German elites to the "legalistic strategies" of the Allies that favored, after 1958, the unfolding of a "national mastering of the past" (*Vergangenheitsbewältigung*) on the unique basis of domestic criminal law. Emphasizing the ambivalent relationship of German postwar elites towards international law, Weinke revisits Judith Shklar's idea of legalism as a mean of depoliticization.[70]

In the following contribution (Chap. 8) on the Belgian trials of German war criminals in the aftermath of the Second World War, Pieter Lagrou seeks to explain an obvious paradox: while the Belgian courts punished a large number of collaborators after 1945, as shown by Luyten,[71] very few German war criminals were actually sentenced. Two factors explain this. First, until 1947, owing to a "legal void,"[72] these criminals could not be prosecuted. Due to the late adoption of a relevant legislation (allowing double incrimination within national *and* international law), Germans could only be tried after 1948, i.e., in a European climate of

[67] As in the case of Burundi, where an ad hoc committee is drafting a "law on the mechanisms of transitional justice." See the current research program IRENE coordinated at the Institute for Social Sciences of Politics (CNRS—University of Paris Ouest Nanterre) by David Ambrosetti, Sandrine Lefranc and Guillaume Mouralis: "International 'Peace Engineering.' How International Experts Intend to Manage Violent Conflicts?," http://www.isp.cnrs.fr/Irene.acceuil.html.

[68] On the "struggle for (of) classifications," see Bourdieu 1979, p. 564.

[69] See Sect. 7.1.

[70] See Shklar 1964.

[71] See Chap. 4.

[72] Ho Dinh 2007, p. 419ff.

amnesty favored by the incipient Cold War. The shift between political and judicial temporalities[73] was also due to the specific experience made by Belgium in the previous postwar era. In this sense, the two chapters on the Belgian case emphasize the complex interplay, at different levels, of internal and external factors in the national unfolding of national purges after the Second World War.

Dimitris Kousouris questions the very peculiar features of "the Greek purge of wartime collaborators" in Chap. 9. Despite its transnational implications, this purge appeared retrospectively as strongly "restorative"[74] as it primarily contributed to put an end to the revolution initiated by the communist political forces during the war. Kousouris underscores the significance of the Greek civil war in the implementation of judicial mechanisms, as if, to paraphrase Clausewitz, while reversing the terms of his famous formula, "transitional justice" was the continuation of war by other means in the Greek case. In the trials, the high-ranking Greek judges produced a "narrative" of the war period that contributed to legitimate the postwar political and legal elites. The question of whether the Greek purge was the product of conscious strategies or the reflection of the social dispositions of the judges remains elusive. As evidenced by Kousouris, the legal field's relative autonomy towards the field of power allowed the judges to weaken the institution of citizen juries, in the context of the Cold War, when the communists had distanced themselves from the government, as one can also observe in the case of Italy.

Liora Israël operates on a different scale, by focusing on a professional group. Chapter 10 is devoted to the French lawyers who were responsible for their own *épuration*. This approach unearths the social thickness of the purge by emphasizing the social dynamics of the group, the distance between the initial political project and the actual professional purge, and the ability of the lawyers to define and control a purge process conceived as an opportunity to reassess professional norms and values. The sociology of legal professions helps to "normalize" the purge by stressing their embeddedness in social and political contexts. The other highlight in changing the "spatial" scale comes as the author examines what happened in the Alger bar association, to contrast the institutional devices developed in Algeria and later on in metropolitan France. Like in the Greek case, the writing of the official past by the group under investigation conceals certain dimensions considered as potentially damageable to its image. Everything thus contributes to the reaffirmation of professional norms in this case, and to the redefinition of identity. Periods of crisis can contribute to the reassessment of the principles of the group, in producing an opportunity to redefine a body of norms.

The third part of this volume collects four texts that question the transnational circulation and hybridization of categories since the Second World War.

As demonstrated in the first contribution of this section, Chap. 11, purges reveal more general political and social logics. Vanessa Voisin's analysis of the Soviet purges against war criminals and collaborators of the Germans in the recovered

[73] Mouralis 2010, pp. 81–100.

[74] Here in the sense of the restoration of the former regime and ideology.

Eastern territories by the end of WWII demonstrates how international law can be a resource for a regime that overrides the law. In the context of this purge, elements belonging to international law were introduced into domestic Soviet law. This apparent openness to international law culminated with the participation of prominent Soviet jurists in the Nuremberg International Military Tribunal. Voisin describes a nonlinear purging process that is also marked by the pre-war experience of the Great purge: parts of the actors in charge of the trials against collaborators at the central level were involved in the pre-war repression The Soviet case shows that the political use of justice in Otto Kirchheimer's sense[75] is not necessary inconsistent with a limited sense of legalism (as analyzed by Judith Shklar). This is illuminated by Voisin's socio-historical developments paying attention to the career paths of Soviet jurists.

In Chap. 12, Valeria Galimi presents the effects of transplanting the French legal model to Italy, where one sees the same purge structures at the level of criminal justice. The Allies had observed the French *cours de justice* and *chambres civiques* used in Paris and in the provinces and suggested similar structures for postwar Italy; however, they set aside the charge of national indignity. Her contribution retraces a more nuanced transition to post-Fascism and contextualizes the *épuration* and its effects on Italian society. From the first studies by Claudio Pavone to the work of Hans Woller, this *épuration* is considered a failure, due in large part to the absence of a purge of the judges. Access to the archives in the last 15 years has shed new light on the political nature of this short purge. (The amnesty laws date to 1946 and the referendum for the republic.) While it is important to stress the importance of the Cold War, the Italian case, like the Greek, highlights nonetheless the context of the civil war and the strong presence of extra-legal *épuration*. The legal purge nonetheless responds to these two elements and it begs for a more refined chronology.

The jurist David Restrepo Amariles's chapter (Chap. 13) presents a critical analysis of "transitional justice." He shows convincingly that TJ has become a legal domain with a fairly coherent body of doctrine. Nevertheless, the author provides an internal critique of this domain, highlighting the corpus' contradictions in relation to the Colombian case. In his opinion, TJ weakens legal standards. It occasionally becomes a political "joker" to not enforce the law that should be applied. Transitional justice thus is increasingly applied to ordinary situations in democratic states that are *not* undergoing regime change. Restropo Amariles does not dismiss "transitional justice," nor its use; instead, he underscores the necessity of contextualizing and reflecting on some conceptual difficulties in analyzing political transitions.

In Chap. 14, Sandrine Lefranc and Frédéric Vairel propose a sociological analysis of the field of transitional justice. Instead of departing from a perspective assuming that transitional justice is a form of legality, they prefer to focus on the fact that in this type of justice, "the rehabilitation of victims, partly through

[75] Kirchheimer 1961.

reparations, is generally favored upon judgment of the perpetrators." Indeed, by focusing on the professional milieu of TJ and its growth, they demonstrate how experts and lawyers are forging a "justice" with attributes to be understood in relation to the development of a new sort of market for expertise in "pacification." In so doing, they echo and complement Mouralis' analysis on the invention of the model. They are convincing in the demonstration that, far from being only a new legal instrument, TJ is, above all, a type of supposedly universal solution to the political management of past mass atrocities. Through their sociological lenses, focusing on the field of the practice, and accordingly on the positions occupied by the advocates of TJ, they confirm both Restrepo Amariles's insights, concerning the replacement of justice by TJ being detrimental to the punishment of criminals, and the Mark Osiel's point in Chap. 15.

An international lawyer himself, Mark Osiel produces a challenging reflection in Chap. 15. Departing from an internal criticism of transitional justice or other forms of (more or less) legal remedies to mass atrocities, he prefers to draw a comparison between nonlegal and legal instruments as means of coercion against human rights violators. By focusing on various examples, from "corporate social responsibility" to social mobilizations regarding the pardon of nations' pasts, he demonstrates how nonlegal initiatives may be more efficient than sophisticated legal instruments. His sensitive advocacy of para- or infra-legal forms of action, issued from civil and corporate society, is based on a criticism of the so-called "juridification" of the world response to mass atrocity, first, to demonstrate that not everything is juridical in this response, and second, that the most efficient policies may indeed not be legal. By concluding the book with a self-conscious reflection on the limitations of his own fields, Osiel achieves one of our major goals. Indeed, even if the variety of periods and contexts in play may create a sense of heterogeneity, the value added by their confrontations is borne by the complex relations between law and society highlighted throughout this collection of essays.

To deepen the history of legal categories by taking into account their social embeddedness is as important as stitching legal logics into the fabric of new patterns of society. The difficulties at stake are at least threefold. First, how, in the social fabric of nations, does one inscribe and describe the moral shocks and the kind of emotions[76] created by harsh repression, war, or dictatorship, followed (or not) by transitional processes? Second, how does one articulate the need to call into question the forging of legal and political categories, and the will to study their contribution to the forging of societies? Third, how much can the sociology of lawyers, practitioners, jurists, and experts contribute to the understanding of the life of law in context? If those questions are not systematically addressed in the book, we hope that these essays offer, at the very least, a better understanding of the multiple ways societies are dealing with their past after traumatic events.

[76] Jasper 2011.

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Part I
Life and Death of Concepts and Categories

Chapter 2
"Épuration": History of a Word

Alya Aglan and Emmanuelle Loyer

Contents

"Épuration."[1] The word smacks of heresy. It leaves behind the scent of political justice and popular tribunals; it evokes the grand passions of Saint-Just or the hysterical crowd of Fritz Lang's *M*. If the word "collaboration" has progressively become known as a synonym for compromise and indeed treason (first during the Occupation, and certainly after the Liberation), the word used to designate only a

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[1] The French word *épuration* is generally translated into English as "purge" and occasionally as "purification." The translator's notes are bracketed within the authors' or marked as "NdT." Whenever possible, references have been made to English-language editions and the references have been updated and adapted for this publication—NdT.

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banal participation in the *oeuvre commune*. Such is not the case of "épuration." Even before the Resistance and unoccupied France took possession of the term and made essential demands on the modalities of the war's settlement, the word resonated with signification and had become fixed in the imaginary. As the word "épuration" came to refer to the legal (and extra-legal) practices that took effect after 1944, which historical memories and political imaginary would the word come to bear?

Words have a memory and this memory has effects that need to be taken into account. As Michael Marrus and Robert Paxton remind us, the Nazis' military administration gave the order to avoid the word "deportation" in Russia because of the strong connotation of the expulsions to Siberia as practiced by the czars.[2] The study of the variations of a word, of the silence, and of the processes of euphemizing is an integral part of the attempt to reflect on historical lexicology. We hasten to specify that this study will not be systematic. Lacking suitable data-mining capabilities, it was impossible to track the word (or its absence) in the immense body of political literature of the nineteenth and early twentieth centuries. The hypotheses formulated are founded primarily on soundings and on some extant works on the subject. Nonetheless, it was necessary to examine the period of the war more closely. Such an attempt to read History at the level of words has meaning: on the side of Vichy, there is a camouflaged vocabulary, each word to decipher; on the side of the *résistants*, words are the first weapons and each one counts. To say "épuration" is already passing to the act in a small way: it announces the reversal of the situation and of the violence.

When practiced in the administration, the épuration takes on a political, if rarely displayed, character, and it distinguishes itself by disciplinary sanction. It is no longer about mistakes or precise breaches of professional exigencies, but about behavior deemed undesirable, generally in the framework of an upheaval of the political system. To a certain point synonymous with banishment under the *ancien régime* or with proscription, the judicial épuration then diverges via the mark of infamy identified with the notion of indignity. Indignity appeared in 1848 within the context of the grand republican tradition, born of the French Revolution, of a strictly "pure" and virtuous citizenship, like the category of those provisionally excluded from citizenship.[3]

If administrative purging is a reality in contemporary French history, the power of the word is often erased by multiple euphemisms (reform, renewal, and removal from office) used by the nascent Third Republic. Born of the defeat and syncretically combining reaction, tradition, and sometimes modernity, Vichy ambivalently utilized the revolutionary reference and the organicist metaphor of the state. Ideological, and for the first time racist, Vichy's épuration was intense. It would fall to members of the Resistance to reverse the Vichy lexicon and to fully seize, at least for the communists, the imaginary of Year Two. There, the excommunications of Saint-Just, halos of glory, remained the possible model, a handy reference to justify the punishment of traitors. Between the hype and the mirror effects, the

[2] Marrus and Paxton 1981, p. 351.

[3] See Simonin 2003, pp. 38–60. [Cf. Ibid. 2008.].

use of the word remains semantically delicate and imperfect as it proceeds from appropriateness to the targeted imperfect thing.[4]

2.1 The Revolutionary Paradigm and its Legacy

Épuration of mores, taste, language, sentiments: more than the first physical sense (purification of water, humors, and metals), French dictionaries reveal the use of the word "épuration" in the moral language of the *ancien régime* to designate a slow dissolution of harmful parts (purification) or a quick excision tending to chase away foreign evils (purge).[5] The political signification of the word is clearly fixed during the French Revolution and notably during the Jacobin phase.[6] Since then, the term "épuration" has belonged to the revolutionary vocabulary and the politicization of the moral or religious term is characteristic of a political experience that very quickly seeks a veritable conversion.

The word and the reality of the épuration are at the core of the radicalization process of the French Revolution.[7] Occupying "the entire space of the popular will"[8] at the Convention, the Jacobin club's "purging elections" [*scrutins épuratoires*] were central in figuring this new form of direct democracy and its members were its partisans. They were the exclusive guardians of the excommunication establishing the Terror. The circumstances of 1793 and the rhetoric of the Committee for Public Safety would make the épuration a nodal piece of the revolutionary government. It seemed necessary to purge the sovereign of his hidden enemies in order to re-establish the unity that was menaced both domestically and internationally. In this way, the épuration is inseparable from a new historical category inherited from the French Revolution: the suspects. As well as a new practice: the list. They are intrinsically linked and each calls for a brilliant future. During the French Revolution, infinitely extendable lists appeared. The names of unambiguous opponents, émigrés, and recalcitrant priests soon faded to give way to the supposed detractors of the new regime. The law of 17 September 1793 defining a "suspect" needs to be

[4] In the same vein, see the inspiring analyses of a lexicologist, Alice Krieg 2000. [Cf. Krieg-Planque 2003].

[5] Based on a small investigation of the great dictionaries of the nineteenth and twentieth centuries: Pierre Larousse's *Grand Dictionnaire*, Emile Littré's *Dictionnaire de la langue française*, B. Dupiney de Vorepierre's *Dictionnaire française illustré* et *Encyclopédie universelle* (1876), *Dictionnaire de la Académie française* (1932), and *Trésor de la langue française*, vol. 8. Rousseau provides an example of this moral usage: "I love not at all that with children one affects a too purified language and then one takes long detours to avoid calling things by their true name."

[6] See Brunot 1937, pp. 818ff.

[7] There is no entry for "Purge" or "Purification" in Furet and Ozouf (eds) 1989, yet there is one in Soboul, Suratteau, Gendron, and Bertaud (eds) 1989. If *épuratif* is rare for F. Brunot, "the noun *épuration* is, on the contrary, everywhere." (p. 819).

[8] Furet 1989, pp. 704–705.

understood in terms of partial continuity with the *ancien régime*, which had also stigmatized foreigners, as well as unknown and undeclared individuals. The law's passage signified fears ranging from vagabondage to the suspicion of individuals whose ideals deviated from the revolutionary norm. In a certain fashion, everything happens as if the purged had placed himself outside the national pact and the purger only sanctioned this distance. The épuration was inscribed in a repressive logic where the continued agitation of *sans culottes*, demanding the arrest of suspects and the épuration of the committees, put pressure on the Convention and established the Terror. Robespierre and above all Saint-Just were the theoreticians of a permanently self-purging society. While the members of the National Convention renounced their inviolability, on Marat's proposition, Robespierre proposed a "purifying vote of the members of the Revolutionary Tribunal":

> I demand that the members of the Revolutionary Tribunal, who are also members of affiliated societies and who have acquired the right to present themselves here, be purged. Their function as juries requires the confidence of the People. The public vote will be for them, if they leave pure, [they will be awarded] the most ringing certificate of civic responsibility.[9]

In his report on the incarcerated suspects (26 February 1794), Saint-Just vehemently pleaded for the merciless battle against the enemies of liberty—"I dare to say that the Republic would soon flourish if the people and their representatives had the principal influence, and if the sovereignty of the people was purged of aristocrats and *comptables* who seem to usurp it in order to acquire impunity"[10]—but also the revolutionary society's necessary pivot: "Mustn't such a society make the biggest effort to purify itself if it wants to maintain itself?"[11]

If the French Revolution rings of repression, it also extends the promise of regeneration, the two aspects being indissolubly linked. Mona Ozouf has shown how "alongside the word 'regeneration' the word 'reform' soon lost its luster."[12] The momentum and the energy delivered by the French Revolution commands the construction of a new man. Nothing less. The revolutionaries chose the brutal rupture with the *ancien régime* of which it was necessary to eradicate, banish, purge, destroy, erase, neutralize all the remaining "rags," including the ones that remained in oneself. The épuration connects to this logic of the tabula rasa and to the organicist vocabulary emanating from Rousseauean thought: the Nation is constructed like a unique and indivisible body of which it is necessary to amputate the gangrenous limb."[13] This metaphor unwound from the political body, and the more

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[9] Robespierre 1967.

[10] Saint-Just 1968, p. 202. In his speech of 30 October 1793, Saint-Just extolled the permanent épuration of the Administration, too. (*Rapport sur la nécessité de déclarer le gouvernement révolutionnaire jusqu'à la paix*), pp. 168–183.

[11] Ibid., p. 191.

[12] Ozouf 1989, p. 782.

[13] Brunot 1937, p. 819: once it has passed by the crucible of the operatory medicine (this rapprochement between the political operations and the practices of the apothecaries is often done in public by derision), "a society was declared regenerated, it is the normal word."

anthropological metaphor of purifying blood, determined the future use of the word *épuration*. Thus, situated between treason and regeneration, the *épuration* belongs to the semantic field of the Terror and Jacobinism.[14] It bears the color and marks of the French Revolution, more 1793 than 1789. It is certainly this halo of significations and the imaginary that also crowns the very selective reemployment of the word in the following century and a half.

Until the Third Republic accomplished the promises of the French Revolution and, by the same token, contributed to the closure of the cycle,[15] the nineteenth century was constructed in a chaotic manner under the double tyranny of the revolutionary memory and revolutionary reference that dictated the possible opinions in the French political repertory. Writing during the Restoration, Chateaubriand showed how 1789 imposed its lexicon on political actors of the bourgeois century without the latter being able to emancipate themselves, consciously or otherwise:

> Each also had a poor grasp of the constitutional language; the royalists made gross errors when speaking about the Charter; the imperialists were even less instructed; the members of the Convention … fell sometimes into the republican dialect that they had almost forgotten, sometimes into the idiom of the absolutism that they had learned completely.[16]

In the clash of the two Frances bequeathed by the French Revolution—a clash that would reinforce a series of regime changes—"épuration" is a troublesome word because of its many connotations. It seemed to disappear from the political vocabulary of the period even though the administrative and judiciary épuration became commonplace, marrying the meanderings of post-imperial history. Thus, forgetting the first article of the Charter, the Second Restoration unveiled the purge as a way of regulating state positions and careers. Fouché proposed lists of banned individuals and the ultras of the *chambre introuvable* voted, against the will of Louis XVIII, for exclusionary laws and wanted to resurrect the category of "suspect."[17] In re-appropriating the language of the Terror—one then spoke of the "White Terror—the word no longer reappeared significantly in the contemporary discourse.[18] A paradoxical coexistence takes effect between a word that one tries to avoid and a reality of purge that harvested its undesirables in 1830, 1848, 1852, and then under the Moral Order and the years 1879–1884 while the Republic, finally in the hands of the republicans, undertook the republicanization of its cadres.

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[14] To avoid weighing down the text, we stick to Robespierre and Saint-Just, but one finds numerous occurrences of the word "épuration" in the period's discourse, for example, by Billaud-Varenne.

[15] According to the interpretation presented by François Furet in part two ("Ending the Revolution") of Furet 1992.

[16] Chateaubriand 1973, p. 827.

[17] See Furet 1992, p. 282.

[18] See Simonin 1998, p. 57. Based on surveys of Benjamin Constant's *Mémoires sur les Cent-Jours* (1829), Guizot's *Du gouvernement de la France depuis la Restauration et du ministère actuel* (1820), and M. Bérenger's *De la justice criminelle en France* (1818), Simonin concludes: "'Épuration' is a word that is not part of the political vocabulary of the men of the Restoration."

Still, one must note that the Commune gave place to the Communards' vast reappropriation of the vocabulary of Year II, which they inherited via a slow underground progression within secret societies and republican sensibilities, a veritable repository of the traditions of 1793. It was thus that a new *Père Duchêne* was published, that the terms "Commune," "Public Safety," "revolutionary committees," "Jacobins," and "émigrés" were reused to inject a dose of revolutionary legitimacy into the emerging communal government. It is logical that the term "épuration," which belongs to the same lexical field, reappeared at the same moment.[19]

Despite their desire to anchor the Republic and to assume a large part of the revolutionary legacy, and therefore to reconcile the two Frances, the moderate republicans, in implementing new republican personnel, went surprisingly far in the administrative and judicial épuration and colonization of public services. In 1879, when the senatorial elections provided them a large success, a vast épuration was expected by men who had waited a long time. Between the purged—several pages of whose names were listed in the *Journal official*—and those who purged themselves, notably judges refusing to apply the decrees of 29 March 1880,[20] the renewal of the magistracy was nearly complete and belonged to a Jacksonian system of going through documents.[21]

The term "épuration" did not appear in the extreme left's body of electoral proclamations of 1881, 1885, and 1889,[22] where the radicals still considered the accomplished "reforms" legitimate, nor on the right, where they were denounced. Still, the word was utilized by critical brochures from various viewpoints, from Catholic liberalism to legitimism.[23] The "revolution of jobs," as Daniel Halévy would later call it,[24] seemed from then on to become the object of discussions for the stakes that overtook it. Thus, while the Popular Front seemed to ignore the épuration in spite of the intense clash which its arrival to power caused,[25] a debate was organized in 1937 between Daniel Halévy, Robert Dreyfus, Jean Guéhenno,

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[19] For the occurrences of the word "épuration," see Dubois 1962, p. 296. Certain people, for example Jules Vallès and the painter Gustave Courbet, did not value—and in fact opposed—this operation of linguistic mimicry.

[20] Issued by Jules Ferry, the decree of 29 March 1880 broke up unauthorized religious congregations in France as part of a larger project of secularizing French society. Later, military personnel and magistrates refusing to sanction the separation of church and state would purge themselves—NdT.

[21] See Association française pour l'histoire de la justice 1995.

[22] See Prost 1974.

[23] See Machelon 1976, p. 289, where both F. d'Aillières' study entitled "Les épurations administrative. Notes statistiques (1877–1880)," which appeared in the liberal Catholic organ *Le Correspondant* (25 February 1881), and P. de Witt's legitimist brochure *L'Epuration sous la Troisième République d'après le Journal official et l'Almanach national* (1887) are cited.

[24] See Halévy 1937—NdT.

[25] The illusion of loyalism of the servants of the State was, however, not shared by the most lucid among them (see Zay 1954), but the principles of neutrality of public powers and the equal access to the State's functions were no doubt, nonetheless, more anchored in the politico-administrative mores while the Popular Front's logic of unanimity and reconciliation, quite strong at the beginning, could have played equally.

and Julien Benda in the framework of the Union pour la Vérité and then the Société d'histoire de la Troisième République.[26] Daniel Halévy denounced the extreme character of the 1879 republican épurations, where he saw a clean rupture with the "République des ducs": it was the end of the reign of the notables in French political history and the new radical strata took the relay without the natural authority of the old elites. Very quickly, the historical discussion moved toward the ideological debate, driven by the category of the épuration. The movement happened as if the épuration of the beginnings of the opportunistic Republic functioned like the touchstone of the acceptance not of the republican regime as such but more fundamentally of the republican model at a moment when the model suffered a crisis of identity and legitimacy.

The Vichy regime officially extolled an "épuration," that it was loath to call by its name, which spread throughout the sectors dependent on the state and targeting the categories of people judged unsuitable to belong to the national community. The systematic euphemism of the administrative language is not the result of the *résistants*. Nevertheless, and although many of them found themselves in the revolutionary eschatology of the war's end, the term "épuration" flourished longer in Algiers than in the *maquis*.[27] This then signaled, paradoxically, the preeminence of a legal order that intended to assert itself against arbitrariness and excesses, as well as the will to implement justice reducible neither to the revenge of the avengers nor to "the eternal law of suspects."[28]

2.2 From Punishment to Épuration

When Roger Vailland saluted the events of 6 February 1934 of a provocateur named "Monsieur Chiappe, purger of the capital," the title of an article published in *Paris-Midi*, the meaning of épuration found itself deliberately misappropriated.[29] During the Occupation, the word saw expanded use, designating both a phenomenon and a metaphor, and finally a chronologically determined legislative action.

If the Vichyist discourse avoided the word itself, the organicist metaphor of a "national community" purified and regenerated by unity and a new order, at the

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[26] See Laurent 2001, pp. 420–422.

[27] Named after a thick Mediterranean shrub (*maquis* or *macchia*), these anti-Nazi guerilla movements were concentrated in sparsely populated mountainous and forested areas—NdT.

[28] Henri du Moulin de Labarthète, former director of the civil cabinet of Marshal Pétain 1946, p. 275.

[29] Edouard Daladier was elected President of the Council in February, 1934, on the heels of the Stavisky Affair and with the support of the socialists. The latter demanded the replacement of the local prefect of police, Jean Chiappe, whom they accused of having impeded the Stavisky case. Right-wing leagues organized a pro-Chiappe demonstration for 6 February 1934 that quickly degenerated into anti-republican riot and led to the collapse of Daladier's new government. Surrealist-turned-journalist Roger Vailland wrote about the events in the afternoon edition of the local newspaper—NdT.

center of the National Revolution discourse, formed around the idea of a necessary "purification of the country"[30] that must exclude the categories deemed undesirable such as "the foreigners," "the Jews," "the communists," and "the secret societies," in particular the Freemasons. The "anti-France" acted as a foil to the new regime, withdrawn over "the foundation of our race,"[31] "true" core of the community. An entire legal arsenal of interdictions and repression was forged on this occasion, for example, to "eliminate the Jewish influence on the national economy,"[32] to reject "the unworthy French" who left the territory of Metropolitan France between 10 May and 30 June 1940," or even to modify the naturalization status of, in particular, "communists, Jews, crooks, political refugees [who] had found asylum among us and, under the pressure of mentally defective politicians they elected, […] had achieved the disintegration of our country," as would be presented by a work of propaganda.[33]

The available lexicographic analyses establish that the word "épuration" was not part of the prevailing vocabulary in Pétain's speeches.[34] But it appeared sporadically in the quasi lyrical oratory of Alphonse de Chateaubriant, ardent defender of National Socialism before the war, where it served as a synonym for European, medieval, and Christian renewal. He wrote on 23 June 1941:

> The Grand Oeuvre deepens. After having placed the Germanness in the grasp of capitalism and its inhuman exploitations, it completes its designs in turning to the East, against the monstrous Russo-Asiatic organization, triumph of hopeless dehumanization. One would have to be blind not to see here the role entrusted to Germany by Destiny. Deposed and damned will be each nation of Europe that does not rally to the flash of this sword. The march of the human genus has put the human genus in the position of no longer being able to go to live—and to deserve to live—from a total épuration.[35]

This blind belief in the épuration, celebrated at the moment of the anti-Bolshevik crusade led by the Reich and its henchmen, is the transposition at the European level of the épuration process—that does not say its name—realized at the national level.

Use of the word "épuration" was effectively restricted to the field of Vichy's administrative semantics. Its principal foundation was in the Law of 17 July 1940,[36] which eliminated from the service of the state those civil servants born of

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[30] *Le Maréchal et sa doctrine*, brochure, 1943. See Peschanski 1987, pp. 145–166.

[31] Message du maréchal Pétain, 11 juillet 1940, in Pétain 1941.

[32] Loi du 22 juillet 1941, "relative aux enterprises, biens et valeurs appurtenant aux Juifs," *Journal official* (26 August 1941) in *Les Juifs sous l'occupation* 1982, 62–66.

[33] *Le Maréchal et sa doctrine*, brochure, 1943 [The German army began its western offensive on 10 May 1940 and invaded the French Channel Islands on 30 June 1940, by which time the French government had left Paris, ultimately seating itself in Vichy.]

[34] Miller 1975 and Pétain 1989.

[35] *La Gerbe* (26 June 1941), qtd. in Ory 1977, p. 170.

[36] A second law, from 17 July 1940, also "relative aux magistrats, fonctionnaires et agents civils ou militaires de l'Etat relevés de leurs fonctions," *Journal official* (18 July 1940) left a free path to arbitrariness by authorizing the exclusion of public agents judged undesirable "by decree taken from the sole report of the appropriate minister and without any other formalities." Baruch 1997, pp. 120–121.

non-French fathers, and it was reinforced by the laws of 22 July and 13 August 1940, which, respectively, asserted the modification of naturalizations and the exclusion from civil service of secret society members. This unfettered "Julyification" constituted an "épuration" of the public service, in the large sense of the word. It permitted the ostracization of every agent suspected of not adhering fully to the ideals of the National Revolution. The subtleness of these measures allying persuasion and constraint left to the political power the possibility of "distinguishing between the good and the bad civil servants" and "realizing first a épuration, and then in making the civil servant the auxiliary of the central government."[37] In actuality, the systematic purge put in place by the Vichy government seemed to be much more radical and arbitrary, by legal appearances, than the épuration implemented at the Liberation. A well-crafted quantitative comparison is needed.[38]

A major phenomenon for a minor term, the word "épuration" is rarely employed to designate the thing itself. In a strongly explicit manner, however, the term figured in the program of the ephemeral *Ligue française*. Founded by Pierre Costantini on 15 September 1940 with the accord of the German embassy, it published, starting 6 March 1941, *L'Appel*, a "mediocre weekly without readers."[39] In September 1941, the movement signed a pact of united action with the Doriot's PPF and then supported the LVF.[40] Without a single reference to 1789, use of the word here comes close to the metaphor, rather than the historically connoted meaning that connects the word to the regime of the Terror.

Paradoxically, if the filiation with Valmy, 1848, and the Commune is explicitly proclaimed by a large part of the Resistance, the word "épuration" appears only relatively late to designate the big objective that the collection of resistance movements set for itself at the Liberation. Instead, it was much more the promise to "punish the traitors" that surged very early in the clandestine press and remained a leading formula until the moment when the legislature intervened to name the process under the definitive term "épuration,"[41] designating at the same time an action—more precisely, a collection of legal sanctions—and a determined period of time. Once again, the meaning preceded the terminology. The word "épuration" could be understood

[37] Synthèse des rapports, 11 octobre 1940, AN 2AG613, qtd. in ibid., p. 123.

[38] Ibid., pp. 656–657, annexe 8, "Bilan d'application de la loi du 17 juillet 1940 au 29 avril 1941." See, too, Laguerre 1988, pp. 3–15.

[39] Venner 2000, p. 570. [The organization's full name was Ligue française de l'épuration, d'entraide sociale et de collaboration européenne].

[40] Ory 1976. [Jacques Doriot and fellow nationalistic ex-communists formed the Parti populaire français (PPF) in June 1936 in order to oppose the Popular Front. The collaborationist French militia Légion des Volontaires Français contre le Bolchévisme (LVF) was founded in July 1941 and in 1944 folded into the Division Charlemagne, a Waffen-SS unit composed French volunteers who fought the Bolsheviks on the Eastern Front]

[41] From December 1940 to August 1944, a single article in *Libération-Nord* entitled "Épuration" in the 21 December 1943 issue (no. 160) announced the implementation and the principles of the Commission d'épuration in Algiers, presided over by Charles Laurent, secretary of the Fédération des fonctionnaires (CGT).

as the legislative and then legal translation of the general aspiration consistent with "punish the traitors," as if the necessity to specify the characteristics and modalities of the action to carry out—limited from the outset—required distancing oneself from an overly readily revolutionary vocabulary.[42] The passage of one term to another marks a mitigation, as underscored by the newspaper *Le Creuset*—"Organ of the engineers and administrative and commercial cadres"—of 15 January 1945, regretting the approximations and slowness of the épuration:

> The word épuration has thrown considerable confusion into the *esprits*. Formerly, during the periods of peace separating the invasions of 1870, 1914, and 1939 – when our domestic quarrels were the rule—the word served the parties which reclaimed all of the places for themselves. Purge the Administration! Purge the Army! Purge the press! […] That's why today between those who intentionally have been the accomplices of the enemy, it was better to use the word *punishment*. It would not have resulted in any ambiguity. Having committed treason, having sold, despoiled, [or] tortured other Frenchmen merited rapid, summary, and exemplary justice. ALREADY AND EVERYWHERE IT SHOULD BE RENDERED […] The verb *punish* would make those without a shred of evidence to support their accusation hesitate. Whereas the verb *purge* is both vague and seductive enough that everyone employing the word wants to believe himself sincere even when he cedes to a partisan motive.[43]

For the Resistance, obviously, the intransigent intention and the action preceded the word,[44] which toned down and legalized a process long sought after by actors spanning from the radical left to the extreme right. Beginning in December 1940, *Libération-Nord* opened a column entitled "Our traitors' heads," inaugurated by Fernand Brinon, "the socialite traitor."[45] Drieu la Rochelle incarnated "the traitorous man of letters" who "today believes marking Nazism with the seal of his own thinking," "The French will brand him before the c… of another seal."[46] "Abel

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[42] *Défense de la France* (no. 31, 20 April 1943) opportunely recalls the text of a decree, not abrogated, taken by the Convention, on 7 January 1793, that stipulates in the first article: "All the French who have accepted or will accept hereafter a civil service position in the parts of the Republic invaded by enemy powers, are declared traitors to the homeland and outlaws."

[43] Excerpt of an article entitled "De quoi s'agit-il? L'épuration," *Le Creuset* no. 3 (15 January 1945), unearthed and quoted *in extenso* by Rouquet 1993, p. 277.

[44] The *résistants* did not wait until the Liberation to proceed to the execution of traitors, with or without a trial, in an expedient manner in each case. This was the case of the police prefect of the Rouen region, André Parmentier, condemned to death by "the secret audience" of 2 August 1943. The CFLN took the decision to judge Pétain and his ministers on 3 September 1943 and it arrested Pierre Boisson, P.-E. Flandin, and Marcel Peyrouton on 21 December. Finally, the trial and execution of Pierre Pucheu—called the "French minister of the Führer" by *Franc-Tireur*—announced on 20 March 1944 that the purge had definitely begun. Philippe Henriot, information minister for the Vichy government, was in turn executed on 28 June 1944 after having been sentenced to death by the Conseil national de la Résistance.

[45] *Libération-Nord*, no. 4 (22 December 1940). [The underground newspaper turned resistance movement was largely socialist].

[46] Ibid., no. 5 (29 December 1940).

Bonnard. He is the academic traitor. He does not commit treason systematically, by conviction, or out of cowardice, but simply to see his name in the newspapers or on posters."[47] Starting in January 1941, a "settling of scores" of the "traitor Déat" and his comrades was promised.[48] "We demand that, at the liberation of the French territory, Pierre Laval and Marcel Déat be brought before the court martial and sentenced, like the traitors they are, to be shot in the back," specified *Libération-Nord* on 12 January 1941 in an article entitled "High treason." The other clandestine newspapers expressed an equally intransigent will. "Lead for the assassins" intoned *Franc-Tireur*.[49] From spring 1942 on, the clandestine press published a myriad of "black lists"[50] without forgetting the deviations of the *Bir-Hakeim* newspaper affair,[51] which did not hesitate to attack certain members of the CFLN.[52] The practice of the black lists spread further in 1943–1944. In July 1943, the regional edition of *Combat du Languedoc* dedicated an entire issue to lists of collaborators from the departments of Haute-Garonne, Ariège, and Gers.[53] *Défense de la France* announced the day when "many would pay who had hoped to save their worthless lives."[54] The communists mobilized references to the French revolutionary tradition: "Vive la Nation! Death to traitors! Such was the cry of the volunteers of Valmy […] Vive la Nation! Death to the Krauts and the traitors! Such is the patriots' watchword in 1942. This word must guide all of our acts."[55] As the Liberation approached, the calls for blood multiplied. *Combat* exhorted its readers to seek revenge: "Against terror, there is no other response than a more powerful and implacable terror. Every assassination of a French patriot which is not immediately followed by the execution of the assassin *or one*

[47] Ibid., no. 9 (26 January 1941).

[48] Ibid., no. 6 (5 January 1941).

[49] *Franc-Tireur* (1 March 1944). [A resistance movement, founded in Lyon in November 1940, and underground newspaper that would later merge with *Combat* and *Libération-Sud* to create Jean Moulin's *Mouvements unis de la résistance (MUR)*].

[50] *Libération-Nord* promised the publication of a "little black Directory of Arts and Letters where would figure the names of all the scholars who committed treason either out of approval, cowardice, or self-interest" (no. 171, 14 March 1944).

[51] Jacquelin 1945.

[52] Resulting from the fusion, in 1943, of Charles De Gaulle's Comité national français in London and General Henri Giraud's Commandement civil et militaire in Algiers, the Comité français de la Libération nationale was responsible for both coordinating the French war effort against the Axis Powers and preparing the eventual Liberation—NdT.

[53] Novick 1968, p. 27.

[54] *Défense de la France*, no. 3 (20 November 1941), cited in Novick 1968, p. 25. [Created in July 1941, this underground movement and newspaper operated in the north].

[55] *La Vie ouvrière (Nord)*, special issue of September 1942, cited in Novick 1968, p. 25. [A communist-linked underground newspaper created in 1940 by former members of the *Confédération générale du travail unitaire*].

of their own kind is a dishonor to the Resistance."[56] Although it had hardly tasted this form of action, *Défense de la France* learned the duty of killing:

> Kill the German in order to purify our land, kill him because he kills ours, kill him in order to be free. Kill the traitors, kill those who denounce, those who have aided the enemy. […] Kill the *miliciens*, strike them down like mad dogs…Destroy them as you would vermin.[57]

The word "épuration" is well-suited to the long process developed clandestinely.[58] Punishment mingled with the idea of a necessary purification for the future. If the Résistance as a whole precociously demanded that an implacable justice system sanctioned acts of collaboration, assimilated with "intelligence with the enemy," it required, too, a longer outlook, a new human ideal. More widely, it was not only about punishing the criminals, but also purifying the atmosphere, by attacking profits. "The *résistants* did not simply want revenge, but also to purify the country; not only the traitors, but also everyone who had profited from the defeat politically, economically, or occupationally."[59] The Resistance's self-assigned high "Mission" consisted of "purifying Man,"[60] as Henri Michel explained in his postwar book *Les Courants de pensée de la Résistance*. "Separating the wheat from the chaff will begin the grand work of purification," that will assure "first the taking over of men," "then the changing of mores,"[61] "political [and] private mores."[62]

The épuration is thus inscribed in the linear thinking of the Résistance, that of the promise of a revolutionary change. The experts of the OCM [Organisation civile et militaire], grouped in study commissions—Charles Bour for the épuration—worked on the subject and began publishing their studies in *Cahiers* at the end of 1942.[63] The first political program conceived for the postwar period appeared in January 1943 in *Le Populaire*, the organ of the Comité d'action socialiste (CAS). If the notion "épuration" was included among the first required political measures at the Liberation, the word was never used. The matter was one of "indicting all the individuals guilty of treason or intelligence with the enemy," of "categorical repudiation,"[64] of "merciless punishment of crimes and spoliations,"[65] of making

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[56] Circulaire des groups francs des MUR (s.l.n.d. [1944]), quoted in Michel 1962, p. 338.

[57] *Défense de la France*, no. 44 (15 March 1944), quoted in Novick 1968, p. 31. [Officially created by the Vichy government in 1943 and under the leadership of its secretary-general Joseph Darnand, the fascist paramilitary *Milice* hunted *résistants*, helped to track Jews, and ostensibly maintained order].

[58] Baudot 1971, pp. 23–47.

[59] Michel 1962, p. 338.

[60] Ibid., p. 439.

[61] Ibid.

[62] Ibid.

[63] "Législation sur les responsabilités et les sanctions d'après *Résistance*, no. 6, 25 janvier 1943," in Michel and Mirkine-Guetzévitch 1954, pp. 251–261.

[64] Andrieu 1984, annex I "Notre programme"; *Le Populaire*, no. 16 (16 January–1 February 1943), pp. 137–140.

[65] Extrait du premier projet commun du CNR, discuté en juillet 1943, in Andrieu 1984, annex II, pp. 141–144.

emerge "a more pure and strong France."[66] None of the later programs submitted to the Conseil national de la Résistance[67] took up the word, although it was used in the ordinance of 18 August 1943 instituting a purge commission with the Comité français de libération nationale. Even General de Gaulle, whose speech of June 19, 1940 laid "the juridical foundation of the future purge by arguing that Vichy was both illegitimate and illegal," according to Peter Novick,[68] does not employ the word "purge" [épuration] in 1940, let alone in 1943 in Casablanca.[69] He preferred the verb "to punish" [*châtier*].

The word has a definite political nature because first it aimed at the managing personnel, Vichy's government ministers, and then in July 1943 the word applied "to the traitors and war profiteers," all the while enlarging the sanctions to include capital, at the impetus of the communists, who proposed "the confiscation of traitors' assets."[70] The communists of Algiers advocated "a real and rapid épuration," facilitated by "vigilance committees" that "could arm the citizens to make the identity of the traitors."[71] As for the country's communists, they emphasized the "punishment of the cartel men, organizers, and profiteers of the defeat."[72]

For the socialists, the necessary work of purification appealed to the "old parties disorganized by the defeat, but purified by the Resistance,"[73] starting with the socialist party itself. Until the Liberation, the Resistance generally preferred the expression "punishment of traitors"[74] to the word "épuration." The latter belonged to the political, legislative, and judicial fields, while the former originated in a

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[66] Second projet de charte soumis au CNR, novembre 1943, proposé par le Front national in ibid., annex 3, pp. 145–148.

[67] The word does not even appear in the definitive version of the Resistance's action program dated 15 March 1944 and approved unanimously.

[68] Novick 1968, p. 21.

[69] In impeccable De Gaullien style, he declared on 8 August 1943 in Casablanca: "It is hardly worth stating, quite to the contrary, that the country must omit from punishing those who betrayed it and delivered to the perpetrators and who, under the irritating pretexts of pardon, invoked either by the guilty, or in the world of the councilors without French responsibility, France can blunt the double-edged sword of her justice. But no! The national union cannot occur and cannot continue if the state distinguishes between the good servants and punish the criminals […] there is only one word to use: 'Treason," and only one thing to do: 'Justice!' Clemenceau said: 'The country will know who defended her.' We say: 'One day, the country should know who avenged her!' Gaulle 1970, pp. 336–337.

[70] Second projet de charte soumis au CNR, proposé par le Front national, novembre 1943, in Andrieu 1984, annex III, pp. 145–148.

[71] Ibid., 105.

[72] An article by G. Cogniot summarizing the 31 August 1944 meeting of the Communist Party's central committee, *L'Humanité* (1 September 1944), quoted in Andrieu 1984, p. 106.

[73] "Le movement de Résistance et les partis," *Libération-Nord* no. 125 (20 April 1943) in Michel and Mirkine-Guetzévitch 1954, p. 261.

[74] The death sentence handed down to Pucheu in Algiers and his execution are saluted by articles entitled "Pour les traîtres, la mort!," *Libération-Nord* no. 171 (14 March 1944) and "Le châtiment," ibid., no. 172 (21 March 1944).

more radical model, even if it simultaneously called for a purification of the society overhauled and regenerated by the ordeal of the war.

The word "épuration" also corresponds to a particular era and function: emergency justice. The word appeared in Algiers in 1943 in the legislative context of the reconstruction of the state and it remained a word that belonged to the semantics of the year 1944, when it was fixed as designating the emerging willingness of a "purer and stronger France." No doubt the replacement of the word "punishment," which retained a clearly individual coloration, with the word "épuration," which possesses a more collective inflection, reflected the necessary adaptation of a vocabulary forged in combat to a more normative vision of a society to rebuild in its entirety. Nonetheless, the malaise subsisted with the use of the word. Numerous *résistants* confusedly felt the disparity between the word and what they wanted to do. If the action of separation with the traitors is evaluated positively, the presupposed hygienists, moralists who judged the separated element "dirty" and "impure," hindered the employment of a term that one could no longer use with quotation marks.[75] At the end of the war and past the feverish hours of the Liberation, rare were those who would completely accept the word (if not the thing). The épuration thus functions like the word of others.

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[75] Krieg 2000, pp. 418–423. Krieg quotes examples of this difficulty in completely accepting the term "épuration": Serge Ravanel, propos reported by Rosenzweig, *Le Monde* (13–14 November 1994), p. 17: "It was the purge for us. Moreover, the word purge is hideous. One has the impression of a soap that cleans. It was not that. In fact, we were at war, there were adversaries and at the time we thought that when you find yourself face-to-face with a traitor, a man who doomed Frenchmen to their death, well, one punishes him as such. It is not épuration. It is something completely different…." The celebrated word of Camus in *Combat*, (30 August 1945): "The word épuration was already painful enough in itself, the thing became odious" in *Esprit* (1 December 1944): "The épuration! The term has moralist and totalitarian consonances that sometimes bother us."

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Chapter 3
Humanity Seized by International Criminal Justice

Sara Liwerant

Contents

For the "post-conflict" governments (and the international community), the twin aphorisms "no peace without justice" and "no justice without peace" assert criminal justice (both national and international) as a central element of the exit from civil and international conflicts. This international criminal justice system was put into place in phases, through first temporary jurisdictions[1] established in the mid-1990s and then, a few years later, a permanent court.[2] The system is constructed around

[1] The first jurisdictions were the International Military Tribunals of Nuremberg and Tokyo following the Second World War. With the resolutions 827 and 955, in 1993 and 1994, respectively, the UN created the International Criminal Tribunal for the ex-Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).

[2] The International Criminal Court (ICC) was established on 17 July 1998 by the Treaty of Rome.

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the notion of attacks against humanity, first by the offense of "crimes against humanity" and then by the offense of "genocide," to punish acts that were progressively differentiated from war crimes. Thus, in the field of law, transitions from war to peace are viewed through the prism of the notion of "humanity." This is why the analysis of notions, concepts, and categories through which one can comprehend the post-war transition causes one to pause on the term "humanity." At the heart of its legal usage, the term requires comprehension of the logic of its mobilization, of its utilization within the international criminal justice system, and of its effects. Using the discourse and jurisprudence of judges from both the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda,[3] the analysis centers on how the notion of "humanity" has become a legal instrument for measuring how judges interpret the facts before them.

Borrowed from other fields, "humanity" is mobilized at the intersection of discourses, legal practices, and policies. It is the symbol of the scale at which the legal vocation is to be applied at an international, if not universal, level. The introduction into law of this "humanist" reference has not been the object of specific discussion among jurists. Furthermore, the objective of the notion of "humanity" is to introduce consensus by use of a term that is elsewhere incontestable. In effect, the chosen reference must appear legitimate, no matter the country where international law is being applied. Thus, the notion of humanity is present in numerous countries (all of which have integrated "crime against humanity" into their legal system), as well as at the international level with the establishment of the International Criminal Court, considered competent to judge the perpetrators of such infractions. "Humanity," now a legal category, is displayed as the circulation of consensus through a legitimate reference that cannot be questioned. Humanity, mobilized by the jurists and present in discourses—both political and those of the actual operators of international organizations—permitted the establishment of international criminal jurisdictions (from Nuremberg and Tokyo to The Hague and Arusha). An analysis of the doctrine and jurisprudence of contemporary criminal jurisdictions and a study of the genealogy of the notion of Humanity in law permit the comprehension of how this category of nomination preserves the representations of the world and of the law that were collapsed by the crime.

3.1 "Humanity" in the Field of Law: Genealogy

"Humanity" was the attempt at a standard by which the legitimacy of the first *ad hoc* international criminal jurisdictions was judged. The temporality and the processes by which this notion has become a legal category pertain to the choice of a legitimate foundation that drives the law to the core of war.

[3] Since, as of this writing, the International Criminal Court has not rendered a "thorough" decision, this chapter only takes into consideration those affairs thoroughly judged by the two international criminal tribunals.

3.1.1 Humanity of the Choice of a Legitimate Reference

In the field of law, the term "humanity" first appears at the beginning of the twentieth century, in the expression "laws of humanity," and again at the creation of the offense of a "crime against humanity" in 1945. The occurrence of "humanity" appears for the first time in substantive law in the Martens clause, inscribed in the preamble of the 4th Hague Convention of 1907. The clause reads:

> Until a more complete code of the laws of war is issued, the High Contracting Parties think it appropriate to declare that in cases not included in the regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and from the requirements of the public conscience.[4]

This clause is inscribed in the perspective of international human rights law which appeared at the end of the nineteenth century with the objective of recalling the exigencies that were to preside over behavior during war. This disposition announced a codification that would be applied in 1920 with the Statute of the Permanent Court of International Justice (which became the International Court of Justice in 1945), via its Article 38, which consecrates the "general principles of law recognized by the civilized nations."

Thus, when the term "humanity" appears in law, it is quite often associated with the terms of "civilized nations." Sometimes it is the "civilization that is truly accusatory to the [Nuremberg] trial."[5] Sometimes the offense "crime against humanity" is the sign of a state of civilization progressing:

> The crimes against humanity are as old as humanity. The legal concept, however, is new because it presupposes a state of civilization that recognizes the laws of humanity, human rights, or the rights of the human being such that the respect of the individual and of human collectivities are enemies, 'law' and non-codified 'rights' maybe yet, but the violation is considered as morally and legally reprehensible.[6]

The civilized nations affirm both a level of higher law that would protect human beings regrouped within a Humanity district and the will to establish a supplementary degree of protection of its rights.

The association of these occurrences illustrates the issues of a war, but also a broader perception of the world and of the law. In effect, it amounts to an implicit equivalence between substantive law and civilization, in other terms, a vision of unique law formalized by written and oral expression within a forum that takes the guise of a jurisdiction.[7]

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[4] Laws of War: Laws and Customs of War on Land (Hague IV), 18 October 1907. [Translation available at http://avalon.law.yale.edu/20th_century/hague04.asp].

[5] Graven 1950–1951, p. 463.

[6] Ibid., p. 433.

[7] Although the laws and customs of war were taken into consideration, their proscription was not envisioned except through an international jurisdiction. (See Liwerant 2002.) Furthermore, works in the anthropology of law have shown the predominance, in the west, of the recognition of the legal phenomenon by the form of general and impersonal norms.

Law thus seizes the notion of humanity via the expression of "laws of humanity." The term "humanity" is then taken up in the works of the Commission on the Responsibility of the Authors of War and on the Enforcement of Penalties created in 1919 to prosecute the perpetrators of "crimes against humanity." In effect, although the Treaty of Versailles does not mention this term, the investigatory commission should have examined the responsibility of starting the war as well as the violations of laws and customs of war. Submitted in 1919, the Commission's report established a list of crimes committed "according to the barbarous or illegitimate methods, in violation of the laws and customs of war and the elementary principles of humanity." It produced a list of 854 individuals to be prosecuted by the Allied tribunals[8] for war crimes, and it mentions the acts perpetrated by the German army that were characterized as "a singular challenge to the essential laws of humanity, civilization, and of honor."[9]

Relying on the Martens clause, and with the aim of indicting the Turks responsible for the massacre of Armenians, this commission proposed the offense of "crime against the law of humanity" to correspond to the declaration of 18 May 1915, wherein France, Great Britain, and Russia declared these acts as "new crimes against humanity and civilization."[10] In Articles 226 and 227, the Treaty of Sèvres foresaw the judgment of "persons accused of having committed acts contrary to the laws and customs of war,"[11] but this treaty was not ratified and, consequently, there was not a single prosecution of the Turkish leaders.[12]

The years following the First World War were marked by a willingness to condemn Germany. Jurists took over the political discourses that, during the war, had advanced the motivating theme of the trial.[13] The process was now about judging crimes against peace, war crimes, and, above all, "atrocious behaviors contrary to the most elementary rules of humanity."[14] In this perspective, the doctrinal movement was very active between the world wars, militating in favor of the creation of a permanent international criminal court that went the way of codifying punishable acts.[15] In effect, there was agreement between the wars that the "violations of the laws of humanity" were acts punishable according to the national laws of all countries, that is to say, according to ordinary criminal law, here turned against the leaders and the perpetrators who had violated the law of their states.

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[8] Becker 1996, p. 56.

[9] Memoir cited by Aronéanu 1948, p. 184.

[10] Cited by Massé 1989, p. 34.

[11] Article 226 of the Treaty of Sèvres.

[12] See Mandelstam 1922–1924, pp. 361; 414; 425.

[13] See, notably, Deperchin-Gouillard 1996.

[14] Graven 1950–1951, p. 448.

[15] The first draft of the repressive international code was developed in 1925 by Vespasien Pella. Following the Second World War, the climate was favorable to a Code of Crimes project from the 1950s, the United Nations General Assembly suspended the examination of a first draft submitted by the Commission of International Law (CIW) because of discussions about the definition of a crime of aggression. Eventually, the CIW did not take back up a code of crimes until 1981, which was adopted in 1996.

The drafts of the international repressive codes were numerous and constituted the major part of the jurists' efforts during the interwar period. The doctrinal movement permitted the regulation of the war until the declaration of its illicit character by the 1928 Briand-Kellog Pact, which outlawed war. Today the codification is similar to the process of "contributing to the defense of justice and international peace, indeed of civilization, or even to assume the establishment of a minimum of international public order or a form of universal social defense."[16]

During the Second World War, the Allies, by a series of declarations, proclaimed the principle of prosecuting war criminals who committed atrocious acts contrary to the laws of humanity "invoked from April 1940 during an appeal to the world conscience launched by the English, French, and Polish governments."[17] The laws of humanity had been laid down, to use the terms of the British delegation, in order to organize legal proceedings against "those who trampled upon international law and the sacred laws of humanity." As the French government put it, "acts contrary to international law and the essential principles of human civilization must not rest unpunished."[18] During several declarations effected during the Second World War between 1940 and 1941,[19] the idea was invoked to punish Nazi criminals in a special international jurisdiction, which led to the famous Declaration of Saint James on 13 January 1942, considered by Eugène Aronéanu to be "the 'chapter heading' of the first International Criminal Code."[20] Although this declaration does not expressly mention the term "humanity," the contemporary doctrine agreed that this declaration aimed at a "type of new criminality, unknown to international law, indeed, to domestic criminal law."[21] These new crimes were considered as requiring a new appellation and a specific definition (distinct from that of war crime). In effect, only national citizens having committed acts during the war could be punished for war crimes. The question remained of how to judge German nationals for crimes committed before and during the war. The crime against humanity allowed the international community not only to register its disapproval, but also to punish acts that, until then, lay outside any legal category. On 7 October 1943, an Investigative United Nations War Crimes Commission was created for the "punishment of individuals who have violated all principles of humanity."[22] It was followed by the Moscow Declaration of 30 October 1943 defining jurisdictions'

16 Mahiou 2000, pp. 37–38.

17 Meyrowitz 1960, pp. 7–8.

18 Citd by Graven 1950, p. 447.

19 Roosevelt and Churchill on 25 October 1941; note by Molotov on 27 November 1941; Declaration of the United Nations, speech of 5 December 1941.

20 Aronéanu 1948, p. 205. In this declaration, the signatory governments expressed their willingness "to set punishment among the principle goals of the war, by the means of organized justice, of guilty individuals or those responsible for the crime that they ordered, that they perpetrated or participated in." Cited by Meyrowitz 1960, pp. 9–10.

21 See, notably, Grynfogel 1994, p. 15.

22 Roosevelt cited by Aronéanu 1948, p. 231.

competency.[23] Aronéanu, a key figure in the post-1945 legal doctrine, declared that the laws of humanity and the re-establishment of human rights were at the heart of the Allies' objective: "the cause of humanity dominated all of the reasons for war."[24]

If the laws of humanity introduced this term into the legal vocabulary, it was the International Military Tribunal at Nuremberg that formulated the new offense by Article 6c of the London Agreement of 8 August 1945.[25] This disposition was taken up again in Article 5c of the International Military Tribunal's statute for the Far East and by the Allied Jurisdictions' Law No. 10 of the Allied Control Council, which pertained to "the punishment of persons guilty of war crimes, crimes against peace, and crimes against humanity." The definition of crime against humanity would ultimately exceed that of war crimes: it applied to acts that were not punishable under ordinary law or that were committed before the war by a sovereign state on its domestic soil. All of the authors of the period did not agree on the category "crime against humanity." Eugène Aronéanu, eminent jurist and central figure of the postwar legal doctrine preferred the expression "crime against the human person," while M. de Menthon (representative of the French Public Ministry at Nuremberg), in his introductory report, qualified these acts as "crimes against the human condition," and Jackson (the American judicial representative at Nuremberg) referred to crimes "against civilization."[26] The doctrinal discussions would not modify the appellation of the new offense. "Crime against humanity" would progressively replace "crimes against the laws of humanity" and only two affairs made reference to the laws of humanity as a general principle of law (by the Special Criminal Court of The Hague in May 1948 in the *Rauter* affair and by the Israeli Supreme Court in the *Eichmann* affair). Since then, the international offense of "crime against humanity" has become inscribed in the statutes of two international criminal tribunals[27] and the International Criminal Court.[28]

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[23] This declaration minorly foresaw that national tribunals would judge crimes perpetrated on their soil and for crimes that could not be localized, the Allied governments would render a joint decision.

[24] Aronéanu 1948, p. 210.

[25] This article defines crimes against humanity as: "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." Writing the principles of international criminal law in 1950 at the request of the UN General Assembly demonstrated the demand for a new legal reference ratifying/confirming the principles brought out at Nuremberg.

[26] Cited by Donnedieu de Vabres 1947, p. 527.

[27] Article 5 of the International Criminal Tribunal for the former Yugoslavia's statute is competent to judge grave offenses to the Geneva Conventions of 1949 (Article 2), of violations of the laws and customs of war (Article 3), and of genocide (Article 4). The International Criminal Tribunal for Rwanda was competent to judge genocide (Article 2), crimes against humanity (Article 3), and violations of Article 3 common to the Geneva Conventions and the additional Protocol II.

[28] Article 5b of the July 1998 Treaty of Rome establishing the International Criminal Court, of which the statute went into force in July 2002 after being ratified by sixty countries. Besides the crimes against humanity, the court is competent to judge crimes of genocide, war crimes, and crimes of aggression.

3.1.2 Law to the Core of "War"

The laws of humanity were invoked as a basis for the principle of prosecution of "war criminals," moreover, this expression was always used to evoke the behavior by which the acts fall outside military logic or to designate new reproved forms of war. Thus the genealogy of "Humanity," in the field of law, reveals a peculiar legal logic: lawyers used it to punish violation of laws and customs of war.

The notions of laws of humanity and the crime against humanity suggest a realm beyond war and inscribed in the series of conventions pertaining to the law of war. The crimes of war are understood as violations of the laws and customs of war, the Conventions of The Hague of 29 July 1899 and of 18 October 1907, and the Geneva Conventions of 1906. In the nineteenth century efforts to humanize war (The Hague Conventions, but also the Lieber Code of 24 April 1863), one witnesses a criminalization of the violations of the laws and customs of war, as the preamble of The Hague Convention of 18 October 1907 clearly expresses the laws and customs of war on land:

> these provisions, the wording of which has been inspired by the desire to diminish the evils of war, as far as military requirements permit, are intended to serve as a general rule of conduct for the belligerents in their mutual relations and in their relations with the inhabitants.

This was thus the behavior in the war that led not only to an extension of the regulation of armed conflicts, but also to an offense designating those acts that were progressively removed from the category of war crimes after the outlawing of war in 1928. This enabled the doctrine to affirm that the crime against humanity evolved from the war and from the idea of protecting the human person in times of peace. In effect, if the war crimes corresponded to an offense of classic international public law, the crime against humanity, qualified as an offense "prior to the formation of a collective system of security,"[29] was dissociated from the war crime in 1945, even if "no impenetrable partition"[30] appeared. To use Aronéanu's famous formula: "the crimes against humanity travelled under the cloak of war crimes"[31] until the Second World War. The crime against humanity did not acquire its own "autonomy" until after the postwar judgments. The International Military Tribunals decided to apply the qualification of crime against humanity only when a connection with war crimes or crimes against peace was established. They also considered that, for the events prior to the start of the war, this connection did not exist. For acts committed during the war, however, the Tribunals reunited under the same category the crimes against humanity and war crimes, thus avoiding the distinction between these two offenses.[32] This is because the majority of the doctrine denounces the IMT's timidity with respect to the qualification of crime

[29] Donnedieu de Vabres 1947, p. 506.

[30] Ibid., p. 505.

[31] Aronéanu 1948, p. 193.

[32] Without researching whether or not the facts were qualified, the Tribunals certified that the statute incriminated them as soon as they presented a connection with the crimes against peace and war crimes (other offenses laid out by the statute).

against humanity; it was retained only in terms of its connection with war crimes against peace.[33] Crime against humanity was "vanished."[34]

The other difficulty confronting jurists in 1945 was justifying the application of a new crime, that is to say, proscribing acts that were not defined at the moment of their commission. In other words, how does one legally justify the prosecution without violating the fundamental principle of criminal law: non-retroactivity?[35] In order to justify the application of this new offense, the doctrine and the jurisprudence situated the origin of the crime against humanity in substantive law via the laws of humanity. If the laws of humanity have been considered as the "fruit" of the law of nations since 1918, it was only after the Second World War that jurists would clearly affirm the genealogy of this notion. The legal doctrine consequently established a "direct filiation" between the crime created by the London Agreement, the laws of humanity, and, more generally, the law of nations, invoked at the Nuremberg Trial. In effect, if the law of nations *stricto sensu* concerns inter-state relations, it is "founded on universal principles of justice of which 'humanity' should be both the object and the beneficiary."[36] The legitimacy of the new Article 6c of the London Agreement answered already to requirements expressed by the law of nations. The promoters of the Nuremberg trial appealed to the theories developed by Thomas Aquinas, Suarez, Gentili, Vattel, and Vitoria. Grotius was mentioned several times during the Nuremberg Trial:

> the sovereign and the holders of sovereign power have the right to apply punishments not only for offenses of which they or their subjects were victims, but also for the flagrant violations of natural law and of the law of nations committed to the detriment of other states and of their subjects.[37]

The references to theoreticians of the just war allowed the justification of the war:

> In our civilization, the preoccupation of [the] 'international' characteristic of human rights harkens to the doctrinaires of the just war that grants the prince leading a just war the right to punish the authors of murders inutile to the war.[38]

Thus, the introduction of the law of nations, which imposes itself on everyone, saw the assurance of its violation by the "just war." The consequence of this law of

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[33] After the Nuremberg and Tokyo Trials, the United Nations Assembly adopted a resolution confirming the Principles of International Law recognized by the "Nuremberg Charter" of 11 December 1946 and the Commission of International Law decided to eliminate the connection between this crime and the situation of war (aggression) and war crimes. The war crimes and crimes against humanity would no longer be linked by a relationship (notably in the statutes of the International Criminal Tribunals and the International Criminal Court).

[34] Donnedieu de Vabres 1947, p. 527.

[35] As an example, it is interesting to note that this question has been resolved not only at Nuremberg, but also in the first decisions of the international criminal tribunals and by the International Criminal Court of Yugoslavia; see the *Tadic* case where the ICCY spent very large developments relative to its competence.

[36] Graven 1950, p. 438.

[37] Cited by ibid., p. 441.

[38] Aronéanu 1947, p. 193.

nations was indeed "the war of law."[39] Representing France at the Nuremberg Trial, Henri Donnedieu de Vabres thus affirmed that "the crime against humanity wronging interests common to the entire humanity [is an] abstraction made of the state form, [and] the crime against humanity is an offense against the law of nations."[40] This filiation is picked up within the Convention for the prevention and the repression of the crime of genocide of 9 December 1948, which inscribes this reference in its first article: "The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish."

The law of nations allows a discourse of legitimation of the new offense applied by the first *ad hoc* international jurisdictions. The genealogy of the introduction of the notion of humanity in law reveals a patina of legitimacy from the moral point of view that would justify the legal use. This discourse reveals the porosity of the boundary between natural and positive law, pertaining to the cleavage between the foundations and the technique of the law.[41]

Moreover, the elaboration of the rules aims decreasingly at the right to war that "contains" behaviors during the war. To put it differently, comportments during conflicts distinct from the military objective provide the opportunity to extend a regulation that seeks to adapt itself to the forms of wartime violence to contain them. The reference to humanity indicates that the *jus in bello*, behavior into the war, was henceforth as significant as the *jus ad bellum,* the right to do the war. This is why Donnedieu de Vabres could say that war crimes are only a species while crimes against humanity constitute a genus. According to this legal logic, this notion provides a foundation for the repression, in "containing" the wartime comportment, that is to say, to effect passage of a law to do the war to a law into the war. More a category of repression than of analysis, Humanity provides the legitimation to establish new judiciary institutions. Even so, must one consider still the crime against humanity as an act beyond the war committed within a conflict of which one must determine the temporal, geographic, and conceptual boundaries?

3.2 Humanity: The Nomination of Shattered Representations

What does the term "Humanity" mean? What are the contemporary legal debates about it? Does the established institution have uncontested legitimacy… what has become of this legal category at the implications of its use (contrary to the criminal policies that it can implement)?

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[39] Graven 1950, p. 439.

[40] Donnedieu de Vabres, 522.

[41] In this sense, see Legendre 1999.

3.2.1 Law and Grammar of the Crime

In the name of Humanity, which establishes the legitimacy of saying the law and, better, protects it, the legal taxonomy calls a definition of this referent. In effect, if humanity becomes the referent of an exaggerated crime, the appellation of the crime requires a definition of that from which the crime detracts.

Analysis of the doctrine and of contemporary jurisprudence reveals that the discussions relative to "humanity" are firstly concentrated on the definition. The question of knowing what is designated by "Humanity" has driven debates on the pertinence of elaborating a definition of this notion and will drive judges to determine who is "the victim" of these attacks. In effect, the polysemy of the referent "Humanity" required to determine if the offense is an attack on Humanity as a category that should be defined or if it is a particular attack on the body of the victim because of the negation of his/her membership in the human species? What is the specificity of the attack that the law decides to stigmatize: an abstract entity or specific individual(s)? In other terms, is this exclusion from humanity as an individual or of a member of a community; if the latter, which human community?

For the majority of the scholars after the Second World War, acceptance of the term of crime against humanity must be understood as the negation of the dignity of the victim and the rupture with the humankind. Others were partisan to a wider definition of the crime against humanity:

> The crime against humanity has no other object than the human person…. We do not believe in 'the crime against the very essence of the human genre' in so far that it is formed of different races, nationalities, and religions. And yet, racial hatred was the motive for the Israelite's inhuman treatment as he was rifle butted into a gas chamber, his person and right to life attacked and not his race.[42]

This question was posed in the national trials for crimes against humanity. In France, during the Barbie Affair, the judges asked themselves about this notion to understand if the crime against humanity was a crime against the essence of humanity, i.e., a quality intrinsic to each human being. The notion retained was that of a crime committed against the humankind, the man is

> attacked in his body, his life (he is assassinated, exterminated) or his liberty (he is deported, reduced to slavery), but also in his human dignity which makes him similar to other men.[43]

From this perspective, in 1994, Delmas-Marty wrote of the urgency to define this "implacable human."[44] She defended this idea with a definition of the crime against humanity because

> the refusal of all general definition permits, aimlessly of subjective appreciations of one another, to make of the crime against humanity an indefinitely extensible notion and not the strong core and constitutive intangible of the supreme forbidden.[45]

[42] Dautricourt 1947, p. 298.

[43] Truche 1992, pp. 67–68.

[44] Delmas-Marty 1994, p. 489.

[45] Ibid., p. 490.

This debate was re-launched among the international judges during the first decisions of the new *ad hoc* international tribunals. Although the attack on humanity serves as the basis for the competence of these jurisdictions, the tribunals agreed that this crime is international because of its nature: it challenges the "essential values on which lay international society."[46]

It is ultimately the "humankind" that is targeted by the reference to attacks on humanity. The international criminal courts' jurisprudence noted that the specificity of the crime lay in an attack that strikes more than the physical integrity of the victim and affirms "that there is no total equivalence between the life of the accused and that of the victim."[47] Echoed in the first decisions of the ICTR,[48] the ICTY stated, in its first case, that:

> Crimes against humanity are serious acts of violence which harm human beings by striking what is most essential to them: their life, liberty, physical welfare, health, and/or dignity. They are inhumane acts that by their extent and gravity go beyond the limits tolerable to the international community, which must perforce demand their punishment. But crimes against humanity also transcend the individual because when the individual is assaulted, humanity comes under attack and is negated. It is therefore the concept of humanity as victim which essentially characterizes crimes against humanity.[49]

Faced with these difficulties, the jurists have recourse to the notion of dignity, almost like a substitute for the notion of humanity. Although not new, this concept found its legal translation in 1945[50] in the endeavor to elaborate a legal protection from crimes against the "human family." The concept of dignity thus makes its appearance in the field of law that attempts to detail the acceptance of the term humanity. Today, the notion of "dignity" is considered a principle of international law, recognized by the international criminal jurisprudence.[51] The attack on dignity appears to be the common denominator of all the crimes against humanity, and a number of the ICTY's indictments make reference to it[52]: the "rules prohibiting crimes against humanity … have the goal of protecting fundamental human values in banishing the affronts to human dignity."[53] Humankind and the human abuses are both contained in this notion of dignity. If the utilization of the notion of dignity in matters of crimes against humanity could permit the recovering of the two principal acceptances of humanity, its

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[46] Francillon 1999, p. 400.

[47] Chambre de première instance I, *Erdemovic* IT-96-22 *"Ferme de Pilica*," 29 novembre 1996, §19.

[48] Chambre de première instance I, *Kambanda* ICTR-97-23-S, 4 septembre 1998.

[49] Chambre de première instance I, *Erdemovic* IT-96-22, *"Ferme de Pilica*," 29 novembre 1996, §28.

[50] The notion of "dignity" makes its entry in the United Nations Charter signed in San Francisco on 26 June, 1945.

[51] See, for example, the *Furundzija* affair judged by the ICTY.

[52] See the indictments in the *Kordic*, *Sikirica*, and *Nikolic* cases.

[53] Chambre de première instance II, *Kupreskic et consorts*, IT-95-16 "*Vallée de la Lasva*," 14 janvier 2000, §547.

definition would not be any easier. This "positive" version of crimes against humanity displaces more than clarifies the referent measure, revealing a rationality of statement founded on an inversion. In the same manner in which the definition of the term "humanity" is susceptible of receiving a contrary definition, the term "dignity" constitutes, too, the reference to the name by which eugenic practices were justified.

From the moment that the offense was named as an attack on humanity, the crime could only be formalized in terms of violation of this reference. This nomination process led to the multiplication of the definition of prohibited acts, regardless of jurisprudence (the ICTY having largely developed the notion of the crime against humanity) or in lengthening in the text the list of proscribed acts (Article 7 of the International Criminal Court's Statute is eloquent in this respect). The discursive logics of law drove the creation of offenses by *a contrario* nomination. The incriminations of crimes against humanity (and then of genocide) were conceived from the specificity of the crime to which the constitutive elements of the offense must respond. The definition by the statutes of international jurisdictions and the legal qualification operated by the jurisprudence attest to a formulation of the crime made from the discourse of the call to murder, certain practices of cruelty, and the traces of crime. The jurisprudence establishes a definition of the crime which takes, point by point, the prohibited acts and classifies and systematizes them.

The legal logic inherent in the genealogy of the notion of Humanity in the field of law led first to the definition of genocide by the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 and then took up, one by one, the terms utilized by the murderous organization and the discourse of the call to murder; the international criminal tribunals, as well as the International Criminal Court, reiterated the terms "race" and "ethnicity" in the incrimination of genocide from which the jurisprudence defined these terms.

The international judges released, in a tautological manner, a definition of the attempts on humanity as a series of inhuman acts. In revisiting the *a contrario* acts, the law did not oppose an inversion. More than that, the law, or more exactly the jurists, compelled themselves to engage to the core of crime. Thus, it was not a construction of an analytical category, but the classification of acts within a generic category of which the newness just signified "no."

Humanity, as a legal category, shows that the law, faced with the crime against humanity, relies on the same principles and the same vision as the murderous logic, thus questioning the legal rationality. This view is impervious to the prohibition of murder. In effect, the same notions are advanced but in an opposite interpretation; an inverse meaning is attributed to a similar sense. Still, the notion of dignity such as it was established by the genocidal logic redefines its beneficiaries; the law has just reestablished the attribution of this affiliation and reaffirmed its indivisibility thanks to the same notion. Law has just responded, term by term, to the established murderous logic, the inhuman attacks, the attempt on humanity that the genocidal logic redefined, such as the notion of responsibility.

This nomination, based on the effects of the crime, allows a "reversibility" of principles to appear, such as responsibility, which also belongs to the legal universe. If responsibility is fundamental to modern criminal law, it also constitutes the fulcrum for the realization of crimes against humanity and, more generally, collective murder. Ordering murder relies on the action of perpetrators in implementing the disappearance of the moral responsibility to the profit of technical responsibility, that is to say, the dissociation of moral and legal responsibility by a "transfer" of the meaning of the act emptied of its symbolic substance. In this capacity, the rhetorical arguments of the perpetrators and of the law respond to each other; rhetoric of the legitimate defense or of the constraint as a legitimate form of submission to authority.[54] These sales points pertain to the same categories and they respond to the constructed language as extenuating circumstances. Our "surprise" at the discourses of justification or of absolving the authors of crimes against humanity reveals more the cultural deep-rootedness of the notion of responsibility and the difficulties of its utilization for crimes against humanity. In effect, if "being responsible" today is associated with the responsibility—including the criminal sense and those of guilt and accountability—the register of the offense does not appear until the moment where this term is transported into the discourse of Christian morality; the act at fault becomes the cause of the form of a responsibility before God's judgment.[55] In other terms, this rationality permits the formulation of the refusal of the crime, but also in reconstructing the shaken representations of "the human." This "mirror effect" of the arguments shows that, in successive temporalities, the same principles serve societal projects founded on its exact antinomy, the reproduction of life in the face of its extermination. A reading of the law that establishes a list of proscribed acts shows that the effort of classification touches what is visible of the crime, to know its materialization.[56] Thus, the construction of this murderous normativity reveals the limits of our categories and of the law.

3.2.2 Law's Unspoken Elements

Through the notion of Humanity, the construction of the legal narrative of a crime makes evident the law's spoken and unspoken elements vis-à-vis the crime. If today the look is less turned away from perpetrated collective crimes,[57] the proof

[54] See Liwerant 2006.

[55] The term "responsible" is recent, dating to the end of the eighteenth century; its original meaning was "to hold accountable for" [*se tenir garant*], that is, it designated a debtor on which weighed an obligation and not an offense. See Villey 1977.

[56] In this sense, our propos consists in affirming that there exists a "murderous normativity." See Liwerant 2010. And, in considering these acts in relation to this murderous normativity, international criminal law cannot attain the construction of its legitimacy and of its authority.

[57] See Liwerant 2007.

is in the development of a new field of research dedicated to this scientific object.[58] The legal category has led the social sciences to free themselves of this nomination of crime against humanity (and genocide) in order to understand the crime. In effect, for some time the legal terminology has formalized the framework of this research. The state of scholarship dedicated to genocides and crimes against humanity shows the force of the legal categorization of these notions, necessitating an empowerment by the other scientific disciplines in order to free themselves from the legal taxonomy and to be overcome with other interpretations of the realization of the crime and its treatment. This "closure effect" reveals the limits of both human perception and of legal rationality before this collective crime.

Humanity seems to be the single reference that accounts for this irrepresentability. The recourse to this reference leads inexorably to the following paradox: the law must define a representation. Besides, the choice of the term "humanity"—the reference conveying a number of representations—signals the vague desire to reconstruct a representation that puts into check the crime.

Faced with this crime, the legal discourse reconstructs the shattered representations in evading all materiality of the crime to emphasize the abstraction of their reference. The legal montage always attempts to preserve this image of the human. It dodges the fracture opened by the crime in order to better restore this indestructible representation of humanity, that of a dread before the posed acts. The crime contains an inexpressible dimension but it does not at all concern the crime; in fact, it signals the collapse of our representations. It is more about considering the representations that founded our system and today put into cause the perception of the human, and also about the implications of the mode of legal nomination. It is not about attempting to reconstruct a representation of the humanity that the murderous logic has largely damaged. The crime shows the collapse of the human representation; its sequential analysis requires the freeing of oneself of all reconstruction and not prolonging the unthinkable discourses on the mass crimes that one attempts to keep at a distance like a reality external to the thought. Or like the acts broken by a force that cannot be human. The difficulties of thinking about the genocide and crimes against humanity signal a perception and a classification of the world. The crime has, in some fashion, lightened the flaw of a rationality from which the law does not escape. In this sense, the law functions like a revelation of the "state of our categories of thought." In effect, the unrepresentability of the mass crimes breaks the classic modes of nomination and our representations.

Several signs illustrate the legal difficulties in taking into consideration the collective dimension of the crime.

On the one hand, Humanity used as an "absolute" reference contrasts with the application of principles of common law by the international criminal jurisdictions. This gap is particularly visible in what concerns the sanction, the object of numerous critiques of international criminal jurisdictions. If the critique is near the one relative to punishments pronounced in common law, then the contradiction

[58] See Liwerant 2012.

between the designation of "crime of crimes" and the applied principles clouds the readability of a crime for a common law offense and for crimes against humanity.

According to the texts, the punishment is principally determined as a function of the gravity of the crime and the personal situation of the defendant.[59] The "fair" punishment reflects the personality of the alleged criminal and must be proportional to the gravity of the act. Based on steadfast jurisprudence, the ICTR[60] and ICTY[61] believed that the gravity of the offense constituted the principal factor of determining punishments. The jurisdictions have freed several elements characterizing the gravity of the crime: those pertaining to the nature of the crime, the victims, and the criminal behavior during the commission of the offense. Thus, the scale of the crime committed, its organization, and the rapidity of its execution characterize the gravity of the crime.

> The odious characteristic of the crime of genocide and its absolute proscription confer a character properly aggravating to its commission. The magnitude of the crimes involving the massacre of approximately 500,000 civilians in Rwanda in the space of 100 days constitutes an aggravating circumstance.[62]

The international criminal tribunals have considered that the gravity of the crime rises in regard to the number of victims and the amount of suffering[63] inflicted by the defendant[64] and the consequences of the offense and its gravity.[65] The ICTY considered that the gravity of the crimes committed by Krstić[66] was characterized by their magnitude, organization, and the "rhythm to which they [the crimes] followed one another in the space of ten days."[67] A "subjective" criterion is added to this "objective" criterion: the behavior of the defendant in view of

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[59] The principle is inscribed, respectively, in Articles 23 and 24 of the statutes of the International Criminal Tribunals of Rwanda and Yugoslavia.

[60] This principle is recalled in "the general principles governing the determination of the punishment," the rubric preceding the in-depth examination. Furthermore, judging the criminal responsibility for the crime of genocide, the "crime of crimes," the ICTR straightaway characterized the gravity of the offense.

[61] Mucic: "The gravity of the offense is far from being the most important, determinant criterion for meting out a just punishment. It is advisable to recall here that the Tribunal was competent for judging, the grave violation of international humans right law committed on the soil of the ex-Yugoslavia since 1991."

[62] Chambre de première instance I, *Kambanda…,* 4 septembre 1998, §42.

[63] Jugement portant condamnation d'*Erdemovic* du 29 novembre 1996. The court recognized that the victims' suffering was an element to take into account in the sentencing.

[64] The *Tadic* judgment concerning sentence: precisely the harm that the defendant had caused the victims.

[65] Chambre de première instance I *Kvocka…*, 2 novembre 2001, §701; see, too, Chambre de première instance II *Mucic …* "*Camp de Celebici*," §1256.

[66] Radislav Krstić (b. 15 February 1948) commanded the Bosnian Serb unit responsible for the Srebrenica massacre of approximately 7,800 Bosniaks in 1995. He was indicted for war crimes by the ICTY in 1998 and convicted on 2 August 2001 and sentenced to forty-six years of prison. -NdT.

[67] Chambre de première instance I *Krstic* …, 2 août 2001, §720.

the circumstances and his/her behavior. To appreciate the latter, the jurisprudence isolated three factors considered as aggravating circumstances: the degree of participation, the premeditation, and the motives.[68] To an exceptional crime, a "common" punishment is inflicted, clearing recognition of the crime's specificity. An attack on humanity, the jurisprudence and the doctrine consider, in application of the texts, that the attack on humanity permits the stigmatization of the gravity of the act committed. The crime is named by an attack on a non-consensual, if not "inexpressible," notion, of which one no longer knows very well who is the victim of what. Thus, the reference to humanity passes, little by little, a definition of the victim of a stigmatization of the offender. In effect, if the reference to humanity allows making the connection, at least in principle, between the collective and the singular victim, it also participates in the confusion of genres, between those which belong to the intimate and to the social. The designation "fusions" the diverse faces of the victim: victim of the movement to the act, target of the institutionalization of the murder, or even intangible disappeared figure. Three dimensions are present: the transgression, the murderous project, and the effects on the representation of the human. One observes thus a shift in the use of the notion: from an attack against Humanity and the definition of the "victim," it is the gravity and is today still stigmatized by the international judges through the charge that reflects on the author. Thus, the notion of "humanity" allows the quantification of the directed attack and becomes a grave criterion of the crime and of fixation of the punishment inflicted on the author of the crime against humanity.[69] Even so, it would not be necessary that, by the designation of attack on humanity, the author of these attacks would be implicitly considered as being "outside of humanity" and which would return to feed the all-powerful imaginary.

On the other hand, the application of these common law principles reveals the law's difficulties in grasping the collective and political nature of the crime. The criminal policy of the international criminal tribunals has always privileged the judgment of the rulers and upper hierarchies to the detriment of the perpetrators, although the nomination of the crime constitutes a political and social issue for the populations within which the crime has been perpetrated only for the governments of these countries. The choice appears as the only translation of the recognition of the political dimension of the crime. In effect, understanding the "post-conflict" in terms of responsibility, on the one hand, leads to the conceptual difficulties and practices of "judging a nation" and, on the other hand, underlies a hierarchization of the responsibilities superimposing themselves implicitly on a scale of gravity of the exactions. As an example, whether it is "Humanity" or "dignity," neither of these notions responds to the question of knowing how the law can take hold of the collective and how it designates the transgression. This adaptation of the law to the collective violence puts into question the differentiation between common and

[68] Ibid., §705.

[69] This same criterion is used to determine the punishment pronounced towards the authors of genocide, which poses the question of the existence of an implicit hierarchy between these two offenses.

"exceptional" law. There, too, international criminal law does not make readable the murderous logic at work; the question of the sanction renders salient the tension between individual and collective.

The will to put an end to impunity pass by the identification of the author and the declaration of the criminal responsibility for the acts committed. Modern criminal law is constructed like an instrument of protection of individuals against the state (through the philosophy of independent judges) and is developed through the monopoly of legitimate violence, including the repressive law. But the crimes against humanity (along with genocide) require a political organization that can be the state itself. International law did not cease to affirm, since the Second World War, the criminal responsibility of individuals, but not of states. The model of criminal responsibility is inherited from classic criminal law which considers responsibility a consequence of individual free will (*libre arbitre*). The demand for international repression has led to an increase in categories of physical people susceptible of being declared criminally responsible for a crime that became international. The mobilization of this principle permitted the neutralization of the earlier principles protecting the members behaving in accordance with their hierarchy, of which the functioning is based on the principle of obedience. One then sees that criminal law became international. The mobilization of this principle permitted the neutralization of the earlier principles protecting the members conforming to their hierarchy, of which the functioning is based on the principle of obedience. One sees when the criminal law, here borrowed by international law, is diminished before the political and collective nature of the crime. In this perspective, the articulation between the national and international jurisdictions takes its significance as well as its necessity to fully consider the endogenous vision of the justice, of the law, and of its forms and forums.

Recently, and more particularly since the activity of the International Criminal Court (ICC), one can observe that the term "Humanity" is less commonly used. In the general declarations, it is not so much humanity that demands repression, but the international community. In effect, this crime concerning all of humanity comes back to the international community to judge it: "In consecrating the concept of humanity, international law effectively refers to the interests common to all men, to the common universal good."[70] If yesterday's "outraged world conscience"[71] or if the international crimes always arouse "indignation,"[72] qualifiers and not subjects are associated with the term "humanity." Today, the latter confers a certain legitimacy to the name by which international criminal justice is rendered; as an example, the ICC's preamble uses the terminology of "human conscience"; today, one can observe that the indictments and the warrants delivered

[70] Carrillo-Salcedo 1999, pp. 23–24.

[71] The lead American prosecutor J. Jackson's initial indictment before Tribunal at Nuremberg, cited by Graven 1964, p. 15.

[72] Donnedieu de Vabres 1947, p. 518. The term indignation is also taken up by the contemporary doctrine. Bettati presents the crime against humanity as a legally vague notion that makes more of a reference to "indignation."

by the ICC are more re-focused on the actors pursued for international offenses in the name of the international community than in the name of humanity. This recent evolution of the vocabulary reveals an accent on the gravity of the crimes, whatever the location or nationality of the presumed perpetrators. One can question the semantic shift. Perhaps this is the enactment of a discourse of truth founded on humanity in the sense where the international scale prevails over the reference that founded the repression. The necessity of establishing a system of international criminal justice is less crucial where the work consists more of finding the legal and political instruments to make it function.

This change of terms is in keeping with the complementary competence of the ICC (contrarily to the two *ad hoc*[73] international criminal tribunals) and this jurisdiction has no vocation to treat all of the cases. The ICC must then elaborate, implicitly or explicitly, a penal policy or at least a "choice" of the cases. The legal proceedings appear as a manifestation of the international community's disapproval and the proposed repartition remains a repartition between those responsible (judged by the ICC) and the perpetrators (judged by the national jurisdictions). In this example, via the question of a de-territorialized justice or not, it is the penal policy that is particularly disparaged on the African continent which remains the principal "purveyor" of presumed suspects. In effect, one observes, a willingness of certain African states to take charge on their own territory, the judgment of individuals suspected of offenses. It is perhaps an affirmation of a sovereign domain and/or of modified power games, notably the geo-strategic and economic equilibriums. However, this position does not contradict the idea of the usage of the notion of Humanity, which, taken by the word, can implicate the consideration of national sovereignties.

The function of the notion of humanity in law thus takes into account the crime by its outrageousness. "Humanity" becomes a means of measurement, rather than an analytical category. Even so, the law does not have for vocation the production of analytical categories, but categories of nomination. Besides naming the crime based on notions that were put into question by the realization of the crime, and in the name of an abstract reference purporting transcendence, the law divides the collective while seeking to name it. The law aspires to be a pacifying instrument when, in fact, it is bellicose: the law attempts to reconcile by invoking the core of the conflict. A justice that divides the "war" or the "conflict" by judging the acts of a few actors and in imposing on them a sanction is governed by principles of common law. The law sanctions violations of acts of war, but from a war no one recognizes. Thus, the opening in the legal taxonomy comes to define an undefinable notion. The nomination is that which passes by reconstruction of a collapsed representation. The introduction of the term into law must define it or, failing that, classify it. If law's function is to name, it is necessary to ponder that which it must

[73] Article 9.2 the Statute of ICTY (similar to Article 8 of the ICTR) states: "The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer the competence of the International Tribunal in accordance with the present Statute and [its] Rules of Procedure and Evidence."

name so as not to "invert the inversion" and the modes of nomination. The choice of this notion operates to signify the refusal of the collapse of a human representation in reconstructing the idea of humanity as the supreme value to protect. The law puts into place a classification to designate what to protect, but in naming the attack on this vital issue and not the issue itself.[74] The work of legal qualification is also the imposition of a symbolic order. The force of this single ordering allows the illusion of resolution and it suffices to produce an effect of truth that becomes the sole alternative treatment. Far from being immutable, our categories can be re-examined. The international criminal justice system is more similar to a model of distribution of responses than to a model in crisis. In this sense, one can ponder this circulation of a model more or, more precisely, on the circulation of the conceptual crisis.

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[74] The creation of the offenses corresponds to a known phenomenon: knowing how to proclaim rights or a prohibition at a moment where the transgression was so devastating that the prohibition lost all its evidence; this is the case of the Declaration of 1948 and the offenses of Nuremburg.

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Chapter 4
Dealing with Collaboration in Belgium After the Second World War: From Activism to Collaboration and Incivism

Dirk Luyten

Contents

4.1 Introduction

After the occupation of Belgium by the Germans between 1940 and 1944, the collaborators were punished by the military justice. This phenomenon has been studied by historians and sociologists since the 1950s. The research perspective was national and often the problem was narrowed down to the cleavage between French- and Dutch-speaking Belgians. The concepts were rarely questioned as such or considered from a more philosophical perspective.[1]

Used frequently between 1944 and 1950, terms such as *collaboration*, *incivisme, répression, épuration* were mostly taken for granted, without examining their significance or questioning why these concepts—and not others—have been used. Nor was the logic behind the legislation analyzed in-depth. If we look at the problem of the repression of collaboration from a broader and international

[1] An exception is Gilissen 1984, pp. 297–327.

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perspective, it becomes clear that questioning of the concepts used to define collaboration and punishment is relevant: all occupied countries were confronted with the same phenomenon. The exile governments cooperated closely in London and participated in international networks after the Liberation. There were ample opportunities for concepts and models to travel from one country to another. Nevertheless, the process of sanctioning collaboration was organized and labeled differently. Do these different labels conceal different practices or was it just a label for the same phenomenon?

Another question refers to the origins of these concepts: were they rooted in the specific judicial traditions of the respective states and if so, to which period can they be traced back? Belgium, for example, punished its collaborators, then mostly called "activists" after the First World War. Was there continuity or does the use of different terms refer to a different phenomenon?

4.2 A National Question?

Immediately after the war, the punishment of collaboration was often called the repression of *incivisme*.[2] Repression refers to penal law, while *incivisme*, not a legal concept, was widely used. In a survey on the repression of "incivism," published in the *Journal des Tribunaux*, the leading legal journal, J. Dupréel used the concept in the title of his article, but was not able to define it properly. People behaving unpatriotically were "usually called" "*inciviques*," Dupréel wrote. He had to refer to common language since he had no legal text on which he could rely.[3] Even if "incivism" has no precise legal content, it was not only contemporaneously used by jurists, but it was defined in the judicial doctrine. In December 1945, S. Degroodt published an extensive article on the *Statut de l'incivique* [Statute of the incivic]. It was an impressive account of the measures taken since 1934 to deprive collaborators of a series of political and civil rights. The (implicit) definition of an *incivique* was a person who, due to his or her collaboration with the Germans, had lost his political and civil rights for a long period of time, or even his nationality. The author implicitly argued that the phenomenon was new to Belgian law, due to its scale, and therefore a new concept seemed justified; in fact, in the article's conclusion he put *inciviques* between brackets, indicating the weak judicial status of the concept.[4]

Used widely in Belgium after 1944, the term collaboration nonetheless had no legal definition.[5] Punishment of collaboration was the punishment of Belgians

[2] This concept remained widely used afterwards, especially in French. The title of one of the first scientific studies on the punishment of collaboration was Gilissen 1951, pp. 513–628.

[3] Dupréel 1946, pp. 149–152.

[4] Degroodt 1945, pp. 613–621.

[5] Gilissen 1984, p. 299.

and non-Belgians who were supposed to be loyal to Belgium, who had helped the enemy occupying the national territory and had endangered the external security of the state (Articles 113-121bis of the penal code), as appears in the title of the inaugural address for the start of the new judiciary year read in 1946 by W.J. Ganshof van der Meersch, chief military prosecutor and the architect of the repression.[6] To put it briefly, collaboration meant helping an enemy who occupied the national territory.

Research on the punishment of collaboration has a national perspective, with the restoration of the state after the war as a central point of attention, whereby the repression was seen as part of a regime change.[7] This national angle seems natural: the instrument used was the national law (the Belgian penal code) and the judicial actors stressed the national importance of their activities and considered themselves as actors of a restoration of the nation and of the state's authority. W.J. Ganshof van der Meersch wrote in his inaugural address of 1946: "The unity of the country, social peace, the uncontentious resumption of the functioning of our institutions, and the faith in justice were the concern of their (the military prosecutors') actions.[8] In a series of articles by key actors of the repression and published in 1947 in the leading journal for criminology, punishment of collaboration was also represented as a work of national recovery and put on the same footing as the successful economic recovery.[9] Even if the national angle is at first sight the most logical one, the question remains if this perspective covers the whole process.

The literature after the Second World War compares national practices of punishing collaboration because: "the degree to which important questions about wartime and postwar European history emerge as fundamentally similar from country to country."[10] In this approach, the nation state remains the unit of analysis, however, with the focus of the research on how the process of punishing collaboration developed in different countries, on what the effects on the political systems, especially pertaining to the transition from one political regime to another.

The punishment of collaboration is indeed a phenomenon which lends itself to a transnational approach. This European phenomenon was a reaction against another European phenomenon: occupation by the German and Italian fascist states. The occupied countries faced a series of common problems: the persecution of the Jews, economic exploitation by the occupiers, transformations of the institutions of the liberal state, and violent repression of political opponents.

Similar measures were taken against (alleged) collaborators. An example is the detention of suspects in special camps in the Netherlands and Belgium, a procedure which proved to be a source of problems for the whole process of punishing

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6 Ganshof van der Meersch 1946b.

7 Cf. Gotovitch and Kesteloot (eds) 2002 and Huyse and Dhondt 1993.

8 Ganshof van der Meersch 1946b, p. 10.

9 La répression de l'incivisme en Belgique. Aspects judiciaire, pénitentiaire et social. Exposé préliminaire. In: 1947 Revue de droit pénal et de criminologie, 834–842.

10 Déak et al. (eds) 2000, p. x.

collaboration.[11] The judicial systems in the different states had common features since they were built on the French legal system. The liberated countries faced a situation of shared sovereignty between the national state and the Allied liberation troops. The war continued until May 1945, putting military constraints on the punishment of collaboration. The Liberation itself occurred in phases, some countries being liberated before others. Immediately after the Liberation, the punishment of collaboration started which allowed practices in one country to serve as examples or counterexamples for other countries. There certainly are leads for a less national-centered approach for the study of the punishment of collaboration; however, what are the points of entry and what is the proper methodology?

One point of entry is the actors themselves. During the occupation and the postwar period, some actors made the comparison with what was happening in most other neighboring countries. When Belgian industrialists were looking for a compromise between production for the Germans and respect for the penal law in the summer of 1940, one of the arguments was that in the Netherlands production had already resumed and, as a consequence, Belgium ran the risk of losing market share and of its industry being handicapped in the international competition after the war.[12] In general, these references to other countries were used as a justification for a policy or to defend a contested national practice. In his inaugural address, Ganshof van der Meersch compared France, the Netherlands, and Luxemburg to show that in Belgium punishment of collaboration had not been too harsh nor had it targeted too many people.[13] The French chief prosecutor Boissarie developed the same line of argument in 1946, referring to Belgium, the Netherlands, and Norway.[14] Comparison with other countries could also be used to underline the merits, or even superiority, of the Belgian system in dealing with collaboration. In the same address, Ganshof introduced the tri-nation comparison by stating that:

> None of these three friendly nations, whose laws are so close to ours, has had the privilege of having both legislation and a judicial organization/structure that would allow them to entrust their permanent and traditional jurisdictions with the application of a legislation in large part prior to the war, punishing crimes against the security of the State.[15]

"Political transfer" has been used to qualify national bias in nineteenth-century political historiography.[16] It refers to the way that concepts, models, or practices were imported into one country from another and how they affected the functioning of the political system. Political transfer is relevant for the study of the punishment of collaboration, as is illustrated by the concept "state of necessity."

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[11] Romijn 1989.

[12] Devons-nous reprendre la production industrielle en Belgique? Dans quelle mesure? 1940 Papiers l'An 40, nr. 25.

[13] Ganshof van der Meersch 1946b, pp. 71–77.

[14] [Procureur général] Boissarie 1946, p. 8.

[15] Ganshof van der Meersch 1946b, p. 71.

[16] Te Velde 2005, pp. 205–221.

The state of necessity was integrated in Belgian legislation, albeit in a restrictive way, by the decree-law of 25 May 1945, which was designed to mitigate the effects of the penal law for economic collaborators. The concept of duress was, following Belgian jurisprudence and doctrine, too narrow a justification for those industrialists who had followed the Galopin Doctrine during the war. The governor of the *Société Générale*, the main holding company of the country, Alexandre Galopin headed a committee of leaders of holdings and banks, as well as some key industrialists. This group elaborated a doctrine to determine to what extent, taking into account the Belgian penal code, production for Germany could be justified. The Galopin committee charged one of its members, Fernand Collin, a professor of penal law, to elaborate a legal argument. This justification was found in the concept *état de nécessité*, meaning that it is permissible to commit an offense in order to avoid a larger evil. Necessity existed in French, but not Belgian, positive law. To use it as a means of defense for the industrialists, the concept had to be integrated into Belgian legislation. This occurred with the decree-law of 25 May 1945, adapting Article 115 of the penal code, the article concerning economic collaboration. This decree-law (the government had full powers) was the result of a campaign of political pressure by the business elite.[17] Necessity remained a contested concept in the Belgian judicial world, however. The chief military prosecutor, for instance, advocated a restrictive interpretation since he feared that this would lead to impunity for economic collaborators.[18] This was a clear case of political transfer: a concept taken from the French judicial system introduced into Belgian positive law and it had a decisive impact on the practice of punishing economic collaborators.

How did French concepts reach the Belgian judicial and economic elite? Belgian jurists were oriented towards and inspired by French legal culture. Most of them were French-speaking and France remained the model and reference as becomes clear in specialized journals such as the *Journal des Tribunaux*. International associations constituted a second channel for transfer. Their role is well known as far as social policy at the end of the nineteenth century is concerned.[19] For the concept of *indignité nationale* in France, the international conference for the unification of penal law played a role. *Indignité nationale* was a political crime and its definition was largely inspired by the Copenhagen conference held in 1935.[20] In the years after the liberation, Belgian magistrates participated in an international network specializing in questions of punishment of collaboration and crimes against humanity. This *Commission internationale permanente pour l'étude de la répression contre le droit des gens et des faits commis dans l'intérêt de l'ennemi*[21] organized workshops on problems pertaining to the

[17] Luyten 1996, pp. 45–75.

[18] Luyten and Magits 1994–1995, pp. 417–425.

[19] Wolfram 2003.

[20] Simonin 2003, p. 53.

[21] Permanent international commission for the study of the repression against the law of nations and of acts committed in the interest of the enemy.

punishment of collaboration. In July 1947, a workshop in Brussels compared the reeducation and resocialization programs for persons convicted for collaboration in Belgium, Luxemburg, and the Netherlands and studied the question of the extradition of war criminals. This commission had an informal character and was composed of representatives of Belgium, France, Luxemburg, the Netherlands, Poland, China, Greece, Persia, and Romania. Some of its members were official delegates, while others participated in a personal capacity only. The members were magistrates, high-ranking civil servants, and university professors. These organizations served as an exchange platform for the transfer of foreign examples and concepts. The conclusions of the workshop were published in the *Revue de droit pénal et de criminologie*, a specialized journal for penal law and criminology in Belgium. The Commission was conceived as an international documentary office on the question of punishment of collaboration. After the workshop of 1947, it assigned itself the task of setting up a network of technical specialists to exchange ideas and standpoints.[22] In the 1950s, the Commission still existed, the *Revue de droit pénal et de criminologie* being its official organ.

Less formally legal was the concept of collaboration, which was imported from France after the Liberation in 1944, which unveiled the close connections between the Belgian and French judicial worlds.[23]

Besides these transfer of concepts and ideas, the political and military context of the Liberation itself questioned the exclusively national framing of the punishment of collaboration. The Liberation and the continuation of the war against Germany implied that the allied troops were present in Belgium and limited the autonomy of the Belgian authorities. One of the main concerns of the Belgian military justice was maintaining its prerogatives and sovereignty as much as possible.[24] Therefore, a large part of the activities of the Belgian military justice concerned the offenses against allied troops in Belgium. Belgian military justice wanted to avoid that allied judicial authorities would persecute and sentence Belgian citizens and by doing so, devalue the sovereignty of the Belgian state and its judiciary. The international framework, in which the Belgian judiciary had to operate, was, on the other hand, instrumentalized to defend and continue the prerogatives of the military justice, when the war had come to an end. In 1946, the Belgian army was again on a peace footing and the Minister of Justice wanted to suppress the decree-laws giving the military justice the competence to protect the allied troops in Belgium. Ganshof van der Meersch was able to ward this limitation of the power of the military justice, arguing that there were still British units on Belgian soil maintaining the communication lines with Germany. To protect them, the military justice system needed to maintain its prerogatives. Moreover, the presence of these troops was a consequence of interallied agreements and they

[22] Commission internationale permanente 1947.

[23] Gilissen 1984, p. 300.

[24] Schrijvers 2009, pp. 189–192.

were in Belgium for the needs of the occupation of Germany, still an enemy of Belgium.[25] This example makes clear that some judicial actors used the imbrication of Belgium in allied warfare to defend their institutional position and that even if the priority of the Belgian law was at stake, the transnational dimension was fundamental.

4.3 From Activism to Collaboration

In his contribution to *The Politics of Retribution in Europe*, Jan T. Gross argues that collaboration was linked with the Second World War and emerged as a new concept.[26] This is a particularly interesting thesis to apply to Belgium. Collaboration indeed appeared as a new concept after 1944, although not in the legal texts, but in the judicial doctrine, scholarly research, and all kinds of publications.[27] Belgium had already been confronted in the First World War with a nearly complete occupation of its territory and had experienced political and economic forms of collaboration between 1914 and 1918.

After the Liberation in 1918, collaborators were punished by military, assize, and criminal courts. Punishment of collaboration was based on the penal code, dating back to 1867, but adapted during the First World War to permit the punishment of certain forms of collaboration not mentioned in the penal code. As a consequence, following the First World War, Belgium had already known the problem of the retroactivity of penal law. This question was resolved by jurisprudence by the *Cour de Cassation*, the top of the Belgian judicial pyramid.[28]

Next to punishment on the basis of the penal law, a new instrument was introduced: internment. The minister of Justice could intern Germans and Belgians who were suspected of having helped the former occupier.[29] In the aftermath of the First World War, (alleged) collaborators were also subject to (symbolic) violence by their compatriots. Black marketers and (alleged) women collaborators were targets; the latter often had their heads shaved by the population and by Belgian soldiers returning from the front. It must be said, however, that when a complaint was lodged, penalties were high and those who had participated in violent actions against collaborators were often judged before the collaborators were brought before the judge. The punishment of collaboration targeted two specific groups: the so-called "activists," people who aimed at the division of the country into separate Flemish and Walloon parts, on the one hand, and economic

[25] Ganshof van der Meersch 1946a, G 2–16.

[26] Gross 2000, pp. 15–35; 24.

[27] Gilissen 1984, p. 300.

[28] Lemoine and Rousseaux 2008, pp. 74–76.

[29] Cassart 1944, pp. 19–20.

collaborators on the other hand. If collaboration was often reduced to activism, activism was also the term used for all types of collaboration with the Germans.[30]

This "first repression" had an impact on the repression after the Second World War in several ways. The legislation underwent no fundamental changes after 1919. The innovations made in the 1930s remained within the existing legal framework and new legislation, especially in 1939 and 1940, did not change the principles. Collaboration was defined as helping an enemy state, regardless of the political nature of the regime. New laws aimed at punishing Belgians who acted on orders of a state which threatened Belgian independence. This legislation had a nationalistic bias: the political life had to be reserved exclusively for Belgian nationals: civilians of other states had to be excluded from political participation in Belgium.[31] This legislation protected the integrity of the Belgian state, but this was defined only from an institutional point of view and not from the standpoint of the defense of democracy. In 1934, the military justice was made competent to judge all the crimes against the external security of the state.[32] The assize and criminal courts would no longer play a role in the punishment of collaborators after a war. In 1942 the legislation was adapted once more, but without changing the principles: the wording of certain articles was altered to be able to punish new types of collaboration in occupied Belgium and the penalty was increased. The problem of the non-retroactivity of the penal law was taken into account: the new provisions were only applicable to acts committed after adding the new legal provisions.[33]

Apart from the legislation, jurisprudence and judicial doctrine developed after 1918 were factors influencing the repression after 1944. The articles of the penal code had been interpreted by the courts, which generated jurisprudence, explaining notions and concepts. This was important for economic and, to a lesser extent, political collaboration. The *Cour de Cassation* stated in 1919 that Article 118bis of the penal code, punishing political collaboration, could be applied to non-Belgian citizens living in Belgium during the occupation.[34]

For economic collaboration, the courts had defined this crime in a broad sense. Each delivery of goods to a German authority, company, or even individual was in principle subject to punishment: economic collaboration was, as a consequence, not limited to products directly useful for warfare. On the other hand, the definition of weapons and ammunitions was much debated before the courts, since trading of goods with a military character was punished more severely. The post-1918 jurisprudence also lowered the threshold for punishment, since special intent was

[30] Van Everbroeck and van Ypersele 2008, pp. 209–239. Within the Walloon movement there was an activist faction too, but its political weight was less than that of the Flemish movement.

[31] For example, Loi relative à la défense des institutions nationales, 22 mars 1940. In: Moniteur belge 1945, pp. 1503–1505.

[32] Gilissen et al. 1967, pp. 113–319; 117.

[33] Dautricourt 1945, p. 142.

[34] Ibid., p. 143.

no condition for punishment: people who had sold products to the enemy could also be brought before the judge. This jurisprudence was commented by legal experts and resulted in a specialized doctrine. This doctrine also put its mark on the interpretation of the penal law and gave more coherence to the interpretation and the application of the articles concerning collaboration. Jurisprudence and doctrine served as guiding lines for the prosecution authorities and the military courts after 1944. This becomes clear in one of the first circular letters of Ganshof van der Meersch to the military prosecutors. He gave instructions for the prosecution of economic collaboration and advised Deryckere on his book on the punishment of collaboration.[35] He was the most influential commentator on the application of Article 115 after the First World War and favored harsh punishment.[36]

The instrument of internment of enemy subjects and those who could be considered to be helpers of the enemies, introduced in 1918, was maintained after the Liberation in 1944, even if it had not often been used against so-called activists after 1918.[37]

The shaving of women and violence against certain collaborators and their properties, which had been part of the post-1918 repression, were phenomena known to the Belgian decision-makers who elaborated the judicial instruments for the repression after the Second World War as well as to those who had to organize the punishment of collaboration. The internment of people was also seen as an instrument to avoid such acts of popular justice after 1944.[38]

The precedent of the First World War also influenced the position of the actors during the occupation who were aware that they could be punished after the war for their activities during the occupation. They anticipated and took into account the penal code in their policies and positions towards the Germans. A clear example is the Galopin committee, which elaborated a policy from June 1940 on, precisely to find a compromise between the respect of the penal law and the continuation of the production. A doctrine was elaborated, the Galopin doctrine, implying the refusal to produce weapons and ammunition and the limitation of the volume of industrial production to what was necessary to be able to import the agricultural products that were missing to feed the Belgian population. This doctrine was used as a guideline by large companies, controlled by the holdings, which implied that at least efforts were made to avoid the production of

[35] Circular letter of the chief military prosecutor to the military prosecutors nr. 947 12.X.1944. CEGES, Omzendbrieven Auditoraat-Generaal betr de repressie van de collaboratie, 1944–1947, mic 253.

[36] Deryckere 1945, a collection of articles originally published in 1919–1920.

[37] Cassart 1944, pp. 19–20; Deckers 2002, p. 163.

[38] Ceux dont la conduite sous l'occupation ennemie a été telle que leur maintien en liberté serait une cause de scandale ou de trouble pour la paix publique, notamment en raison des représailles sont ils pourraient être les victimes. Le souci de leur sécurité se confond avec celui du maintien de l'ordre public, Circulaire du ministre de la Justice concernant l'application de l'arrêté-loi du 12 octobre 1918 in Cassart 1944, p.13.

semi-military goods. Even if at a macro-economic level, the Galopin doctrine did not make much difference—the contribution of the Belgian economy to the German war economy was not significantly lower than the French or the Dutch—it mattered for the postwar repression in two respects.[39]

By anticipating a possible repression, the economic elite respected certain limitations, took precautions, and it was cautious in the negotiations with the Germans pertaining to orders in the gray zone of the Galopin doctrine. Moreover, by defining a code of conduct for production under occupation, the economic elite took the initiative and set the framework for the discussion after the Second World War on what could be labeled as economic collaboration. The economic elite had a strategic advantage: the judiciary had to react and was therefore not able to produce the sole acceptable interpretation of the penal law: there were competing narratives and the chief military prosecutor had to make his interpretation, which was less lenient than the Galopin doctrine, accepted by the tribunals and courts. Moreover, the debate on economic collaboration was highly politicized and societal arguments played as important a role as judicial ones, a situation that favored the economic elite, which had been able to make a coalition with the moderate wings of the labor movement and could use the argument of economic reconstruction to avoid a repression targeting large sections of the economy, as was the ambition of the chief military prosecutor, for whom punishment of economic collaboration was a priority. Although the chief military prosecutor had a strong institutional position at the Liberation, his political impact lessened as time went by and the attention of the political decision-makers and public opinion shifted from a harsh punishment of collaborators to their reeducation and measures to tone down the effects of the repression. As the political situation normalized and new parliamentary elections were organized, political parties and parliament regained power at the detriment of the judiciary, which had played a dominating role in the decision-making process on the repression immediately after the Liberation.[40]

Even if the repression after 1918 put its mark on the punishment of collaboration after 1944, the latter was not a copy of the punishment of "activism." There was the idea that the repression after 1918 had not reached its aims. Théodore Smolders, an eminent lawyer, expressed his disillusion with the post-1918 repression, which had been too weak, in the foreword of J. Dautricourt's book on the repression of collaboration, published in early 1945.[41] Notwithstanding measures for amnesty in the 1920s and 1930s, collaboration had been widespread in the Second World War and a number of collaborators proved to be recidivists. The idea was that the post-1918 repression had not always been effective. A symbolic

[39] For the exact figures for five countries compared with the population number, see Klemann 2002, p. 114.

[40] Luyten 1996.

[41] Dautricourt 1945, p. 15. Dautricourt himself mentioned the mistakes and weaknesses of the post-1918 repression as one of the elements explaining the collaboration with the Nazi-occupier (p. 34).

case was the trial against father and son Coppée, important coalmine industrialists. In 1921, the case against the two men was closed, but soon reopened after a press campaign. In 1924, six years after the armistice, the two men were discharged.[42]

For the actors of the repression of collaboration after 1944, the post-1918 repression was not perceived as an overall success, as appears from the comment of Ganshof van der Meersch in his already mentioned address:

> On recalled the failures of the repression that followed the preceding war and its lamentable consequences, in underscoring that, nevertheless, it [the war] had not known a collaboration whose characteristics and forms could not compare with those that we came to know.[43]

A fundamental difference between the post-1918 and post-1944 repression was the scale of the operation. The post 1944-repression concerned many more people and, therefore, its social impact was much more far-reaching. According to the most recent research about the post-1918 repression, 3,900 persons were brought before a judge for acts of collaboration. After 1944, 52,778 people were judged by the military tribunals. To this figure should be added 21,889 people who were concerned by the *épuration civique* (civic purge), giving a total number of 74,667.[44] Thousands were sent to internment camps; however, we do not dispose of exact figures, only of the number of internees at a given moment. The maximum was 77,000 (February 1945).[45] Even if some of the internees were also punished or subject to the civic purge, it is clear that the scale and scope of the operation were much bigger than after 1918.

This difference of scale had several causes rooted in the war as well as in the postwar period. The occupation offered more opportunities to collaborate, due to the nature of the regime and the societal evolution towards more state intervention and bureaucratization. Even if Belgium was under the control of a *Militärverwaltung*, whose first goal was to ensure law and order and while exploiting the Belgian economy for the German war effort, certain features of Nazism were imported to occupied Belgium. The economy and agriculture were organized according to the principles of Nazism implying authoritarian and bureaucratic organization, where often confidants of the occupier were appointed. Nazism relied on mass mobilization. Therefore, a new trade union was created, the Union of Manual and Intellectual Workers (UTMI), which was soon completely dominated by the occupier. Political parties permitted by the *Militärverwaltung* held rallies and public manifestations and had paramilitary sections. The occupier aimed at controlling the centers of political decision-making by appointing people they could trust and who favored the New Order. This concerned not only top officials, officers of police forces, but also mayors, aldermen, and governors of the

[42] Rousseaux and Van Ypersele 2002; 2008, p. 47.

[43] Ganshof van der Meersch 1946b, p. 8.

[44] Massin and Rousseaux 2008, pp. 131–145; Bourgeois and Temmerman (1984–1985), p. 91.

[45] Huyse 1992, pp. 135–139.

provinces. Police forces and newly created control services had many people who were advocates of the occupier in their ranks.[46] In contrast to the First World War, the Germans recruited inhabitants of the occupied territories for their war against "Bolshevism."[47] The economic exploitation differed, too. While industry nearly came to a standstill during the First World War, especially when the Germans started to dismantle machines to recuperate metals such as copper that could serve the war production, during the Second World War the Germans sought maximum production by the Belgian industry for the German economy.[48] Opportunities to collaborate were much more widespread and, as Jan T. Gross argues, collaboration was a process driven by the occupier. As a consequence, there were potentially more collaborators in 1944 than in 1918.[49]

This created new problems for the punishment of collaboration and shows the paradox that the enemy, by creating the framework for collaboration, had a decisive impact on the postwar repression. As early as 1942, the Belgian government-in-exile, in London, was aware that certain acts that were considered as unacceptable collaboration by the population could not be punished under the penal law of 1942. Therefore, the wording of certain articles was changed to be able to punish specific types of political and military collaboration, taking into account that only crimes committed after the promulgation of the new legislation could be punished according to the principle of non-retroactivity, an issue with which the Belgian government and judiciary had been confronted already in the First World War.[50] There was an awareness of the gaps in the judicial system which did not respond to the changing nature and the massive character of the collaboration, but the fundamentally different nature of the Nazi regime was not taken into account: the existing articles were simply broadened or made more specific, without changing the underlying concepts of the articles of the penal code punishing those who threatened the external security of the state.

The same goes for internment, which was introduced in October 1918 to control the subjects of an enemy state present on Belgian soil at the Liberation. All foreigners and naturalized Belgians had to report to the municipal authority and needed an authorization from the Minister of Justice to stay in Belgium. This permission to stay could be subjected to certain conditions: an obligation to stay away from certain places, or to live in a specific place or even to be interned. The same measures could be taken against Belgians who had made themselves suspect due to their relations with the enemy during the war.[51]

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[46] Wouters 2004, 2006; De Wever 1994.

[47] Seberechts 2002.

[48] Nefors 2006.

[49] Gross 2000, pp. 24–25.

[50] Lemoine and Rousseaux 2008, pp. 75–76.

[51] L'arrêté-loi du 12 octobre 1918 relatif au séjour en Belgique des étrangers et des personnes d'origine étrangère. In: Cassart 1944, pp. 9–10.

Internment did not play a major role in the post-1918 repression, contrary to the period after 1944. The decree-law had never been suspended and by means of a circular letter of the Minister of Justice it was revived and reinterpreted in August 1944, when the invasion of Western-Europe was imminent. The decree-law of 1918 concerned primarily foreigners, citizens of an enemy state. In the circular letter, the accent was somewhat different. The Minister explained that the circular letter made it possible to intern suspected Belgians, Belgians who had had "relations with the enemy," often implying a criminal offense. As the occupation had made it impossible to gather proof of these offenses and had brought certain branches of the judiciary to a standstill, internment was the only possibility, waiting for the normalization of the judicial activities. For the Minister of Justice, internment was part of the repression as it would be organized by the judiciary. Three categories of Belgians had to be interned: those who had worn a uniform of the German Army or a Belgian (para) military organization of a collaboration movement and those who had worked for a German administration. Here the link with the continuation of the war and the protection of the liberating army was clear. This was not the case for the third category, the Belgians whose behavior during the war had caused offense and might endanger the public order, if they remained in freedom. Moreover, internment would protect them against public vengeance.[52] The last argument can be read as an implicit reference to the post-1918 repression and the phenomenon of violence against people who had behaved unpatriotically. But what strikes the most in this circular letter is the emphasis on ensuring law and order after the Liberation. It is clear that the repression was not only about punishing collaborators, but also about ensuring law and order. Here the end of the war in 1918 had shown that public order could be endangered by the rejection of the collaborators. Ensuring law and order also meant maintaining political stability, which was in the eyes of many political and judicial authorities threatened by the (communist) resistance movements.[53] The link between punishing collaboration, ensuring public order and political stability also became clear at a personal level: Ganshof van der Meersch became high commissioner for the security of the state in 1943. The commission was created by the London government to monitor the Liberation and ensure law and order.[54]

The internments broadened the scope of the repression. People were interned, not only by authorities, who were entitled to do so (mayors, public prosecutors…), but also by the resistance movements. Internees were locked up in special internment camps spread over the country. This mass of internees put extra pressure on the judiciary: not all of them had been implied in collaboration, but it was for social and military reasons impossible to liberate them. Moreover, in the spring of

[52] Circulaire du Ministre de la Justice concernant l'application de l'arrêté-loi du 12 octobre 1918 (Circulaire no 340). In: Cassart 1944, p. 11.

[53] Gotovitch 1992.

[54] Rapport sur l'activité du Haut Commissariat à la Sécurité de l'Etat 29 juillet 1943 1 novembre 1945, p. 11.

1945, when the victims of Nazism returned from Germany, public vengeance reappeared, leading to a second wave of internments. The internments were a source of trouble for the military justice: all these people had to be screened to determine whether or not they had committed a legal offense. This workload was too high, therefore at the end of September 1944 a new system of settlement was introduced: the advisory commissions, composed of a magistrate and two lawyers. The commission could advise the Minister of Justice to liberate an internee, to maintain the internment, to send him to a place far from his place of residence, or to hand over the internee to the military justice system. Closer examination of the procedure makes clear that the internment had become an extension of the repression, whereby the repression and the military justice prevailed. The initiative was with the Minister of Justice: he asked the commission to open an inquiry. The commission examined the file and if there were indications of collaboration, the commission advised handing the internee over to the military prosecutor. The second hypothesis was that the person had not committed an offense, but that measures remained necessary because of the pro-German attitude of the internee or because his liberation would harm public order. In that case, the inquiry was more elaborate: there were interrogations of the internee, the plaintiff, and witnesses, and the lawyer of the internee could intervene.[55] In practice, the advisory commission acted as a tribunal for cases of pro-German behavior that were not punishable but were regarded as obnoxious by the local community: this was an implicit shift from punishment, regulated by the penal law to *épuration* (purges), which was closer to disciplinary jurisdiction.[56] *Épuration*, especially with the participation of the resistance movements, was what the chief military prosecutor always wanted to avoid: dealing with collaboration was the work of the military justice, which claimed the monopoly in this field.[57]

4.4 Punish or Purge?

It was not until September 1945 that Belgium—like France and the Netherlands—had a system of *épuration*, the so-called *épuration civique*.[58] But as was the case for the internments, this *épuration* remained closely linked to the repression and did not put into question the central role of the military justice. The aim of the decree-law of 19 September 1945 on the civic purge was to sanction minor acts of collaboration as: being member of a collaborationist party, taking a leading role in a social, economic, or cultural organization which served the interests of the

[55] Cassart 1944, pp. 35–46. Cassart refers to the legislation and the practice in the advisory commission in Brussels.

[56] As appears from a case study of the commission of the city of Ypres: Elaut 2005.

[57] Huyse and Dhondt 1993, p. 72.

[58] Arrêté-loi relatif à l'épuration civique. In: Moniteur belge (1–2 octobre 1945), pp. 6333–6341.

occupier. People who met the criteria enumerated in the decree-law were put on the list of the military prosecutor and automatically lost a set of political and civil rights as the right to vote, the right to be elected, the right to become a lawyer, the right to become a teacher, etc. The system of the civic purge was based on the repression of collaboration, but the sanction was halved. Persons punished for collaboration automatically also lost civil and political rights. Those concerned by the civic purge were not imprisoned or fined, but lost civil and political rights more or less at the same footing as those punished for collaboration. They were excluded from public life and in that respect, this decree-law responded to the French *indignité nationale*. An appeal could be made against the decision of the military prosecutor to the civil court. The whole process remained in the hands of the judiciary; the resistance movement was not implied, meaning that the evaluation of civic dignity remained a matter of the state. The sanction, which was not a penalty, was taken from the penal code. The rights lost in virtue of the decree-law were nearly the same as the rights enumerated in Article 123 *sexties* of the penal code. Individuals convicted for collaboration automatically lost the rights listed in article 123 *sexties*. The civic purge diminished the sanctions for collaboration, was only applicable for minor offenses and was expeditious: the military prosecutor took the decision, without intervention of the tribunal. This decree-law implied extra work for the offices of the military prosecutor; therefore, new deputy prosecutors only in charge of the civic purge were recruited.[59]

This civic purge was ambiguous. It was a purge targeting the exclusion of "unworthy" individuals, but it differed in some respects from purges in other formerly occupied countries. As already mentioned, France had the *indignité nationale*, which was also a purge, wherein people who had behaved unworthy during the occupation had to be excluded from political and public life—the Republic not only had to be restored, but also renewed. Thus, a measure was needed to prohibit unworthy people to put their mark on politics and society.[60] The Belgian *épuration civique* was also intended to exclude people from the "public life of the nation." One of the rights these people lost was the right to vote. The reason for the exclusion was not that these people would hamper the political renewal, but that their behavior had been offending to the public consciousness.[61] The civic purge had a more social than a political character as compared to France. In connection with the internments, the hypothesis can be put forward that ensuring law and order was one of the motivations behind this decree-law: the civic purge gave the judiciary an instrument to sanction minor forms of collaboration, which normally would not be brought before the judge and would, if internees would be liberated without any sanction, possibly be a source of social unrest. Another indication for the more social than political accent in the civic purge is the way the activities of the people concerned were described: they had worked for the enemy, under his protection,

[59] Luyten and Magits 1998, pp. 203–226.

[60] Simonin 2003, p. 49.

[61] Arrêté-loi relatif à l'épuration civique. In: Moniteur belge 1945, p. 6334.

while their fellow citizens were aggrieved and threatened with severe sanctions.[62] Here the accent was more on the interpersonal relations than on politics. The differences can be explained by the different origins of the two measures. National indignity was a project of the French Resistance whose ambition was to transform and renew French politics and society. The aim was not simply to restore the Third Republic, but to install a new political system, in which there was no room for supporters of Vichy. The "national indignity" was part of a global political transformation.[63] The civic purge in Belgium was a measure taken by the government, largely inspired by the judiciary and aiming at the restoration of the prewar parliamentary system and the authority of the state, not at its transformation. Conservation was the aim, not change.

This would also explain why the procedure remained in the hands of the military justice. Moreover, if the resistance was allowed to play a role in the civic purge, its political power would be strengthened, just what Ganshof van der Meersch wanted to avoid. From the French perspective, participation of the resistance could be justified as a contribution to the renewal of French politics, by setting aside a part of the elites who had compromised themselves by playing an active role in the Vichy regime. The division of roles between state and resistance can also be explained by the nature of the offenses in the two cases. The civic purge in Belgium sanctioned those who had collaborated with the enemy, albeit in a minor way. *Indignité nationale* was a new offense created at the end of the war; it did not target collaboration with the enemy, but collaboration with the Vichy regime. *Indignité nationale* introduced a punishment for a crime that had not been defined in the penal code before 1940, which explains the problem of the retroactivity for which *indignité nationale* was criticized.[64] Punishing those who had been a threat to the external security of the state was a matter for the state itself, thus the judiciary, while sanctioning those who had chosen to adhere to the Vichy regime was more difficult for the state, since Vichy had been the legal government of France.

The comparison with Belgium makes clear that *indignité nationale* makes an implicit distinction between the state as a set of institutions and the state as emanation of a political regime. The Belgian civic purge was meant to inflict a sanction on those people who had been prepared to help the enemy to dominate and oppress Belgium and legitimize the occupation. The link with enemy and occupation is maintained, but nothing is said about the nature of the Belgian political regime. In the decree-law, no reference is made to parliamentary democracy or other features typical for a democratic regime.[65] *Indignité nationale* concerned people who had helped the Vichy regime and by doing so supported indirectly the enemy. They also had cooperated with a regime incompatible with the principles

[62] Ibid.

[63] Simonin 2003, p. 41.

[64] Ibid., pp. 37–60.

[65] Arrêté-loi relatif à l'épuration civique.

of the French Revolution, which refers clearly to a specific political regime. Making propaganda for racist or totalitarian doctrines was also considered as *indiginité nationale*: both concepts are part of specific political regimes.[66]

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[66] Simonin 2003, pp. 42–43.

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Chapter 5
Transitional Justice as Universal Narrative

Jon Elster

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In my conception of transitional justice, there are three principal constituents: the punishment of criminals, the purge of their collaborators, and the compensation of their victims. A fourth tool emerged in the 1990s: truth commissions. The commissions are also likely to have a punishing effect, in the sense that the publicity surrounding the crimes can bring painful social ostracism to their authors. In my opinion, the most important effect of these commissions, though, is to render impossible the denial that crimes were committed. In a society where transitional justice is subject to political constraints that thwart the documentation of crimes through ordinary legal trials, truth commissions can offer an alternative. On the other hand, I am rather skeptical of these commissions' alleged capacity to engender reconciliation and healing. A priori, releasing the truth without justice being done would seem cause for resentment rather than reconciliation. In South Africa, one can ask if, from the point of view of the large portion of the impoverished black population, access to the truth is truly capable of compensating not only the absence of justice but also the absence of land redistribution.

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I shall pause a moment on this point. In a situation of transition, one can ask oneself if transitional justice ought to prevail over distributive justice. Should priority be given to the restitution of confiscated property, to the compensation of destroyed property, or to poverty relief? In the case of South Africa that I have just evoked, the first and third goals coincided, but it is rarely so. The question of reconstituting large fortunes was raised in Romania, for example, where a ceiling of ten hectares (almost 25 acres) was imposed for land restitution. In contrast, Vaclav Havel was returned his family's palace in Prague.

I return now to the disclosure of the truth. In the former Communist countries, notably in Poland, another mechanism was developed to serve the ends of the purge. This method of "lustration" imposed on all nominated candidates and candidates for elected office (above a certain threshold) the duty to declare whether or not they had ever collaborated with the Communist secret services. In case of a positive response, the voters or the pertinent administrative hierarchy were free to do what they saw fit. In case of a negative response that was later revealed to be false in light of the archives of the secret services, these individuals were barred from office for ten years. The South African truth commission included a similar aspect. If it could be demonstrated that an individual had not told the whole truth regarding his or her actions, then the individual could be put on trial. Of course, the efficiency of this method depended on the perception of the risk of being exposed as a liar. Although, given the nature of the situation and that there is insufficient data on the number of unexposed liars, it seems that the method succeeded more in Poland than in South Africa.

Transitional justice entails a political aspect in addition to the strictly juridical aspect. This proposition can be understood in two distinct ways. First, there are questions over which the law is silent, of a sort that to address these questions it is necessary to take into account extra-legal and political elements. I have in mind notably the compensation for non-material and intangible suffering, like time spent in prison, health problems, and the fact of living in a fettered society. Although the suffering is more or less as real and important as the material despoliation, by nature the law tends to privilege the compensation of the latter. Legal thinking emphasizes acquired rights that can usher in the reconstitution of the large fortunes about which I wrote earlier, whereas politics deal with real needs. These complexities are, for example, at the core of the best monograph on the subject, André Gain's dissertation entitled *The Restoration and Emigrés' Property*. It would be useful to see it reprinted.[1]

Secondly, politics can interfere in transitional justice by inhibiting legal principles. In my book *Closing the Books*,[2] I enumerate a large number of violations of the principle of legality that one sees in the quasi-totality of the cases. It is nonetheless appropriate to distinguish between the sources of these violations and their degree of noxiousness. The summary justice that one observed in France and Italy

[1] Gain 1928.

[2] Elster 2004.

in 1944–1945 justified itself in part by the necessities of the war and in part by the anxiousness over an even larger evil—uncontrolled or illegal justice. Certain irregularities explain and justify themselves by the material shortages that often accompany the processes of transition, notably the lack of competent and untainted judges. On the other hand, the numerous violations of the principle of non-retroactivity of laws are poorly justified, although they are easy to explain. It seems to me that in numerous transitions very strong vindictive emotions pushed people to flagrant violations of legality, notwithstanding the subterfuges employed, like in France, to make measures appear as conforming to legality even when they did not.

In a period of transition, one can turn towards the future or the past—or towards both. On the one hand, the transition is likely to constitute a founding moment. In Italy and France in 1946, in Spain in 1976, in Eastern Europe after 1989, in South Africa in 1996, the transition supplied the occasion to write new constitutions. On the other hand, the transition is often perceived as a moment of cleansing, purging, and compensation. The relative weight of these two aspects of the transition has known considerable variation.

According to some, it is necessary to expunge the past—pardon it, forget it, or at least ignore it—in order to concentrate on constructive tasks. Broadly speaking, this was the Athenian solution in 403 BCE, the famous Spanish solution in 1976, and, finally to a lesser degree, the French choice in 1945. Recall De Gaulle's phrase, which serves as the title the collective work edited by Marc Olivier Baruch: the French collaborators could only have been "a handful of wretches."[3] Following this logic, a severe purge would have had the double effect of perpetuating the conflict and of depriving the country of experts for which it would have an acute need.

According to others, the reconstruction required the preparatory elimination of criminals and collaborators. Following this logic, it would instead be the immunities, amnesties, pardons, or simple non-prosecution that would maintain an insidious climate of conflict incompatible with the national reconstruction. In this hypothesis, the cause of conflicts would be found in the leniency of measures adopted, whereas in the previous hypothesis it would be the severity instead. In the former Communist countries, the fear that the collaborators did not practice sabotage and blackmail constituted, for some, an important reason for lustration.

It would be simplistic to believe that certain actors proposed severe measures and others proposed leniency; they took their stances only with the goal of facilitating the national reconstruction according to their respective causal hypotheses. Post-Communist Poland offers the best example of a political purge dictated in large part by the strategies of different political parties. After 1945, French and Danish communists endeavored to encroach on socialist territory while proving to be intransigent in matters of transitional justice. Meanwhile in Italy, one observed the opposite situation. Conversely, the opposition to transitional justice of German

[3] Baruch 2003. Charles de Gaulle pronounced this famous phrase on the radio on 14 October 1944.

Nazi groups after 1945 owed nothing to the desire for national reconstruction. In this respect, the ex-communist parties in Eastern Europe offer a surprising exception; when in control of the government, they several times proposed lustration laws for which their own members would be the first victims. As my former student Monika Nalepa has demonstrated in her magisterial works on lustration, the reason was probably that the communists wanted to preempt more severe laws that their successors might adopt.[4]

I would like to return to the Spanish solution, the quasi-unique example of a consensus decision not reached under the constraint of abstaining from all transitional justice, be it punishment, purge, or compensation. If one constructs a scale from 0 to 10 to measure the intensity of the demand for transitional justice, the Spanish case is located near zero. At the other extreme, one finds the western countries that had had been occupied by Germany during the Second World War. The former Communist countries sit near the middle, as do Argentina and Chile. How does one explain the differences? It is not necessary to take account of the variation of the measurements taken, but to understand the spontaneous demands for justice.

After the fall of Communism in 1989, the liberal faction of Solidarity wanted to follow the Spanish example, as did the Hungarian government. In order to explain why they failed, one ought to reflect on the Spanish situation. Two aspects regarding 1976 Spain merit particular attention. First, the worst atrocities were situated in the fairly distant past. Second, important atrocities had been committed by both sides during the civil war. Those committed by the Francoists out-numbered those of the Republicans by a ratio of five to one, but it is also true that the Republicans' successors could not claim to be representative of a so-called moral superiority.

If we switch to the countries of Eastern Europe after 1989, we find, at least in part, the first aspect. The movements crushed in Berlin (in 1953), in Budapest (1956), and in Prague (1968) were distant enough. One ought, nonetheless, to add that the Czech and East German regimes remained almost Stalinistically brutal until their last days. Similarly, Poles clearly had a vivid memory of the martial law regime imposed on them in 1981. Even if these facts might explain why the demand for transitional justice was more acute in Poland and Czechoslovakia than it was in Hungary, the quasi-totality of the demand in East Germany remains mysterious in this regard. One could perhaps hypothesize that the participation of a large number of East German citizens in the persecution of a handful of dissidents, as well as the extraordinary "political correctness" imposed upon them, demoralized East Germans to the point of lacking the capacity for indignation.

Regarding the second aspect, the relative symmetry of the atrocities committed on both sides was completely absent under communism. It is a remarkable fact and one worthy of explanation that there was no armed resistance against the regimes—not even individual acts of violence—except for a brief moment in Budapest in 1968. As far as we know, not a single individual took up a gun to bring down a Soviet general. From this point of view, the regime's opponents would seem to have the requisite moral authority. Unlike Spanish Republicans or,

[4] Nalepa 2009.

to a clearly lesser measure, the African National Congress, one could not point out to them the *tu quoque* that Admirals Dönitz and Rader cited often and effectively during the Nuremberg trials.

That said and returning to my observations, the moral authority of citizens in the ex-Communist countries was perhaps undermined by their daily complicity in the numerous minor absurdities of those regimes. This is the well-known theme of Vaclav Havel's essay on the power of the powerless.[5] Similarly, Leszek Koławoska paid particular attention to the demoralizing effect of everyone having to say obvious lies publicly and loudly.[6]

If we turn now to situations, like those in France or in Norway in 1945, where there was a strong demand for transitional justice, the explanation is undoubtedly in the asymmetry and recentness of the crimes. Even if the asymmetry was imperfect, since there were crimes committed by the resistance movements, sometimes towards their own members, there were very few trials. There was, in effect, a sort of iron law that a victorious army never punishes its own. The counterexample found in South Africa is not really on point because in that country there was a negotiated transition in which the symmetry of treatment was a non-negotiable condition on the part of whites.

I would like to conclude my somewhat rambling remarks with a few words on the international dimension of the problem. In certain cases, one observes an internal transitional justice organized by and in the country where the crimes themselves took place under a previous, internal, that is, native and domestic, regime. At the other extreme, East Germany provides the singular example wherein a foreign regime has been at the origin of the punishable or compensable crimes and of the transitional justice. Evidently, it is not the same regime in the two cases!

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[5] Havel 1992.

[6] Koławoska 1999.

Chapter 6
The Invention of "Transitional Justice" in the 1990s

Guillaume Mouralis

Contents

> *Readers should know that while they are using these books, people in many other countries are studying them too. We hope these volumes raise the profile of scholarship on transitional justice; it is extraordinarily important for the success of democracy and a world with greater freedom (Smith 1995, Introduction).*

6.1 Introduction

There are different ways to address the phrase "transitional justice." On the one hand, it could be considered a category, both descriptive and prescriptive, without clear and stable content, but founded on two beliefs: one normative according to

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which there is a universal need for justice in a liberal, legal-procedural sense; and one causal according to which the implementation of a set of measures will further justice and confidence in the "rule of law" after a regime change conceived as a transition from an authoritarian regime to a democracy. These measures, intending to "correct" the injustices inherited from the authoritarian period, generally consist of retribution for wrongdoers, reparation for harms suffered by victims, and highlighting of the past through "truth telling."[1] On the other hand, transitional justice could be considered a political and professional practice, an international activity based on the existence of specialized agents and specific institutions responsible for designing, encouraging, and implementing the related measures and policies.[2]

In order to better understand the invention of TJ, its academic legitimization, and its gradual institutionalization, this chapter aims to historicize the phrase in the beginning of the 1990s. The goal of such a historicization is double. First, it allows us to denaturalize "transitional justice," which is conceived by its proponents as a universal interpretative framework, regardless of the historical, geographical, or social context. For its proponents, "transitional justice" has no history, neither the promoted measures to which it refers, nor the phrase or "concept" itself. Thus, its theorists think in terms of (almost) national "cases," which are comparable whatever their historical, geographical, or social context might be. Ruti Teitel drew a "genealogy" of "transitional justice" conceived as a trans-historical phenomenon, but not as a phrase and practice whose invention could be dated and described.[3] A similar conception of history can be found in Jon Elster's book *Transitional Justice in Historical Perspective*,[4] wherein history seems reduced to a collection of case-studies that have to be compared in order to identify their possibly changing features (a reminiscence of the old conception of history as a reservoir of exempla worthy of imitation?[5]). Elster proposes several typologies after considering hundreds of cases from the ancient world to the present. In other words, history is no more conceived in terms of *processes*, as the emergence of discursive practices, social and political configurations and—what could be of interest in such a large panorama?—their dissemination in time and space.[6] One could dwell at length on the very problematic relationship to history of the proponents of transitional justice and on their unbridled practice of anachronism.[7] But what matters here is understanding its international achievement.

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[1] On these and other often implicit postulates, see Mouralis 2008, pp. 19–29.

[2] On these questions, see Lefranc and vairel in this volume (Chap. 14). On the genesis of the ICTJ, see Dezalay 2011, pp. 345–379.

[3] Teitel 2003, p. 69.

[4] Elster 2004.

[5] A reminiscence of an old conception of history, challenged in eighteenth century by the passage from plural to singular, that is from the *historiae* (conceived as *exempla*) to the *Historia* (which is worth being described and analyzed). See Koselleck 1990.

[6] On this point, let me refer to my review: Mouralis 2006, pp. 209–212.

[7] This is indeed an uncritical practice of anachronism, far from the controlled use of it which could be heuristic. See Rancière 1996 (since anachronism is inevitable, better to lucidly take advantage of it).

In Germany, for instance, "transitional justice" met instant success. It was thoroughly consistent with both the authorized historical interpretation of the intensive post-communist purges, in terms of a "break" with a tradition of convenience toward past dictatorships, and their ideological legitimization, based on the triptych of "victims" (in whose name these purges were conducted), the "rule of law," and "reconciliation" (one of the main goals of the purges).

Second, from the viewpoint of social historians, the historicization of transitional justice illuminates the circumstances in which new experiences are requiring new words[8] and are therefore linked to new social expectations.[9] Such historicizing is more generally aimed at identifying the context in which internationalized agents attempted to redefine their activities by seeking to unify and formalize a new field of thoughts and practices. This raises the question of the reconfiguration, since World War Two, of (at the time) "traditional" activities such as human rights activism, peace engineering and legal responses to mass atrocities. In the context of the democratization of Latin American and Eastern European countries, the traditional activism of human rights organizations (based on the denunciation of a state's injustices) had fewer outlets than before and some activists sought new forms of action in sync with the growing importance of examining past abuses committed under former authoritarian regimes. They turned from denouncing the state to consulting for it (at the state's demand) and they specialized in a renewed legal expertise.[10]

In this chapter, I will proceed in three steps: I examine first the emergence of "transitional justice" as a phrase and as a label in the 1990s. Then I analyze its progressive institutionalization and academic legitimization by focusing on two crucial moments: the Salzburg conference "Justice in Times of Transition" (1992) and the publication of the three-volume *Transitional Justice* edited by Neil Kritz (1995). Finally, I examine briefly the case of unified Germany, which proved to be a fertile ground for "transitional justice." Even though the phrase initially met with limited success due to the existence of indigenous terms more or less synonymous with transitional justice, some German scholars and activists played an important role in the emergence of the label and the related set of practices in the context of the purges which took place after the breakdown of the GDR and the German unification.

6.2 Labeling "Transitional Justice": Its Emergence as a Phrase

In analyzing the emergence of "transitional justice" as a phrase and thereafter as a label, it is useful to scout out the first occurrences of the expression and to identify the

[8] See for instance, Lepetit 1995, pp. 9–22 and Suter 1997, pp. 543–567.

[9] This is one of the aims of so-called conceptual history. See Koselleck 1990.

[10] One can observe in the post-Cold War context a "shift from a 'denunciation' model to that of a silent, scientific, organizational model of non-profit relying on practical expertise." Dezalay 2011, p. 185.

people who contributed to the expression's coinage. The advantage of this method is that it makes it possible to reconstruct the social context of its apparition in the public space. The need for a new term often reflects struggles over qualifications and prescriptions within a social space, as lexical changes often indicate the displacement of the positions occupied by the agents in the social space. The need for a new term can also mean a change in the articulation of the experiences made by the concerned people and their expectations. By looking for the occurrences of keywords and phrases in the main databases of newspapers and law and social sciences journals, as well as utilizing Internet search engines, I tried to establish a chronology of their successive meanings and to follow the evolution of their frequency in different social spaces (especially the journalistic and the academic fields and their subdivisions such as law and social sciences). This methodology certainly suffers a number of limitations, insofar ideas and practices often precede their "labeling," but this difficulty could partially be overcome by extending the search to concurrent labels and to their respective lexical field.[11]

In social science publications, there are few uses of the phrase before 1992, which is when it seems to appear for the first time in its (unstable) current sense. In sporadic occurrences since the Second World War, the expression "transitional justice" most often meant literally a *temporary* judicial office (for instance in a book from 1948 on the judicial administration in the wake of the conquest of New Mexico)[12] or a *temporary* legislation and organization after a regime change (for instance in a 1988 survey on official publications in Austria after the Second World War).[13] The expression also appears to have been used sporadically in debates of Marxist inspiration on the transition *from capitalism to socialism*: for the theorists of such a transition, the phrase certainly refers to temporary institutions in all areas (including the judicial one) but also and above all, to quote philosophy professor and socialist activist Milton Fisk, a "state's conception of transitional justice" (1989).[14] The latter meaning is insofar interesting as it reveals a conception largely undermined by several semantic evolutions in the 1970s and 1980s. Here, the term "justice" has a clear social-redistributive sense in a context where it is challenged by a more formal-legal meaning[15]; at the same time, the concept of "transition" is experiencing a significant semantic change. "In recycling the [originally Marxist] concept of a 'transition,' [political scientists and human rights activists] recast it in terms of political reform, rather than social transformation. In this model, transitions were construed as taking place primary at the legal-institutional level of politics."[16]

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[11] The following inquiry is partly congruent with that of Paige Arthur, which is only sketched out in a few interesting footnotes in Arthur 2009, pp. 329–330.

[12] Poldervaart 1948.

[13] Johansson 1988.

[14] Fisk 1989, p. 305.

[15] On this evolution, see Honneth 1994.

[16] Arthur 2009, p. 338. See also Guilhot 2002, pp. 219–242. This historical analysis could be completed by the quite different hypothesis formulated by Michel Dobry about the formation of the "transitology" (he underlines the role played by economic theory and neo-institutionalism) in Dobry 2000, pp. 585–614.

In an essay on fear and state terror in South America, published in 1992, Juan E. Corradi, an Argentine born professor of sociology at New York University, proposed to call "transitional justice" a "particular and intensive type of political justice: the trial by fiat of a previous regime."[17] Here the theoretical background is quite different from that of Milton Fisk: Corradi's reflection is directly inspired by Otto Kirchheimer and his analysis of what he called "successor justice."[18] But, apart from the emphasis on justice in its legal dimension and the role the elites are supposed to play in the process,[19] "transitional justice" differs from the current sense, both regarding the kind of regime change envisaged—not necessary a democratic one—and the form of such a process, since Corradi evokes an expeditious justice with "serious irregularities."

At the same time, the first occurrence of the term I found in a newspaper appears in an article of the *Boston Herald*, which reported a conference on "Justice in Times of Transitions" held in Salzburg by the Charter 77 Foundation (New York) in the beginning of 1992.[20] In her 19-page report on the conference, Mary Albon used the phrase four times. According to her, "the Project on Justice in Times of Transition was established in an effort to provide perspective, guidance and direction to the decision-makers currently grappling with the grave and complicated issues connected with transitional justice."[21] Among the participants were key figures of the emergent professional field like Neil Kritz, Ruti Teitel, and Jaime Malamud-Goti. (See below.) By reading the conference report, we find the ingredients of "transitional justice" as it exists today: the normative and causal beliefs on which it rests; the catalog of measures or public policies (reflecting nevertheless a clear reservation in respect to criminal law); and the idea that these measures could more or less be transposed from one country to another. This conference can be seen as one of the first steps in the "labeling" of the phrase in its current usage insofar as the publication of seminal texts on the subject grew out of the discussions in Salzburg. However, the organizers and participants were unsure of the terminology and ultimately described their activities as "justice in times of transitions."[22]

Use of the phrase "transitional justice" increased with, and following, the publication of the three volumes edited by Neil J. Kritz in 1995, which succeeded in

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[17] Corradi 1992, pp. 267–292. "The trial by fiat of a previous regime" is precisely the title of chapter eight of Otto Kirchheimer's famous book *Political Justice: The Use of Legal Procedure for Political Ends*.

[18] Ibid., 308 ("The obstacles [faced by] a *successor's justice*." More explicitly in the German edition, p. 452: "Die Justiz des Nachfolgeregimes"). Both surprising extracts of Kirchheimer's book are reproduced in Kritz 1995, p. 350 et seq., although his reflection on the political boundaries of such a successor's justice seem to be totally rubbed out in the rest of Kritz's compendium.

[19] For Corradi, the power holders are seeking a "moral and political regeneration," which is "a constitutive act of the new regime," ibid., p. 286.

[20] Palumbo 1992, p. 16.

[21] "Project on Justice in Times of Transition. Inaugural Meeting," Salzburg, Austria, 7–10 March 1992, 1. http://www.pjtt.org/.

[22] On this hesitation see Arthur 2009, p. 329.

establishing the label simultaneously in different social science disciplines. It is interesting to examine the first uses of the phrase in legal and social science journals. The phrase appeared for the first time in 1994 in three articles. In two cases, the authors made reference to the still forthcoming volume edited by Kritz.[23] In the third case, Ruti Teitel, professor of Law in New York, evokes "H.L.A. Hart and Lon Fuller's debate on transitional justice" (sic), which is not only a curious anachronism, but also an attempt to embed the new label in an academic tradition which makes sense: the famous debate between the law professors Hart and Fuller on law and morality, which became a canonical reference in the legal literature to illuminate the divide between natural law doctrine and legal positivism (1950–1960).[24]

The timid establishment of the phrase primarily in academic law publications can be observed a year later. Once again, some professors at prestigious US universities played a crucial role in legitimizing the originally nonacademic undertaking of the Project on Justice in Times of Transition (PJTT), which resulted in the 1995 three-volume publication on "transitional justice." However, as evidenced by an article by Luc Huyse, published at the end of 1995 in *Law and Social Inquiry*, the expression "transitional justice" was still not unanimously accepted among the proponents of the set of practices to which it refers. Concurrent appellations still challenged, among them *retroactive* or *post-authoritarian justice*, the latter having the preference of Huyse.[25] Some of these similar and possibly concurrent appellations were linked with older traditions in the social sciences, especially the expression "successor justice," probably coined by Kirchheimer in 1961 to point out a specific type of political justice. Nevertheless, as shown by several publications, the labeling does not necessary dismiss previous or concurrent appellations for the new label operates as a producer of equivalences: different and older expressions are often used synonymously with "transitional justice," which has become the generic name for an emerging field of thoughts and practices.[26] The success of the phrase came finally from its academic legitimiza-

[23] Hayner 1994, at pp. 622 and 624 and Marks 1994, at p. 18.

[24] Teitel 1994, pp. 241–242. Interestingly, the Fuller-Hart debate was provoked by the judicial treatment of Nazi crimes in Germany and the Allies' retroactive application of criminal law until 1949. However, the philosophical orientations of the jurists (positivist vs. natural law doctrine) had in fact no effect on their concrete political and legal practices; for instance, each doctrine could justify either leniency or severity of a successor justice. See Mouralis and Israël 2005.

[25] Huyse 1995, p. 53, note 7.

[26] For an illustration of this mechanism, McAdams 1996, pp. 74–75 and Teitel 1997, 2009–2080 (10 occurrences). McAdams cites Kirchheimer, but in a way that does not correctly render the latter's argumentation. For example, he fails to specify that Kirchheimer wrote about the "tu quoque" argument made by the defense in the main Nuremberg Trial: "4.Tu Quoque: Successor justice is both retrospective and prospective. In laying bare the roots of iniquity in the previous regime's conduct, it simultaneously seizes the opportunity to convert the trial into a cornerstone of the new order. *Against the inherent assertion of moral superiority, of the radical difference between the contemptible doings of those in the dock and the visions, intentions, and record of the new master, the defendants will resort to tu quoque tactics.*" McAdams fails to cite the sentence in italics. Cf. Kirchheimer 1961, p. 336. Taken out of its argumentative context, the citation seems congruent with the new "transitional justice."

tion: among those who recognized "transitional justice" as a legitimate concept (or simply used it), there were not only professors of law involved in the emergence of the new professional practice and who hold the more heteronomous positions in the academic field, but also some professors belonging to more autonomous poles of the same field. From 1994 to 1997, according to a search in JSTOR, two-thirds of the references to TJ are to be found in law journals and the rest in periodicals devoted to human rights and international politics.[27] Among the legal publications, we find the mainstream US law journals, but also, as aforementioned journals such as *Law & Social Inquiry*, whose approach to legal practice is more sociological.[28]

From 1995, we can follow the continuous growth of the occurrences with an important time lag between legal and social sciences publications on the one hand, and print media on the other hand.[29] Until 2002, the phrase "transitional justice" was much more frequent in the first category (289 vs. 90 occurrences between 1994 and 2001). Since 2002, however, the success of the phrase has been stronger and quicker in the second category with exponential growth in both academic and media spheres (in the year 2002 alone: 126 vs. 142 occurrences). One could certainly explain this success in the light of contemporary events favorably affecting the emerging professional sector of transitional justice, e.g., the creation of the International Center for Transitional Justice (ICTJ) in 2001; the development of international criminal justice in Rome, The Hague, and Arusha; and, finally, the US invasion of Iraq in 2003. However, this context should be analyzed in a more detailed manner than it is possible within the limited scope of this text devoted to the emergence of transitional justice in the 1990s (Fig. 6.1).

6.3 Obtaining Political and Academic Legitimacy. From Salzburg to Washington (1992–1995)

While following the emergence of TJ as a phrase, I could identify two crucial moments in its "labeling" and legitimization, which require now a more detailed analysis. The first step was the Salzburg international Conference, which led to the first attempt to institutionalize "transitional justice" (1992). The second step

[27] According to a keywords search in JSTOR, limited to the period 1994–1997, 31 articles referred to "transitional justice," most of them citing Kritz's volumes. Twenty-one of these articles were published in the major American law periodicals (*Stanford Law Review, Duke Law Journal, Michigan Law Review, Yale Law Journal, American Journal of International Law,* etc.).

[28] Thus there are two references to Kritz's volumes in an early article written by Osiel 1995, pp. 463–704.

[29] Search for the phrase "transitional justice" without time limitation in LexisNexis Academics ("Power search" in "all news (English)") and HeinOnline ("Law Journal Library"). One should of course take into account the technical bias of such research, but the recentness of the phenomenon limits substantially their effects (the digital collections cover periods often exceeding 20 years, and the available publications are numerous and varied). Much more difficult to overcome are the bias related to the corpus itself, which does not include per se unpublished productions (such as gray literature, conference reports, internal newsletters, etc.).

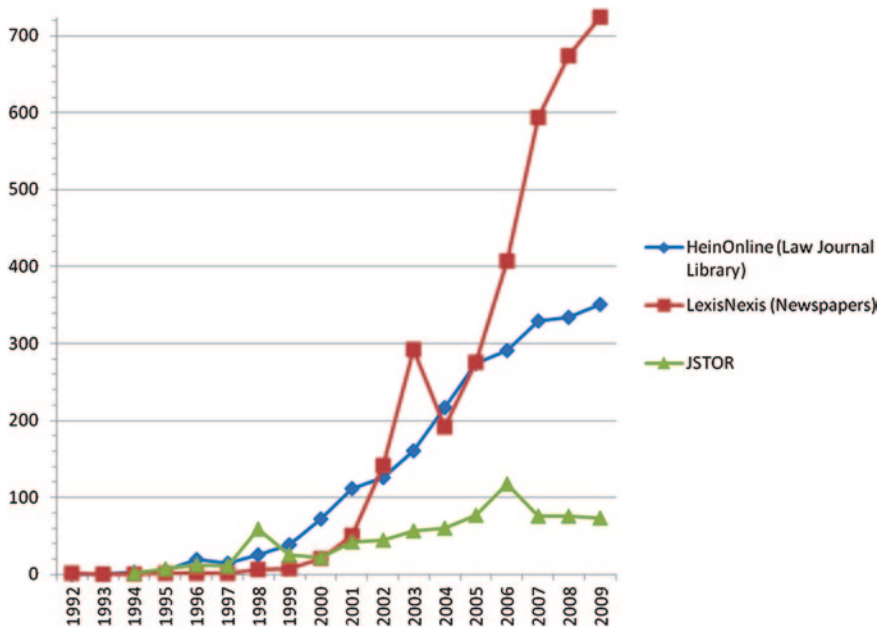

Fig. 6.1 Occurrences of the phrase "transitional justice" in law journals and newspapers[30] **a** LexisNexis—Newspapers: 2,061 worldwide Anglophone newspapers, more than a quarter (515) published in the US. In addition, the database includes 251 non-Anglophone major national newspapers. Collections cover varying periods, ranging from nineteenth century to today. Most often, the last 30 years (since at least 1980) are accessible.[31] **b** HeinOnline—Law Journal Library: 1,652 worldwide "law and law-related periodicals" in various languages; "Coverage is from the first issue published for all periodicals and goes through the most-currently published issues allowed based on contracts with publishers."[32] **c** JSTOR: 1,215 journals in social and human sciences, mostly US-based.[33]

was undoubtedly the publication of the compendium edited by Neil Kritz (1995), which established it both as phrase and practice.

6.3.1 The Salzburg Conference and the Project on Justice in Times of Transition (1992)

The Salzburg conference was one of at least four international meetings, between 1988 and 1995, devoted to the public policies and set up by new democratic

[30] This accounting of occurrences in the three databases was made on 14 March 2011 and verified on 12 March 2012.

[31] http://www.lexisnexis.com.proxy.cc.uic.edu/hottopics/lnacademic/ Accessed 12 March 2012.

[32] http://home.heinonline.org/content/list-of-libraries/ Accessed 12 March 2012.

[33] http://www.jstor.org.gate3.inist.fr/action/showMyTitleDelimitedList Accessed 12 March 2012.

governments after a regime change in order to "redress" past injustices. While the first one, organized in November 1988 in Wye, Maryland by the Aspen Institute, was devoted to the situation in Latin America and the third one to the South African case (February 1994, Western Cape), the Salzburg Conference intended to confront the East and Central European policies with those from Latin America. During these conferences, international lawyers, political actors, human rights activists, and numerous global observers "convened to compare experiences and discuss options." According to Paige Arthur:

> Each of these conferences not only featured the same kinds of participants (in terms of competencies), but they also had many overlapping participants (…). Moreover, each was structured in a similar way: they dealt with a distinct set of measures – prosecution, truth-telling, restitution or reparation, and reform of abusive state institutions – whose aims were to provide justice for victims and to facilitate the transition in question. The conferences optimized the possibility for comparative analysis of transitional 'dilemmas.'[34]

6.3.1.1 Origins of the Conference

The organizers and conveners of the conference defined themselves as "social entrepreneurs," to quote Timothy Phillips, the main initiator of the conference. Self-described as "a Boston-based business and public policy activist," Phillips founded, in the 1980s, Energia Global International Ltd., which is devoted to renewable energy facilities in Latin America. According to Phillips, his activities permitted him to establish contacts within the political elites in South and Central America, especially in the countries experiencing a "democratic transition." Phillips could thus style himself as an expert of transitions in Latin America and a significant intermediary between the US and Latin American political elites. Timothy Phillips "met" East and Central Europe in 1991 thanks to a fellowship to the Salzburg Seminar, a US organization. On this occasion, he met co-fellows who were dissidents of the former communist countries. While discussing with his new acquaintances, he developed a new idea:

> Toward the end of the two-week program in Salzburg, I approached the deputy director of the Salzburg Seminar (…) with the idea that the Seminar might organize a special program to help new leaders from the former communist states figure out how best to confront the legacy of their past. [We developed together] a memorandum outlining a proposed three-day conference that would bring together leaders of the former communist states with their counterparts from [Latin American] countries that had successfully navigated the difficult transition from dictatorship to democracy.[35]

This narrative is interesting insofar as it points out Phillips' ability to act as go-between for different national elites. [36] For his new project, Phillips quickly gained

[34] Arthur 2009, p. 325. Among the about seventy-five speakers at these three conferences, nine attended at least two of them.

[35] Phillips 2008, p. 218.

[36] Sapiro 2006, pp. 44–59.

the support of people holding appropriate positions in different trans-nationalized areas of activity. For example, Wendy Luers, head of the Charter 77 Foundation in New York,[37] provided the personal and institutional link to a wide network of prominent politicians from the former communist countries. As a journalist and wife of the U.S. ambassador in Prague in the mid-1980s, she "played an important role" "by reaching out to the dissidents and publicizing their cause to influential audiences in the United States and Western Europe." Specifically, she gained the support of President Vaclav Havel for the meeting's project. Like Tim Phillips, Wendy Luers was positioned in different sectors and she brought to the project experience in human rights issues, which she had gained in the 1970s while working in Latin America for Amnesty International. In addition, the Hungarian-born financier George Soros "immediately liked [the] conference proposal and agreed to fund the travel of all the [European] participants."[38] He provided not only the financial support, but also contributed to promote transitional justice as a valuable "philanthropic" investment for the main US foundations. The US-based organizing team and its informal advisers included people well-positioned in the legal field, such as attorney Lloyd Culter, Professors Herman Schwartz (specialist of constitutional law in Washington) and Ruti Teitel; in non-governmental human rights organizations (Juan Mendez, lawyer of HRW, Alice Henkin from the Aspen Institute, Neil Kritz from the US Peace Foundation, Arieh Neier); and, finally, in the US media (Lawrence Wechsler).

6.3.1.2 "Shared Experiences"

The organizers' goal was to promote a "new methodology" based on what they called "shared experiences," i.e., to favor exchanges and debates between elites in "emerging democracies" on how to deal with their "authoritarian past." Officially, the meeting was designed following a proven model: the US organizers were supposed to serve as mere go-between those who communicated their experiences and those who presumably would learn from them. The success of this methodology was supposed to be illuminated by the paradigmatic narrative of the conference, according to which the attendees from South and East mistrusted each other on the first day and then began to listen and understand each other from the second day, thanks to the more informal talks in the previous evening.[39] However, this theoretical schema and its enchanted representation do not correspond to the conference as it unfolded in February 1992, if only by the numerical imbalance between the three groups of participants: 42 Westerners (including 30 US-based participants), 34 Eastern and Central Europeans, and only eight Latin Americans.[40]

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[37] Named after the movement "Charter 77" founded in 1977 by Czechoslovakian prominent dissidents including Vaclav Havel.

[38] Phillips 2008, p. 219.

[39] Kritz 1995.

[40] The list of participants is available at http://www.pjtt.org/. Accessed 12 March 2012.

Table 6.1 Participants Salzburg conference 1992—main profession and citizenships

Main profession		Citizenship	
Officials	33	USA	30
Professors	15	European Western countries (including Germany)	12
Human Rights "activists" (NGOs)	13	East and Central Europe (including Russia)	34
Journalists	12	Latin America	8
Lawyers (attorney-at-law)	3		
Unknown	9		
TOTAL	85		85

Not surprisingly, we can observe certain equivalence between the social structure of the organizers' group (nine individuals) and that of the whole group of attendees (76 participants in total). While the "social entrepreneurs" such as Timothy Phillips and Wendy Luers (well doted in social capital) were central in the first case, most attendees were prominent national officials with a strong legal and political capital. Almost half of the participants (33) held or had held political and/or elective positions at a national level (six of them in the judiciary) and one-third (25) belonged to the legal field (as attorneys, judges, or law professors). Within the latter group, the nine legal scholars—mostly US-based—played a crucial role, such as Ruti Teitel (New York Law School) and Diane Orentlicher (Yale University).

Focusing on those who took part in at least two conferences, we can observe that they had at their disposal a mixture of resources and held significant positions in several fields. For example, Jaime Malamud-Goti, professor of law in Buenos Aires and instructor at US law schools, was, as Presidential Adviser, one of the architects of the trials of the military juntas in Argentina, where he was later appointed Solicitor General. Another Argentinean, the lawyer Juan Mendez, also teaches at several US universities, became general counsel of Human Rights Watch in 1994, before co-founding and presiding over the ICTJ in 2001. These multi-positioned agents, in the sense of Luc Boltanski,[41] played a key role in publicizing and legitimating the new "cause" of transitional justice, which went through a struggle of labels and qualifications (see Tables 6.1 and 6.2).

6.3.1.3 The Creation of the Project of Justice in Times of Transition (PJTT)

Following the Salzburg conference, its organizers decided to institutionalize their initiative by founding the "Project on Justice in Times of Transition," an important step for the emergence of the new area of activity. From the beginning, the PJTT had an academic basis for "it was formerly an inter-faculty project at Harvard University affiliated with the Kennedy School of Government, the Law School and

[41] Boltanski 1973, pp. 3–36.

Table 6.2 Participants Salzburg Conference 1992—officials and academics

Officials		Officials		Professors	
National level	31	Executive and legislative	27	Law (USA)	9
International organizations	2	Justice	6	Political Science (Germany and France)	2
				Other academics (Eastern Europe)	4
Total	33		33		15

the Weatherhead Center for International Affairs."[42] Concretely, however, it was an independent project financed by the organization led by Luers (the Charter 77 Foundation, New York[43]) and affiliated with Columbia University and Tufts University's Institute for Global Leadership (IGL), whose 1991 symposium entitled "Confronting Political and Social Evil" Phillips attended, and where he later taught as "visiting lecturer."[44]

6.3.2 The Kritz Moment (1995)

The second moment in labeling and legitimating transitional justice was undoubtedly the publication of the three-volume compendium on this topic in September 1995, for it ensured academic recognition for the phrase. The editorial project began 4 years earlier with a "review of over 17,000 books and articles of possible relevance to the project." Conceived as a "set of first-rate readings on basic questions of 'transitional justice,'" the book compiled 224 reprinted articles and documents. The final product was a mixture of various texts from different periods and of various status (philosophy, law, political sciences, journalism…), in which, with the exception of Peter Novick, the absence of historians' contributions is noticeable. The first volume is especially the academic showcase of the entire work. It seeks to lay the theoretical basis of the new field. Among the 43 authors of this volume, we find the most prominent proponents of TJ in the academic, political, and human rights spheres, a large number of whom have attended the main international conferences on this topic since 1988 and notably that of Salzburg. The editor of the compendium, Neil J. Kritz, took part in this important meeting, as he recalled in his general introduction to the compendium.

[42] According to the biography of Wendy W. Luers on the PJTT website: http://www.pjtt.org/bio_wluers.htm. Accessed 12 March 2012.

[43] Now called the "Foundation for a Civil Society."

[44] According to Timothy Phillips's biography on the PJTT website (http://www.pjtt.org/bio_tphillips.htm) and the "History of our strategic partnership with IGL," http://www.pjtt.org/partner_history_igl.htm. Accessed 12 March 2012.

6.3.2.1 An Editorial Project

According to Kritz's introduction, the publication resulted from an editorial project born in 1991 at the United States Institute of Peace (USIP), a non-partisan and federally-funded institution created in 1984 by the US Congress. Its so-called "Rule of Law Center of Innovation" developed several projects, including an early "transitional justice" initiative, whose aim was (and remains) to promote the "best practices" in this area, by providing "guiding resources as countries deal with the legacies of past abuses, war crimes in efforts to rebuild and reconcile in the wake of violence."[45] Unlike the PJTT, this program from the outset had no direct academic basis, but a strong political legitimacy considering the statute of the USIP as the main national public institution in the US in charge of encouraging peace building and conflict resolution.

The success of the editorial project owed much to the capacity of its supervisor, Kritz, in exploiting specific resources accumulated throughout his education and short career. The Washington College of Law (WCL) at the American University, where he earned his law degree, looks like a breeding ground for, among other internationalized professionals, the future TJ promoters (Juan Mendez, the future president of the ICTJ, as student; Diane Orrentlicher as Professor of Law…). To quote an authorized portrait published in the alumni journal, "Mr. Kritz found WCL an ideal academic institution to engage his interests in and dedication to promoting the rule of law and human rights."[46] After earning his law degree in 1986, he worked for the Administrative Conference of the United States (ACUS)[47] and then in 1991 he joined USIP, where he helped to develop the "Rule of Law program."[48] There he could build on his short experience in human rights questions and conflict resolution, as well as (certainly) on his competencies acquired at WCL regarding public management and public communication directly inspired by organizational and marketing techniques in the business world.

Although his social capital in 1991 was by no means as diversified as that of Timothy Phillips, Kritz could take advantage of his job at USIP to meet and recruit for his project people occupying central positions in the various internationalized areas of activity originally concerned by TJ, especially in academia. The paratext written by the compendium's editor is interesting, especially the "Acknowledgements" section (p. xviii). Here

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45 To quote the official presentation of the initiative: http://www.usip.org/programs/centers/rule-law. Furthermore, the initiative develops "research that examines these issues in comparative perspective, publications, grant-funded work and policy advice."

46 Bassett and Edman 2008, pp. 59–60.

47 The ACUS defines itself as "an independent federal agency dedicated to improving the administrative process through consensus-driven applied research" [http://www.acus.gov/about/]. Kritz was, in 1989, Senior Special Assistant to the Chairman of ACUS. See Administrative Conference of the US 1990, p. 59.

48 The "rule of law" became in the 1980s and 1990s not only a slogan (Dezalay), but also an efficient symbolic mean to legitimate various form of domination at the international and national levels. On the uses of its German variant, the *Rechtsstaat*, see Mouralis 2008.

Kritz expressed his gratitude toward several professors who not only wrote the leading articles in the first volume, but who also "reviewed a draft of the volumes and provided valuable advice and perspective."[49] Guillermo O'Donnell ensured recognition in political science and especially in the dynamic field of "transitology,"[50] while John Herz, Herman Schwartz, and Ruti Teitel did the same for law schools and beyond. The most crucial support came indeed from professors of law, who had the ability to legitimate or impose the new label in significant parts of the social sciences. Unlike in European countries like France or Germany, the U.S. legal field was, in the beginning of the 1990s, no longer dominated by the "pure jurists" whose academic authority was increasingly challenged by the "law merchants."[51] In addition, the professors of law themselves relied less exclusively on continental traditions, such as the German "legal dogmatic," bordering on a certain closing of law on itself.[52] Thus, significant numbers of the professors of law defined themselves (and were accepted) as "social scientists"—keeping one foot in "pure law" and another in legal expertise. For all these reasons, the support of professors at prestigious law schools was a necessary, if not sufficient condition, for a successful "labeling" of TJ. And indeed, as noted above, the reception of the compendium took prominent place in significant journals of law and social sciences—through citations and reviews—and only subsequently in the media.

Kritz's symbolic *tour de force* finally brought to his project the main figures of the still weakly structured field of transitional justice, that is, "social entrepreneurs" and former opponents or dissidents from the South and East now holding political offices (such as Nelson Mandela who wrote the foreword) as well as the law professors. Through his three-volume publication, he largely succeeded in promoting "transitional justice" as a legitimate concept in the academic world and a desirable political practice.[53]

6.4 Germany: A Fertile Ground for Transitional Justice[54]

Before concluding this article, I would like to briefly evoke the case of Germany. According to a somewhat simplistic vision, the "market" of peace and conflict

[49] Kritz 1995, p. xviii.

[50] He stood with C. Schmitter for the academic variant of the transitology, while the apocalyptic one was well represented in the book by Samuel Huntington with an article on the "third wave" of democratization. See the critical account of Dobry 2000, pp. 585–614.

[51] Dezalay 1990, pp. 70–91.

[52] Garcia Villegas 2009, p. 29ff.

[53] This success is concerning as transitional justice itself as certain related measures detailed in the book, especially the "truth (and reconciliation) commissions," an expression N. Kritz also publicized through his work at the USIP. See the systematic publication by the USIP's "transitional justice initiative" of public reports of various national commissions since the 1970s, also long before the expression or the practice were established. USIP website.

[54] For a more detailed account on this topic: Mouralis 2004.

resolution would be almost organized either side of a North-South main line. However, during the 1990s, there was also a significant East–West line within the northern post-Cold War world.

From the beginning, Germans played a sizable role in the emergence of transitional justice as phrase and practice. They were well represented at the Salzburg Conference (1992) and moreover in the canonical book edited by N. Kritz in 1995. Not only several authors came from Germany (Joachim Gauck and Ingo Müller as well as the classical Jaspers and Kirchheimer), but German history was evoked at length in the three volumes. In fact, the way in which the Allies and German half-states dealt with the legacy of Nazism enjoy the best place in this book, not to speak of the politics toward the communist past in unified Germany (two sections of 15 articles out of 70 in total in the second volume). If we consider the participants of the 1992 conference and the authors of the book, we can schematically distinguish three kinds of actors from Germany. They were the first professors who contributed to the labeling and establishment of the phrase. Claus Offe, professor of political science and sociology at Humboldt University in Berlin since 1995, is undoubtedly representative of this category: he took part in the 1992 meeting and two years later he published an oft cited article in which he defined what he called *Vergangenheitspolitik*, a concept he helped to coin and to which he gave a meaning very similar to that of the still un-established transitional justice.[55]

The former GDR dissidents who contributed to the elaboration of the public policies regarding the communist past represented the second category of participants to the 1992 conference. In Germany, the most prominent representative of this category was the pastor Joachim Gauck, who took part both in the conference and in the book. A leading figure of the East German civil rights movements, Gauck succeeded in his fight for the opening of the Stasi files and for citizen control of them (foundation of the Gauck agency). This was, however, an exception to the rule: citizen access to the Stasi files (1992) was one of the rare successful projects championed by the former dissidents. Indeed, as I demonstrate it in my book on post-communist purges in unified Germany, most measures concerning the GDR past were conceived and applied by West German lawyers or officials and they largely rested on criminal law. High-level lawyers and officials represented precisely the third category of Germans involved in the emergence of TJ.

Without going into detail, we can distinguish two stages in the history of "transitional justice" in Germany: during the first (1990–1993), the idea of a set of complementary measures (enlightenment of the past, reparation for victims, and above all retribution of perpetrators) was developed and championed by lawyers, judges and politicians—almost all West Germans—through specific German categories, which proved politically efficient in the public space. Indeed these categories (*Vergangenheitsbewältigung, Aufarbeitung der Vergangenheit*) emerged in the 1950s and 1960s in order to designate a morally necessary and serious confrontation with the Nazi past. Affixing the label "transitional justice" to public policies directed

[55] Offe 1994, pp. 187–229. Two years later, Norbert Frei would give a very different sense to this word.

toward the East German past in general, and the post-communist purges in particular, represented the second stage (in the second half of the 1990s). This symbolically decisive operation was not accomplished without tension nor paradox: the highest judicial authorities often reaffirmed the primacy of the German legal traditions in order to rule out any alternative to criminal law because they implicitly identified "transitional justice" as such an alternative.[56] However, affixing the label could finally succeed thanks to the authority of legitimate holders of academic capital in the legal field. Indeed, as in the United States, some professors of law holding central positions in the academic field (along with political scientists such as Claus Offe) began specializing in "transitional justice" in the mid-1990s and contributed to the boast of a "German" model of transitional justice, which thus gained international legitimacy it had not enjoyed until then.[57] This process was certainly favored by the recent and partial conversion of TJ-specialists to criminal law. Of course, this was not merely a pure academic exercise: it made the German means of dealing with the communist past an exportable model, opening new perspectives for German legal expertise, noticeably in Central and Eastern Europe (in developing "institutes of national remembrance"), but also at the international level (where the competencies of German lawyers in international criminal law are at present praised).

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[57] Among the pioneers of transitional justice in the German academic world, we can mention Klaus Marxen and Gerhard Werle, professors of criminal law at the Humboldt University in Berlin. They initiated the "project criminal justice and GDR-past" in 1996, funded by the Volkswagen Foundation, and devoted to an exhaustive legal analysis of the post-unification cases involving former East German officials. The popularization of the German "model" of transitional justice went through several publications; cf. Werle 2006.

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Part II
Implementation of Categories and *Savoir-Faire*

Chapter 7
"Transitional Justice" and National "Mastering of the Past": Criminal Justice and Liberalization Processes in West Germany After 1945

Annette Weinke

Contents

7.1 "Nuremberg" and the Ambivalences of International "Legalism"

Long before the founding of the permanent International Criminal Court (ICC) at The Hague, in 1998, contemporary history research began to show a renewed interest in the International Military Tribunal at Nuremberg and the follow-up trials of National Socialist mass crimes.[1] Beginning in the 1980s, scholarly discussion at first centered on how the postwar criminal justice proceedings initiated by the Allied powers should be fit into the general history of reckoning with the Nazi past—the *Aufarbeitung*. The trend accelerated after the collapse of the Communist dictatorships in Eastern Europe. Many of those works were very much defined by

[1] See e.g., Brochhagen 1994; Frei 1996; Kochavi 1998; Deák et al. 2000; Douglas 2001; Bass 2001; Frei 2006b; and Weinke 2006.

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theoretical and methodological concerns about the social and cultural functions of different forms of memory,[2] in addition to the more praxis-oriented research on transitional justice.[3] The focus was simply on achieving a first empirical overview of the different forms of *Vergangenheitspolitik* ("politics of the past") and the different practices of criminal justice in Europe after the Second World War. Thus, we cannot say that the establishment of a criminal justice agency with worldwide jurisdiction—still considered a "utopian goal"[4] even among legal experts as late as the mid-1990s—actually caused the new historiographic interest in the development of modern international law and of national and global human rights regimes. But the arrival of the ICC definitely helped to intensify this trend in the scholarship.

The fact that the ICC's creation enjoyed prominent and strong support from the Federal Republic of Germany also lent political and societal currency to "Nuremberg and its consequences." Given that Germany was the first country to experience the implementation of the international legal innovation known as the multinational tribunal, whether the Allies failed in 1945 or were able at least partly to fulfill their aims and expectations in the undertaking is not simply an academic question. In asking it, we must remember that the four occupation powers involved in "Nuremberg" were not solely concerned with carrying out the traditional aims of punishment, like retribution or deterrence. The project was tied to far more ambitious ideas, especially among the Western allies, and most of all among the Americans. As early as the Moscow conference of late 1943, the Allies implicitly agreed that a joint criminal trial of the so-called "main war criminals" (the top officials of the Nazi party and state) would be only the first of a great many other trials that the countries affected by German occupation would conduct on their own.[5] Robert H. Jackson, appointed by the Truman administration as the chief prosecutor at Nuremberg, envisioned nothing less than the creation of a "world peace order through law" and the legal prohibition of aggressive war[6]—a goal that Woodrow Wilson had also pursued after the First World War, without success. A tableau of retributive and educational measures was planned with the aim of initiating a social reconstruction and democratization of German society. The trials against the Nazi elites, in particular, were supposed to become a forum for historical enlightenment. This went together with the principle that the trials would be conducted mainly on the basis of confiscated documents rather than witness testimonies. Later on, this choice would become crucial for the historiography on the Third Reich.

For almost two decades, the paradigm of transitional justice[7] has met with widespread and apparently consistent success. Even as theoretical reflections still

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[2] See Welzer 2001.

[3] See Minow 1998; Teitel 2000; and Teitel 1997, 2009–2080.

[4] Hankel and Stuby 1995, p. 12.

[5] On the discussion during the war, see Frei 2006b.

[6] Weinke 2006, p. 20.

[7] See Elster 2004.

lag behind the practical application,[8] the transitional justice model has seen an impressive advance in institutionalization[9] accompanied by a broad differentiation of concepts, approaches, and terms. But, as with other realms of national and international human rights policy, normative treatments of the subject rarely show understanding of the historical prerequisites, contexts, stages of development, continuities, and ruptures involved in each national and regional case. Even as institutions claiming worldwide jurisdiction like the ICC confidently adopt the legacy of "Nuremberg" as an important source of their political, legal and ideological legitimation,[10] we lack an accompanying scholarly discussion that critically scrutinizes this manner of tradition-formation and its selective approach to the historical realities of the German case (among others). Such scrutiny is also missing from the discourse surrounding the revival of certain substantive and procedural instruments, for example, the definition of genocide as formulated in the 1940s by the Polish-Jewish legal scholar Raphael Lemkin.[11] The discourse tends to leave aside the fact that, while that definition may have originated with Nuremberg, it also faded into obscurity for the first several decades of the Cold War. Also largely ignored is the history of the ideas and the legal philosophy in which the Nuremberg project was rooted. Standing very much in the interventionist traditions of the 1930s and 1940s, the US government and its legal advisers understood the Nuremberg program as a kind of medium for projecting the specific norms and values of American New Deal liberalism on an international stage.[12] The historical origins of the program therefore demand a more careful examination, one that can account for contradictions and incoherencies. Judith Nisse Shklar, an American political scientist originally from Lithuania, called attention to the implications of a world view that sets the goal of substituting the law for politics as the central instrument for solving conflicts in her now classic 1964 work on political theory and legal philosophy, *Legalism: Law, Morals and Political Trials*. Echoing Woodrow Wilson's well-known intent "to make the world safe for democracy," the plan of the anti-Hitler coalition to instead make it "safe for justice" achieved an undeniable first success in the case of the main war crimes trial at Nuremberg.[13] Shklar argued that this did not derive in principle from the superiority of legalistic strategies for overcoming totalitarian and authoritarian regimes. On the contrary, the extremely violent character of the National Socialist crimes necessitated a

[8] Thus the critique by Sabine Jaberg at the concluding discussion of the AFK annual conference in 2009; cf. Rollin 2009.

[9] Bearing witness to the trend are the courts and truth commissions established around the world, and also non-governmental organizations like the International Center for Transitional Justice in New York.

[10] See the ICC's own "About" page at http://www.icc-cpi.int/Menus/ICC/About+the+Court/ICC+at+a+glance/Chronology+of+the+ICC.htm.

[11] See Cooper 2008; Borgwardt 2005, p. 241.

[12] As described in Borgwardt 2005, p. 205.

[13] Shklar 1964, p. 123.

legal innovation like the offense of "crimes against humanity." In Shklar's view, the jurisdiction applied at Nuremberg, based on the fiction that there existed a positively applicable international law, was effective in part because it played out before a German professional and bureaucratic elite that—despite the readiness it had shown to cooperate with the law-averse Nazi regime—still carried a strong affinity for legalism, even in the mid-twentieth century. Since the nineteenth century, this German particularity brought forth an attitude as state-centered as it was prone to be pessimistic about politics.[14] On the whole, if transitional justice as practiced in Germany reinforced classical liberal values like the rule of law and pluralism, then it was, in large part, because the process proceeded from the social and cultural conditions in the country; the concurrent example of Japan highlighted the negative side of legalism. The attempt by the American prosecutors to lend metaphysical significance to the Tokyo trial against the Japanese main war criminals[15] by employing a natural-law argument as a demonstration of "just war" theory[16] must have come across as little more than the imperial arrogance of a colonial power. In the face of this prosecutorial strategy, and given the fact that Japan so recently had been the first victim of the nuclear age with the dropping of atomic bombs on Hiroshima and Nagasaki, the tribunal came to be viewed merely as a form of "legalistic gymnastics."[17]

The following overview of the German case is not meant to revive debate on the strengths and weaknesses of the Nuremberg concept, as these have been treated exhaustively in the literature on law and contemporary history. Rather, proceeding from Shklar's thesis, I wish to consider the possible interactions and transfer effects between the Allied (and/or American) prosecutions and the German defense strategies and societal responses. To what extent may we say that, in the end, the legalistic approach to the German racial war and war of destruction—to genocide and to biologistically motivated mass murder—led to the formation of a consciousness for individual rights, liberty, and the rule of law, at least among part of the German elites? Did the typical dilemmas and paradoxes of transitional justice, with its inherent need to strike a balance between justice and stability, contribute to the initial resistance among Germans? Did it also paradoxically facilitate their subsequent processes of adaptation to, and adoption of, liberal models? The answers to these questions are difficult, above all because the transformation occurred in discrete stages. The gradual German turn to "Western" values was brought into motion and influenced by a broad range of different factors. Nevertheless, we shall attempt here to lend more precise contours at least to a few of these.

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[14] Ibid., pp. 156 and 169.

[15] On the Allied Military Tribunal of the Far East (IMTFE), see Cohen 2003.

[16] On the historical background of this concept, see Weber 1995, p. 365 et seq.; Walzer 1977; Borgwardt 2005, pp. 212–217.

[17] Shklar 1964, p. 181; cf. Paech 1995.

7.2 Nuremberg and the Paradoxes of the German Position

Today, the main war crimes trial against 24 leading officials of the National Socialist party, state, military, and six other organizations is considered a milestone in the development of humanitarian international law. With the initiative for holding the tribunal coming mainly from American officials (lawyers and judges), the leading political and military personnel of the NS state had to answer in court for starting a war of aggression in which millions of people across the globe, a large proportion of them civilians, died. The Americans were also eager to use what they saw as a well-placed opportunity, after the collapse of the German Reich, to reform international law according to their own ideas. The Kellogg-Briand Pact of 1928 served as an important reference point in this respect. Despite the fact that it held little more substance than rhetorical moralism with which the Coolidge administration had responded to the widespread isolationist mood among American voters,[18] it was now interpreted as regular international law which allegedly allowed the punishment of offensive war. However, confronted with the mass murder of the European Jews, the Americans also wanted to create new judicial instruments with which those responsible for genocide could be punished and future genocides could be prevented. It was, above all, European human rights advocates—prominent scholars like Bohuslav Ecer, Hersch Lauterpacht and Raphael Lemkin—who used their expertise to develop a durable concept for later prosecutions. Looking back today, we may conclude that the criminalization of offensive war—the most important legal and political issue in the Truman administration's view—achieved as good as no lasting effect. By contrast, the codification of crimes against humanity (Article 6c of the IMT statute) today is seen as the IMT's most lasting contribution to humanitarian international law. With the decision to make the murder, detainment, and enslavement of civilians for "political, racial, or religious" reasons into a violation of international norms and customs, the Allies sent a decisive signal on behalf of individual and collective human rights protection. For the first time in the history of modern state systems, the principles of sovereignty and immunity, until then barely ever contested, were relativized to the favor of universal human rights and humanitarian interventionism. Despite this qualitative breakthrough, the practical effects at first were limited. Contrary to the hopes of the prosecution and of Lemkin, who was involved in its preparation, the IMT did not see itself in a position to extend its verdicts to the prewar period. As prepared by Lemkin, the charge of "genocide," i.e., the intentional destruction of a national, racial or religious group, found no place in the IMT verdict. The reasons for the court's reservation requires closer examination; we may assume that both the traditional legal conservatism of the participating judges as well as the defensive attitude of the British and the French, who were subject to growing political pressures as colonial powers, were decisive factors. In a letter to the editors of the *New York Times*, Lemkin voiced his great disappointment at the restrictive legal interpretations of

[18] Borgwardt 2005, p. 67.

the Nuremberg judges. While the illegal sale of narcotics to an individual had already come to be viewed as an international problem, "gassing millions of human beings" still counted as the domestic concern of individual states. This, Lemkin argued, could not be reconciled with Western ideas of civilization.[19]

In the course of 1946, political and organizational problems led the British and Americans to abandon plans for a second IMT, and the criminal justice programs shifted to the lower levels. Even before the IMT verdict was handed down, all four occupation powers had set up courts in their own zones for the purpose of holding trials against German soldiers and civilians accused of crimes against members of the Allied armed forces. These trials were mainly held on the basis of national military statutes, although elements of the IMT verdict were often cited as precedent.[20] The earlier promises to use the cooperatively developed norms of international law in the most uniform way possible soon turned out to be illusory. In the end, each occupying power used the law in a way consistent with its own political interests, national legal traditions, and particular historical experiences with National Socialism. Especially controversial were the activities of the Soviet Military Tribunals (SMTs) on eastern German territory. They targeted mainly civilians, since German prisoners of war for the most part received trials in the Soviet Union itself. Recent research estimates that about 5,500 persons were convicted by SMTs stationed in the Soviet zone between 1945 and 1953. In retrospect, it is probably impossible to separate cases of Nazi and war crimes from those pursued because of actual or suspected opposition to the Soviet occupation. Soviet legal practice in these cases was based on terror and caprice, with little interest in determining truth or falsehood.[21]

Allied Control Council Law No. 10 of 20 December 1945 (CCL 10) facilitated the decentralization of additional trials, and also set the legal foundations for mandating German justice agencies to conduct their own investigations of Nazi and war crimes. Their responsibilities were limited insofar as they were allowed only to investigate crimes by Germans against other Germans or stateless persons. Although their authorities differed from one occupation zone to another—German courts in the British, French, and Soviet zones were given permission to apply CCL 10, which, in practice, was usually done only in concordance with German law, while those in the American zone ruled exclusively on the basis of the German law books[22]—these criminal investigations primarily focused on crimes of denunciation (i.e., to the Nazis) and medical crimes, as well as acts of violence immediately following the National Socialist takeover and during the so-called period of collapse between fall 1944 and spring 1945. By the most recent estimates, German courts delivered 4,800 verdicts through 1949, very few of which

[19] Lemkin 1948; quoted in Borgwardt 2005, p. 230.

[20] See Sigel 1992; Lessing 1993; Bloxham 2003, pp. 91–118; and Hassel 2009. Figures on the internments and Allied criminal justice programs are found in Cohen 2006, pp. 59–88.

[21] See Hilger 2006.

[22] See Raim 2009.

were for murder or complicity therein.[23] Only a fraction of these procedures treated the central crime of the NS regime—the persecution and undifferentiated murder of almost six million European Jews, 250,000 of whom had been deported from the German Reich and Austria to the extermination camps.[24] It took until 10 years after the founding of the Federal Republic—by which time most of the survivors had left Germany, mainly headed to Israel or the United States—before the first systematic investigations for Holocaust crimes were initiated.

German reactions to the Nuremberg main war crimes trial saw a discrepancy between published and public opinion. While the licensed press in all four occupation zones reported intensively on the "trial of the century," a large part of the population seems to have given scant attention to the proceedings. Reliable conclusions on public opinion are nearly impossible since the necessary data were not compiled. Likely trends can be derived from the surveys held by the Opinion Survey Branch (OSB) of the Office of Military Government for Germany (OMGUS) from 1945 to 1949 in the U.S. zone. On the whole, the survey results suggest that the initial acceptance for IMT was relatively strong, and the guilt of the accused more or less considered to have been proven. An OSB report from August 1946 reads, "The guilt of the defendants is, without a doubt, established in the minds of the German people. The guilt of the indicted organizations… is accepted by a somewhat smaller majority."[25] An important indicator of this initial readiness to recognize the jurisdiction of the Allied courts may also be read into the finding that only 6 percent of those surveyed believed Germany's former enemies bore part of the responsibility for starting the Second World War. However, the respondents also tended to reject on their own behalf any collective responsibility for the seizure of power in 1933 or the later outbreak of war.

But by the end of the occupation period this partial support for the Allied criminal justice aims had turned into a defiant attitude, one that basically resisted anything even remotely associated with "Nuremberg." No great feats of logic are required to imagine the growing rejection that accompanied the denazification process, which was widely viewed as problematic, and the Nuremberg follow-up trials against doctors, lawyers, judges, industrialists, and diplomats. Carried out by the Americans on their own, this criminal justice program came "so close to the structure of the society carrying the 'Third Reich' that it stimulated a general discomfiture."[26] Given the seeming never-ending wave of coming to terms, more and more of the former members of the German "Volksgemeinschaft" may have been asking if they might not themselves come into the sights of Allied criminal justice. The thought could hardly be remote when one considers that the number of direct or indirect perpetrators involved in the Holocaust is estimated at 200,000–250,000.[27]

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[23] See Eichmüller 2008, pp. 621–640.

[24] See Rüter 2005.

[25] Quoted in Krösche 2008, p. 141.

[26] Weisbrod 2008, pp. 247–270, at p. 249.

[27] Pohl 2000, p. 124.

Given the fact that the Americans attributed a decisive part in the rise of the National Socialists to the traditional German elites, their reactions in particular were observed vigilantly. A key role in the debate on the "guilt question," the Allied denazification program and the treatment of convicted German war criminals was played by the two great German churches, the Evangelische (German Lutheran) and the Catholic.[28] Church involvement in this realm grew out of a variety of motives. The churches wished to lay claim to a spiritual lead role in the midst of the political and moral collapse. From hierarchical and institutional self-understanding, they viewed themselves as the speakers for German society in the face of occupation. Furthermore, their agitation against "Nuremberg" was to some extent a matter of church identity politics, an effort to bridge over the sometimes severe conflicts about the past within their own ranks. On the one hand, tensions went back to the dissent between the "Deutsche Christen" who had aligned with National Socialism and the "Bekennender Kirche" (professed church) which had tried to defend institutional and spiritual autonomy. On the other, the ambiguous attitude of the hierarchies and bishoprics to the National Socialist eugenics policy was glossed over by "rituals of consternation purged of detailed historical knowledge."[29] On top of that, the churches maintained a pronounced anticommunism and, in the case of the Evangelische Kirche, had to deal with the anti-modernist legacy of National Protestantism with its intellectual baggage of deep-seated anti-semitic and anti-American resentments. As US sociologist Jeffrey K. Olick concluded, the church discourse about Nuremberg was a decisive factor in establishing a general "grammar of exculpation," which thereafter greatly influenced the German view of the war, the Holocaust, and the Allied occupation.[30]

Already in May 1946, while the IMT trial was still ongoing, the Evangelische Kirche in Deutschland (EKD) issued a declaration on denazification. This acknowledged the necessity of a political "purge" of the German people, but at the same time raised a warning in general terms against overly severe sanctions. The argument was that a retroactive punishment would be seen by most Germans as a violation of the natural sense of right and wrong, and drove them into the arms of the Communists.[31] With the opening of the "Doctors' Trial" in December 1946, the first in the series of twelve successor trials by the Americans, the NS proceedings became a fixture of the churches' politics of the past. Church representatives began to appear in court as witnesses for the accused, and petitions on their behalf were submitted to the military government with the aim of achieving reduced sentences and milder conditions of imprisonment.[32]

The establishment of the Federal Republic in May 1949 and the appointment of the Allied high commissioners saw a renewed German critique of "Nuremberg."

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[28] See Schildt 1995.

[29] Kaminsky 2008, p. 26.

[30] Olick 2005, p. 212.

[31] Ibid., p. 222 et seq.

[32] See Weinke forthcoming.

Above all, the conviction of Ernst von Weizsäcker, a state secretary in the Foreign Ministry under von Ribbentrop, set off a mobilization among traditional elites on behalf of a non-partisan and ecumenical movement for amnesty. In the spring of 1949, there formed the "Heidelberg Juristenkreis," a loose grouping of church functionaries, Nuremberg trial defenders, legal scholars, and politicians with the goal of seeing the fastest possible end to the Allied criminal justice program and the release of the convicted perpetrators.[33] The Heidelberg circle avoided fundamental criticism of the legal basis for the trials in its memoranda to the US High Commissioner, John McCloy, as they were fully aware that he had been among the initiators of the Nuremberg process as a lawyer and former undersecretary in the Defense Department during the war's final months. Instead, they emphasized humanitarian concerns and the argument that a signal of "good will" for the German prisoners would make the people more receptive to Western democratic ideals.

Before long, serious internal conflicts developed within the circle over the extent of the amnesty demands. An especially heated point was the question of which prisoners should receive the privilege of amnesty. In particular, the lawyers of the German industrial captains and bankers were of the opinion that a schematic approach might backfire on their own clients, among a few of whom hopes were already rising for early rehabilitation given the Americans' economic reconstruction policies. Otto Kranzbühler, defense attorney to steel magnate Alfried Krupp in "Case No. 10," believed there was a danger that the Americans would get the impression that the German side saw no distinctions between people like Krupp and the convicted leaders of the SS Einsatzgruppen. For this reason, Kranzbühler made it plain during the internal deliberations of the Heidelberger circle that he considered the latter to be "common murderers" who would not have escaped punishment under the statutes of the Reich Criminal Law books.[34]

This was in contrast to the group of "Vergangenheitspolitik extremists," as historian Norbert Frei has described them. Among them was von Weizsäcker's defense attorney, Hellmut Becker. Beyond his own client, Becker argued on behalf of men like Otto Ohlendorf. The latter was sentenced to death by an American military court on the basis of CCL 10 in April 1949, together with other Einsatzgruppen leaders (Case No. 9). As the leader of Einsatzgruppe D, operating in the Crimea and Caucasus, Ohlendorf had organized the shootings of almost 100,000 Jewish civilians. Becker, who had provided the prisoner at the Landsberg fortress with works by Nietzsche, Heiddegger, and Hemingway, sought ways to prevent Ohlendorff's execution. Speaking to Herbert Blankenhorn, Konrad Adenauer's closest adviser on foreign policy, Becker described former RSHA Division Chief Ohlendorf as "an educated and quite unusual personality" who had

[33] On the "Heidelbergers," see Frei 1996, pp. 163–166; Buchstab 1999.

[34] Malz to Becker, 2 Aug. 1949; PAAA, NL Becker, vol. 13/2; Kranzbühler to Schmoller 15 Aug. 1949; PAAA, NL Becker, vol. 14.

been unjustly depicted as "the embodiment of the extermination program" by a "not necessarily pleasant clique of generals" and their own defenders.[35]

When Ohlendorf's lawyer, Heinrich Malz, himself a former staff advisor to RSHA chief Ernst Kaltenbrunner, voiced concerns in the summer of 1949 that the general amnesty efforts might lose sight of his own client's plight, Becker sought to allay his fears. He told the story of a conversation with students in Freiburg that had made him realize how difficult it was to elicit understanding for the "tragedy of the Ohlendorf case." But he urged that patience and persistence might lead to a solution even in Ohlendorff's case, because,

> Nuremberg is a fortress that first must be slowly shelled until it is ready for the storming, and attacked at the points that are already the weakest… You must view the Einsatzgruppen trials in connection with the larger happenings around Nuremberg, in much the same way that Hitler viewed the Polish question in 1938. The key in all these things lies in staying power, basically in not losing sight of the cause.[36]

If his aim was to help Ohlendorf's case, Becker was sorely mistaken. Although McCloy responded to German pressure by reviewing all verdicts, he confirmed, in January 1951, the death sentences against Einsatzgruppen commanders, even as he granted amnesty to Krupp and a dozen other industrialists, doctors, and Nazi functionaries.[37] McCloy justified his decision to German President Heuss as follows: "There are some crimes the extent and enormity of which belie the concept of decency… I do not feel that the German people can possibly associate the interests of such criminals with their own."[38]

We should note that Ohlendorf's most persistent lobbyists went on to remarkable careers. Malz made his way up to managing director of the German civil servants' union, while Becker—son of the once highly regarded Prussian Culture Minister Heinrich Becker—became one of the best-known reformers of the German university system, serving as in-house counsel to the Frankfurt Institute for Social Research and, finally, as the director of the Max Planck Institute for Education Studies.

Most of the members of the Heidelberg circle agreed fundamentally that the use of international law against German defendants in itself constituted a serious violation of international law. Committed as they were to the larger political goal of a rapid termination of the war crimes trials, the attorneys discovered CCL 10 was a useful instrument in their effort to "shell the fortress until it can be stormed." Even before the campaign against Allied "victor's justice" gained momentum in the late 1940s and early 1950s, their argument against the ex-post-facto character of CCL 10 became the dominant leitmotif in a German discourse that emphasized the sanctity of the German *Rechtsstaat* ("rule of law") while ignoring the necessity of finding an effective legal response to the challenges of genocide, deportation,

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35 Becker to Blankenhorn, 23 Dec. 1950; PAAA, NL Becker, vol. 16/1.

36 Becker to Malz, 5 Aug. 1949; PAAA, NL Becker, vol. 13/2.

37 See Wiesen 2001, p. 202.

38 Cited in Frei 2006b, p. 214.

and slave labor.[39] For observers without specific knowledge of legal matters, this debate among experts on CCL 10's legality must have created the impression that the German state and its national penal code were under grave threat, not from the continuation or revival of Nazi ideas, but above all from Allied law.[40] While Nuremberg law was rejected with the argument that it could not be made to conform to German legal tradition, it was also avowed that a number of the prisoners held by the Allies could and should be turned over to German courts. The underlying assumption, that the German justice system could handle prosecutions of Nazi crimes without need for international law, was based on two premises. First was the belief that Nazi mass crimes could be adequately covered by customary laws against homicide, including those in effect under the Third Reich; this meant judging criminal acts under the standards of law applicable at the time of their commission, and also allowing for extenuating circumstances (or grounds for harsher treatment) as specified under these laws. Second was the assumption that almost none of the many direct perpetrators had developed any form of personal initiative in carrying out the crimes, but that all had acted on the basis of an "extermination order" issued by Hitler, Himmler, and Heydrich.[41] At least implicitly, the demand to overturn CCL 10 was tied to a historical understanding of the Germans as a "people of abettors" who committed crimes in part because of outside pressure and in part because they had been unaware of the genocidal "master plan." Further, the widespread notion that the Germans themselves had suffered from Nazi rule more than anyone else was taken as a general extenuating circumstance with regard to *mens rea* or subjective intent.

7.3 Using Criminal Law to "Master the Past"?

The years immediately following the founding of the two German states in 1949 were characterized by the "let's get over it" attitude. After the Christian Democrats (CDU) under Konrad Adenauer resoundingly won the first *Bundestag* elections, nearly all West German parliamentarians gave priority to the goal of eliminating the supposed excesses of what they called the "Nuremberg System." Only the Communists remained staunch advocates of "Nuremberg," in line with the Ulbricht regime in East Berlin. The Allies withdrew their authorization for CCL 10 in 1951 at the request of the new German government. By then, this was of little practical significance, since the newly founded *Bundesgerichtshof* had in 1950 already ruled against application of CCL 10.[42] As government and bureaucracy

[39] See Pendas 2002, pp. 23–41.

[40] A resolution by the German Society for International Law led by former diplomat and international law scholar Paul Barandon claims the Allies violated the principles of the Geneva Convention by forcing German defendants to submit to special law.

[41] See Werle 1992, pp. 2529–2535.

[42] See Werle 2008, pp. 97–126.

reintegrated tens of thousands of de-nazified civil servants, including more than a few former members of the Gestapo and Waffen-SS,[43] and as more and more prisoners of the Allies were released, West German prosecutors felt little impulse to pursue further investigations against German suspects. The number of investigations and convictions in West Germany both sank steadily after 1949, dropping to almost none by the mid-1950s.

The unwinding of "Nuremberg" essentially concluded in May 1958 with the early release of the last three Einsatzgruppen leaders; the same period, however, saw an increasing political and social involvement of the Federal Republic in international affairs. In the early 1950s it had still been impossible to speak of German integration in the Western community, let alone moral rehabilitation, as the consequences of the catastrophic war of expansion and destruction were still visible everywhere in Europe. But the commitment to peace and freedom as set forth in the Basic Law, entry into the political and military alliances of the West and joining the European Convention on Human Rights (ECHR) seemed to assure the country's renewed conformity with universal standards of human and civil rights. That the German government was now also seeking to gain a foothold in the international discourse on human rights, however, did not sit comfortably with the culture of impunity maintained in the treatment of Nazi crimes. The continuing defensive posture against "Nuremberg" meant that the Federal Republic joined the ECHR with the curious stipulation that it not actually be required to apply the "Nuremberg principles" insofar as these were included in the ECHR.[44] While efforts to avoid conferring even the most implicit recognition on Nuremberg law were carried to a positively embarrassing degree, West Germany in 1954 became one of the first states to follow Lemkin's appeal and transform the UN Genocide Convention into national law.

West Germany's entry into the Convention and definition of genocide as a crime under its domestic law actually came at the initiative of the Heidelberg circle working in tandem with several Bundestag members and representatives of German refugee organizations. Their plan was, however, to initiate prosecutions of crimes related to the Soviet-ordered expulsion in 1945 of German populations from the easternmost territories of the pre-war German Reich and of ethnic Germans from Czechoslovakia and other areas. The Foreign Ministry, the Federal Justice Ministry and Adenauer's international law adviser, Professor Erich Kaufmann, all favored an unconditional adoption of the treaty. By acknowledging National Socialist genocide, they hoped to create a tool for possibly intervening against alleged crimes of genocide in the Communist countries of Eastern Europe, as the West German government held that such crimes had been committed or were still in progress there.[45] In the course of passing the legislation, the government

[43] Garner 1995, pp. 25–80.

[44] See Werle 2008, p. 103.

[45] Sanne to Mosler, 20 February 1952; Memorandum Schwarz-Liebermann v. Wahlendorf to Riesser, 21 April 1952; PAAA, B 80, vol. 202.

formed close contacts with Lemkin, who was looking for additional states willing to ratify the Convention. Lemkin saw a potential alliance stemming from the very fact that West Germany had put up a strong front *against* "Nuremberg." During a visit to the United States in the spring of 1954, Eugen Gerstenmaier (CDU), the chair of the Bundestag's committee on foreign affairs, asked Lemkin to submit a memorandum on the Federal Justice Ministry's draft of the law. A few months earlier, Lemkin had alerted Adenauer and Federal Justice Minister Thomas Dehler (FDP, i.e., liberal party) to the fact that the English original of the UN Genocide Convention had been given a faulty and imprecise translation into German. The original's "destruction" was rendered in the German draft first as "*Ausrottung*" (extermination), then as "*Vernichtung*" (annihilation or elimination), in place of the most literal German word, "*Zerstörung*." This gave rise to two concerns. He considered it dangerous for Germany to adopt terms that had played an "outstanding role" in the IMT verdict, as this ran the risk of supporting Nuremberg jurists' plans to disseminate and generalize their principles. Furthermore, a narrowing of the legal text to "physical harms" would depart from the spirit of the Convention and be counterproductive to German hopes of achieving culpability for "psychological suffering," such as that caused by the massive expulsions of German populations from areas of the Eastern bloc.[46] Lemkin reiterated his criticisms of the suspect terminology to the CDU parliamentary deputy Eduard Wahl, who was the formal head of the Heidelberg circle as well as a rapporteur to the Bundestag foreign affairs committee. Lemkin wrote:

> As the author of the Genocide Convention, I can assure you, Herr Professor, that I introduced the term "destruction" (without adjective) expressly for the purpose of emphasizing the disadvantagement of the sociological fabric of a group as such. In light of the history and sociology, the destruction of a national, religious, racial or ethnical group is possible even if the members of the group do not disappear. By contrast the terms of the "Nuremberg law" are of an exclusively physical nature, operating with "extermination and elimination." The four groups of the Genocide Convention are unknown to [the Nuremberg] Charter. This is why the Genocide Convention also contains terms that are independent of physical injuries, like "serious mental harm." Now I am very concerned that this exact term, which is illustrated by the suffering of 11 million expelled Germans, is missing from the German draft legislation.

He appealed to Wahl to use his experiences in the "fight for right" to block the efforts of a group of jurists "known all too well" to him who wished to "smuggle 'Nuremberg Law' into 'International Law' via the back door of the United Nations."[47]

Although Lemkin's concerns were taken quite seriously in Bonn (he received the Federal Cross of Merit in 1955 for his service in the proscription of genocide), the German genocide paragraph achieved no practical meaning in the jurisprudence of

[46] Raphael Lemkin to Thomas Dehler, 4 May 1954; New York Public Library, Lemkin Papers, Reel 1.

[47] Raphael Lemkin to Eduard Wahl, 4 May 1954; New York Public Library, Lemkin Papers, Reel 1; cf. Mouralis 2013.

macrocriminality. Because ex-post-facto punishment was ruled out by Article 103 of the Basic Law, the statute could not be applied to Nazi crimes or to the Soviet-bloc expulsion of Germans in 1945. However, this did not put an end to the question of judicial punishment for Nazi crimes. After Adenauer's trip to Moscow in September 1955 led to the release of almost 10,000 German POWs—among them a number of major Nazi perpetrators—the matter resurfaced and became one of most controversial issues in public debate. The October 1958 creation in Ludwigsburg of the National Central Office for coordinating Nazi crime investigations among the various state prosecutors was a turning point. As conceived by the state ministers of justice, Ludwigsburg was charged with the systematic investigation of crimes perpetrated in the context of the Holocaust.[48] Until the mid-1960s, prosecutors focused on crimes committed in concentration camps and the so-called *Judenaktionen* in the German-occupied "eastern territories." Shortly after the creation of the agency, the number of investigations skyrocketed. Already in the first year of its existence, Ludwigsburg prosecutors opened 400 new cases. By the mid-1960s that number rose to over 6,000.[49]

The period between 1960 and the late 1970s was shaped by a series of spectacular Nazi trials that gained national and international media attention. The fact that these trials could take place more than 20 years after the war was in itself remarkable, because it indicated increased awareness for the singularity of Holocaust crimes in contrast to "normal" war crimes—a distinction Germans had still denied at the time of the Nuremberg trial. The balance of this second phase of judicial *Aufarbeitung* was on the meager side, however. By 1989 there had been little more than 1,500 convictions, in addition to the nearly 5,000 that German courts had delivered during the Allied occupation. The pronounced decline in conviction rates after 1949, as well as the generally mild sentences, followed partly from the weakening and abolition of CCL 10. Early prognoses that the German criminal law as a whole was unsuited to the prosecution of macro criminality proved to be correct. On the other hand, these public deficits of the home-grown strategy also contributed to the decline, albeit not the disappearance, of the earlier apologetics and calls for amnesty. Because of the difficulties and the unwillingness of the justice system to facilitate just punishment even of the most severe crimes against humanity, the early 1960s saw the rise of a broad public discourse on the causes, forms and extent of National Socialist crime, which has not died down to this day. It was characteristic of the late-coming *Aufarbeitung* in the Federal Republic that while its decisive impulse came from the attempt to get away from "Nuremberg," its legalistic forms and methods nevertheless sought to imitate the Allied model. In the first place, an indirect reference to "Nuremberg" can be discovered in a highly selective prosecutorial strategy which highlighted certain forms of political violence while fading out others. A further paradox of the West German reaction to Nuremberg may be seen in the fact that today, the IMT and the American

[48] Weinke 2008.

[49] Rückerl 1979, pp. 125–129; Rückerl 1984; Haberer 2005, pp. 487–519.

follow-up trials are considered milestones in the confrontation with the Holocaust, although at the time even their intent to serve historical enlightenment had been widely rejected.

7.4 Conclusions and Questions

The above overview raises the question of whether we should think of the societal experiment of transitional justice in occupied western Germany and the Federal Republic as a political and educational failure. If that is the case, the transformation to a stable democracy and the renunciation of the victim mythology of the postwar years becomes all the more puzzling. Or does the German case confirm Shklar's thesis that legalism and its inherent "elements of a *status quo*" were in fact the most appropriate means of persuading the conservative German functional elites of the advantages and strengths of the liberal constitutional model?[50] Can we find causal connections here between the half-hearted transitional justice of the postwar era and the gradual subsequent internalization of principles and norms of rule of law, as the legal historian Devin O. Pendas recently postulated?[51]

The big picture view and general categorization of the German case at present is made difficult above all by the strong parcelization of the discourse. Central research issues of transitional justice, like a change in elites, criminal justice practices, historical research and memory culture are as a rule each treated separately from one another. We may assume with some confidence, however, that the many interdependencies and cross-currents *between* these various realms are precisely what created the particulars of the German developmental path. Furthermore, there is a decoupling of Allied transitional justice—*Aufarbeitung* "from outside"—from the Federal Republic's own efforts at self-investigation after the occupation period, the home-grown *Aufarbeitung*. Tendencies to view the two developmental processes as separate units in turn support the preference for specific narratives and terms. Thus the current academic debate on the model character of the German "overcoming of the past" makes do almost entirely without mentioning the Nuremberg process that preceded it.[52] This blind spot is paradoxical, insofar as the perceptual horizon of the West German actors was so obviously affected by "Nuremberg." Both the protagonists of *Aufarbeitung*, of whom the Frankfurt attorney general Fritz Bauer is exemplary, as well its antagonists, including people like Heydrich's former deputy Werner Best, oriented themselves directly or indirectly to the Nuremberg process as a foundational event. Every consideration of the issue must therefore take into account that the phenomenon of transitional justice had its origins in Germany—but the true starting point of such efforts should be placed

[50] Shklar 1964, p. 189.

[51] Pendas 2011, (http://www.allacademic.com//meta/p_mla_apa_research_citation/3/1/1/4/6/pages311462/p311462-1.php).

[52] See the articles in Hammerstein et al. 2009.

more at the end of the First rather than the Second World War. As a constant in political semantics, it has shaped the thinking and the emotions of several generations down to this day.

The US legal scholar David Cohen recently asked how the public memory of the Allied postwar trials differs in German and Japanese societies. Cohen is of the view that the Allied prosecutions are still very current in Japan as an experience of national discrimination and humiliation, while the crimes committed by the Japanese in the Second World War have largely fallen prey to amnesia. In Germany, Cohen argues, the reverse applies: "Here the war crimes seem to remain in memory, while the thousands of trials to prosecute them by the Allies have been forgotten."[53] This observation is true insofar as the increased willingness to deal with the German war of destruction and its ideological underpinnings really does seem to have been related to the decline of "Nuremberg" as a rallying point for national self-definition and apologetics. Of significance to the gradual loss of "Nuremberg" as former rallying point of German memory is that the public evocations of the concept in the 1970s and 1980s came almost entirely from the fringes of the political spectrum. By contrast, the new NS trials initiated out of Ludwigsburg were treated in (mainstream) published opinion mostly as leitmotifs of the "rule of law," the "pedagogy of morals," and "historical-political education." This indicates that from the German perspective, it makes a difference right up to the present whether the former victors or the national justice agencies are the ones dealing with German crimes. In retrospect, the impression becomes unavoidable that the founding of the Central Office in Ludwigsburg was a key event in causing the negative recollections of the supposedly unjust Allied prosecutions and the "exaggerated" reeducation measures to fade. There apparently followed a gradual erosion of the mental barriers that until then had prevented a closer confrontation with the facts of the Nazi regime's mass crimes. To an extent, the above-average German engagement for the ICC can be understood as an attempt to overcome the domestic difficulties with the Nuremberg legacy by supporting on the international level the most neutral possible authority for the pacification of future conflicts.

At a distance of 65 years, the history following "Nuremberg" appears as a thoroughly contradictory process in which skepticism and defensiveness, appropriation and a readiness to learn are all inextricably woven together. But what were the prerequisites for such a societal confrontation to get going in the first place and to allow controversial discussion over "Nuremberg" and humanitarian international law? A decisive point surely was that the Allies in conducting the trials did not aim solely at symbolic reckonings and expiations, but made a broad effort to express a universal need for historical justice and morality, one that in the end most Germans desired and could join. This allowed the West German elites in a first phase to continue *Aufarbeitung* by criminal justice as a national undertaking, and in a second phase (analogous to the remembrance of the Holocaust) to universalize it.[54] This development was further facilitated by the

[53] Cohen 2003, pp. 51–66, at 52.

[54] See Eckel and Moisel 2008, pp. 333–353.

Allied approach, which politically and culturally resonated with the ongoing Westernization and heightened receptivity to legalistic strategies. As the Federal Republic increasingly came to understand itself as a part of a hegemonial “Western community of values,” so, too, could “Nuremberg,” after several decades, find its place in the country’s own history and its use as a positive tradition. Given the context of recent trends in national and international memory cultures, which point to a growing decontextualization of historical processes, contemporary historians are faced with the task of reminding that this result was not the product of a linear process.

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Chapter 8
Poor Little Belgium? Belgian Trials of German War Criminals, 1944–1951

Pieter Lagrou

Contents

8.1 Culprits and Convicts

In October 1945, Walter Ganshof van der Meersch, *auditeur général* or leading magistrate of the Belgian military tribunal, wrote in one of his extremely instructive quarterly reports the following:

> According to the forecasts—inevitably approximate—the total number of persons condemned to death for offenses against the security of the State, whose sentence will be executed, will reach a number varying from 2000 to 2500.

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This number is not relatively high if one takes into account the following elements:
1. The number of political prisoners who died in deportation is approximately 38,000 Belgians, of whom 28,000 are Belgian Jews.
2. In Breendonk, 750 patriots have been killed and 120 bodies have been unearthed at the National Shooting Range
3. The victims of bombing and V.I. in 1943, 1944, and 1945 add up to 19,750 (of which 1,616 in 1943, 13,066 in 1944 and 4,888 in 1945)
4. More than 8,000 Belgian civilians died in 1940 in Belgium and France
5. In 1940, 7,500 to 8,000 Belgian soldiers have been killed by the enemy.[1]

The quarterly reports were destined for the minister of Justice; they were official policy documents in which the head of the military tribunal went to great lengths to explain, justify, and defend his course of action. The announcement, in October 1945—that is, well after the heated moments of the liberation in September 1944 and the liberation and repatriation in May 1945—of the official intention to put to death 2,000–2,500 individuals might appear shocking. It not only represents the tenfold number of executions actually carried out in the next 5 years (242), but this statement of intent materializes in a report whose general tone is one of moderation and control of a purge process that appeared to spill out of control in the course of the spring and early summer of 1945. Ganshof van der Meersch prided himself on the fact that, one year after the liberation and a mere five months after the end of the war, 120,000 out of 400,000 cases had been dismissed (*ordonnances de non-lieu ou décision de sans suite*) and that the situation of the irregular detention of suspects had almost been brought under control (fewer than 15,000 individuals were still *mis à la disposition de M. le Ministre de la Justice*, meaning interned without being formally charged for any offense, compared to almost 25,000 three months earlier, while the number of inculpated prisoners awaiting their trial had decreased to 23,500).

More interesting still is the explicit justification of this policy statement and the hierarchy of capital offenses it established. Death in deportation ranked on top, with the explicit mention that this concerned in the vast majority *israélites belges* (almost exclusively Belgian residents of foreign nationality) followed by patriots executed in the country, bombing victims (of which an unmentioned 9,000, or almost half, were casualties of allied bombs) and casualties, both military and civilian, of the invasion in May 1940. The overall indictment justifying the fact that this time death sentences had to be carried out, and carried out in great number, despite Belgium's routine conversion, since 1863, of death sentences into sentences of life in prison, was an indictment of German aggression and German persecution. The collaboration of Belgian nationals in this aggression and in these criminal policies went unmentioned in this excerpt and one could thus reasonably expect that the vast majority of the capital punishment would be meted out to German convicts.

Ultimately, 242 death sentences would be carried out between November 1944 and August 1950. The total number of death sentences pronounced (2,940)

[1] Rapport Justice Militaire du 1 juin au 1 octobre 1945, Auditorat Général. Notes générales concernant l'activité de la justice militaire, 1945–1947, (8 rapp.) CEGES, AA326.

surpassed even Ganshof van der Meersch's prediction in October 1945. The number of 242 was symbolically related to the number of hostages executed by Alexander von Falkenhausen, head of the German *Militärverwaltung* in Belgium, again an entirely German frame of reference. Yet only two of the 242 were German nationals: Philip Schmidt, commander of the internment camp Breendonk, who was the last to be executed, in August 1950, and Walter Obler, Kapo in Breendonk—that is a German Jewish inmate—in April 1947. Von Falkenhausen himself walked free three weeks after his trial in March 1951, after a considerable legal argument on the status of hostage taking in international law, in which the court conceded the lawfulness of at least part of the general's decisions.

Nor were completed death penalties an exception, compared to the overall picture of investigations, trials, and sentences. Less than 1 % of the cases investigated by the military judiciary related to offenses committed in Belgium during World War II concerned German nationals. Belgian authorities, and more specifically its War Crimes Commission, communicated the names and profiles of 4,436 individuals to the United Nations War Crimes Commission (2,481 accused, 1,193 suspects, and 762 witnesses).[2] Of these, the military justice system examined 3,455 cases.[3] Prior to March 1948, when the allied authorities ceased all extraditions, 523 individuals were transferred to Belgium and at least briefly detained.[4]

Of these, only 314 individuals were extradited as suspects, the remaining 219 appeared as witnesses.[5] As we will detail below, in the ongoing research project on which this article is based, we have so far identified 103 individuals who effectively stood trial, in a total of 37 cases (the largest of which judged 21 suspects).[6] By 1951, only eleven German convicts remained in Belgian prisons.

8.2 Second Offender

The precedent to our story of the judgment of German war criminals in Belgium after 1944, namely the attempts after 1918 to bring German war criminals to trial, was not a fortunate one. As Alan Kramer and John Horne brilliantly demonstrate, the "German atrocities" and their afterlife played a very prominent role in perceptions of the fate of Belgium during World War I, both at home and abroad.[7]

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[2] Commission d'Enquête 1948, pp. 14–16.

[3] Gilissen 1951, pp. 513–628.

[4] Commission d'Enquête 1948.

[5] Ibid.

[6] The collective research was conducted in the third- and fourth-year seminar of the students in contemporary history at the Université Libre de Bruxelles in 2003–2005. An earlier version of this article appeared in German: Lagrou 2006, pp. 326–350.

[7] Horne and Kramer 2001.

However, the volume and detail of the various reports published by the *Commissions d'Enquête* during and after the war were in stark contrast to the complete failure to act upon the recommendations of these enquiries, to apprehend, judge, and punish the culprits.

Part of the story is well known. The Belgian authorities first drew up a list of 1,132 individuals accused of war crimes, whose extradition it sought in order to organize their trial in Belgium. Under repeated Allied pressure, this list was reduced first to 1,058, then to 632 and finally to 334 names, but, faced with the outright hostility of the vanquished Germans, the Allies failed to send rogatory commissions and capture commissions to Germany.[8] By February 1920, the Allies had abandoned the idea to obtain extraditions altogether and accepted the principle that the German authorities themselves would judge the cases brought to their attention by foreign powers at the Leipzig High Court. The Belgian authorities presented in the first instance fifteen cases related to crimes committed during the invasion in Aerschot and Andenne, atrocities committed against children during the occupation, and the mistreatment of prisoners. The German General Prosecutor sent five rogatory commissions to Belgium, but only to dismiss the charges and provoke the solitary and indignant withdrawal of Belgium and France from the proceedings at Leipzig.

Less known are the trials effectively organized by the Belgian judiciary. In the absence of in-depth historical research on the issue, sparse evidence suggests the following elements. Fourteen individuals were arrested in Germany and put to trial in Belgium for crimes committed during the occupation of the latter, particularly in the French and Belgian occupation zones.[9] Accused of common law crimes, such as theft, arson, and murder, they were referred to ordinary jurisdictions—notably the *Cour d'Assises* for the murder cases. The Versailles Treaty radically changed the situation. Instead of the amnesty habitually assorted with a peace treaty, the Treaty contains several articles establishing German responsibility for the conflict. More specifically, Articles 228–230 assert the principle of extradition of the accused, in order to be judged by national military tribunals. As a result, firstly, the capture of German suspects by Allied authorities, rather than a formal request for extradition to the German authorities, became illegal as soon as the capturing nations had ratified the Treaty. Second, ordinary jurisdictions were no longer legally competent to judge the accused, since the Treaty attributed exclusive competence to military tribunals. However, the Belgian Military Penal Code of 1890 does not extend the legal competence of the military justice to judging foreign nationals and, in spite of a proposal for legal reform of the code by the later head of the Belgian Supreme Court, Vicomte van Iseghem, the Belgian legislator failed to act on his recommendations. After the German refusal to extradite suspects, the matter did appear academic indeed. However, had parliament reformed the code to define war crimes and enlarge the legal competence of

[8] Ibid., pp. 326–355 and Wolf 1946.

[9] Wolf 1946, p. 3.

military justice, it would have avoided the central problem of retroactive legislation the Belgian legislator faced in 1945.

In the meantime, only those proceedings initiated by ordinary jurisdictions before the ratification could be brought to court. *Faute de mieux.* Belgium then engaged in a process of judgments *in absentia*, resulting by 1937, in a total of 333 cases of the final Belgian list, including 22 dismissals, 28 death sentences, and two life sentences of forced labor.[10] Almost all the cases were related to crimes and offenses committed in 1914. The sentences and the list of suspects, which the Belgian authorities maintained in spite of repeated German protests, were mainly a diplomatic nuisance and a legal basis to refuse visas to the individuals concerned. Other marginal cases continued to create legal and diplomatic controversy, notably the case of the illegal extradition by the United States to Belgium of the German citizen Hermann, accused of theft; the case Walther Dryver, accused of the murder of a British soldier in Ville-sur-Hanaine in 1918 and extradited to Britain; or the case of German citizens from Alsace-Lorraine, arrested for murder by the Belgian authorities and extradited to France in application of the Versailles Treaty (which effectively changed the nationality of the suspects).

In short, compared to the impetus created by the successive commissions of inquiry, the publicity, and diplomatic wrangling over German war crimes committed during the First World War, the judicial proceedings produced a major frustration. Paradoxically, the Versailles Treaty, while formally establishing German guilt, it prevented national jurisdictions from putting German offenders to trial. Yet the postwar international framework was certainly not the only one to blame. In spite of a substantial investment in matters pertaining to international law and the prevention of war crimes by Belgian legal theorists, for instance in the *Revue de Droit Pénal et de Criminologie* and the *Journal des Tribunaux* and in spite of concrete proposals for new legislation that would have prepared the national judicial system for a future conflict, no action was undertaken. At the time of the second German invasion, in May 1940, the country was no better armed to deal with war crimes and to bring offenders to court than a quarter century earlier.

8.3 Belated Legislative Ambitions

Among the most controversial pieces of legislation passed by the Belgian government in exile in London are a number of "arrêtés-lois," laws enforced under the special legislative powers bequeathed to the government in time of war, are its revision of the legal categories of offenses, the procedures and sanctions dealing with treason. Larger definitions, swifter procedures and more severe penalties were designed to have both a dissuasive effect and to allow for the efficient and thorough judgment of crimes and offenses perpetrated on such a scale as

[10] Ibid.

to threaten the cohesion of the Nation and the reconstruction of the rule of law. Crucially, because of the circumstances of war, civilians accused of treason, of having constituted "a menace to the security of the State," were to be exclusively referred to military courts and risked the death penalty.

Even though the Belgian government figured among the signatories of the Saint James Agreement in June 1941, whereby the Allied nations solemnly affirmed their commitment to bring the perpetrators of Nazi crimes to justice, and later participated in the United Nations War Crimes Commission (including in its technical sub-commissions dealing with matters such as legislation, extradition, and arrests), no comprehensive legislative initiative was taken that would have updated the legal apparatus dealing with war crimes the same way as was achieved for national treason—"incivisme" or collaboration by Belgian nationals. Clearly, dealing with the accomplices was awarded a much higher priority than dealing with those carrying the main responsibility for the crimes committed. An executive law-order of 3 August 1943 extended legal competence to Belgian jurisdictions for crimes committed abroad against Belgian citizens, without, however, solving the central problem of which jurisdictions would be competent, nor on which legal basis—ordinary national penal code, military penal code, international law.

In December 1944—three months after the liberation of the country—the government created a *Commission d'Enquête sur la violation des règles du droit des gens et des lois et coutumes de la guerre* (Commission of Inquiry into the rules of international law and the rules and regulations of war). Regardless of the scale of the atrocities committed and the number of victims, the political urgency seemed much less pressing than had been the case in the wake of August 1914. Belgian involvement in and presence at the International Military Tribunal in Nuremberg was weak. The country was represented by France and, unlike the Netherlands, whose fate under German occupation was prominently present at the trial in the person of Arthur Seyss-Inquart, none of the 24 accused (or of the 21 who effectively stood trial) had been directly involved with the occupation of Belgium.

The Commission of Inquiry faced a double task: on the one hand informing national and world opinion on the scale of crimes committed by the German occupier in Belgium during the occupation, and, on the other hand, gathering incriminating evidence, identifying perpetrators, and preparing for the action of the judiciary. The first part of its task led to the publication of a series of reports, published mostly in 1947 and 1948, dealing with crimes committed during the invasion, the liberation, and the Battle of the Bulge, but also with antisemitic persecutions, the execution of hostages, and the deportation of workers. A number of these reports were also translated into English. Headed by Antoine Delfosse, former Minister of Justice in the London government, the commission realized a considerable work of investigation. However, its proceedings seem to have benefited from a lesser degree of public and international attention and from a weaker involvement of local and religious authorities than had been the case after 1914. Even though the comparison calls for a more detailed examination, it also seems that the data collection did not reach the same detail of incriminating evidence as its multi-tiered predecessors.

Part of the explanation is the sheer impact of the revelations during the Spring of 1945 of the crimes committed in Germany and occupied Poland and judged by both the International Military Tribunal at Nuremberg and by the national military courts of the main occupying powers of Germany and which largely overshadowed the "lesser crimes" committed in Belgium. Though many of the documented crimes were perfectly comparable to those committed during World War I—Vinkt and Meighem, for example, or Fôret-Trooz or Bande—others were of a totally new nature and reached an incommensurately superior scale, e.g., the deportation and killing of the 38,000 mentioned by Ganshof. Atrocities committed in Belgium had faded from the center stage of world opinion after 1914 to a mere side show after 1945, a rather unremarkable case on a long list of martyred nations. The emergence of an international justice system also placed the Belgian judiciary in an awkward position: it had to prove its decency and efficiency in a crowded arena and show its norms and procedures were up to international standards.

The comparison of early drafts of the reports in the archives with the published versions also suggests a change in tone. Direct and nominal incriminations were removed and the initial, vengeful tone and explicit calls for the punishment of the perpetrators were markedly toned down. There are several reasons for this. First of all, the investigation into war crimes ran on three tracks: the Commission, which had no formal judicial competence, the *Sûreté de l'État*, or security police, and the *Auditorat Général*, or military justice. It is only normal that the Commission separated its role of gathering historical and educational information from its role of preparing the judicial process; furthermore, it did not want to interfere with future court proceedings. A second reason pertains to the rapidly changing international climate. By March 1948, the Western Allies, the United States and Britain in particular, had publicly announced their cessation of the extradition of German citizens to stand trial in formerly occupied countries. The decision was motivated by Anglo-American unease with the extradition of German citizens to stand trial in Soviet bloc countries, where communist parties had taken firm control of the judiciary. However, they affected Western and Eastern European countries alike. The Allied program of war crime trials was also increasingly criticized by policy makers as incompatible with Western strategic interests and pressure was exerted to reduce the sentences and to halt the preparation of new charges. Less than three years after the end of the war, the Cold War cast its shadow over the judicial *Vergangenheitsbewältigung* and set new priorities, particularly as far as the German army was concerned. When the Commission toned down its claims to bring German culprits to justice, it was also simply because, by early 1948, they knew very well there was very little chance that this would actually happen, with the exception of the few hundred German citizens already in Belgian hands (actually, in the Saint Gilles prison). The third reason brings us back to the unresolved matter of appropriate legislation to judge German perpetrators of war crimes.

This time around, one could argue that the Belgian judiciary was unhindered by the specious dispositions of the Versailles Treaty and that it could truly pursue its initial project of 1918, to judge German offenders before ordinary jurisdictions. There was an almost instant consensus that this was not a feasible option.

Proceedings before a *Cour d'Assises* were extremely demanding and exactly the same arguments in favor of the exclusive attribution of the competence over treason cases by Belgian nationals to military courts applied here: a massive one-off operation demanding expeditious justice meted out through a centralized operation. Would the Belgian legislator offer procedural safeguards to German criminals it refused its own citizens? The case for a militarization of the judgment of German offenders was much stronger even than for their Belgian counterparts: while the latter were almost exclusively civilians, the majority of the former were military personnel. Only a military court could deal with the very particular challenge to determine individual responsibility in an organization based on discipline and the unquestioning execution of a superior's orders. The unresolved legal situation of German war criminals led to absurd situations, such as during the trial of the torture camp Breendonk: Belgian civilian camp personnel were tried in 1946 by a military court, while the German military commander of the camp, Schmitt, could only be tried by a civilian jurisdiction. It also led to pressing practical problems: as long as the matter of the legal competence was undecided, extradited German suspects could not formally be inculpated. Their detention and extradition were thus irregular. They were, in the vocabulary of the time "put at the disposal of the Minister of Justice," a fact their defense attorneys and support groups did not fail to publicize, including with the Allied authorities who carried legal responsibility for the extraditions.

The law of June 1947 was designed to solve these problems. It was also presented as a showpiece of legal craftsmanship, both setting new international standards and offering a legitimate source of pride for the Belgian Nation. Not only was it vastly superior to the arbitrary and lawless rule of the regime it sought to bring to justice, it was also juridically much sounder than the expeditious solutions of the French law, promulgated in Algiers in August 1944, which was based exclusively on internal French penal and military law, and it figured as a model and inspiration for the legislation adopted a few months later in the Netherlands and Luxemburg.

The Belgian legislature affirmed insistently that the new law was exclusively concerned with matters of procedure and jurisdiction—merely settling the legal competence of courts and organizing their proceedings in the application of existing legislation. The absence of retroactive legislation was a matter of legal pride and strict observance of the sacred principles of the rule of law. The basic innovation of the Belgian law was the principle of the double incrimination. In order to be considered as a war crime, an offense had to qualify both as a violation of the Belgian penal code and as a violation of international law and the rules and regulations of warfare. Legal competence was attributed to the regular military courts, following the same procedures and with the same composition as the regular trials of Belgian nationals accused of treason. Compared to earlier proposals by the minister of Justice and compared to an abortive proposal of 1945, the rights of the accused were singularly strengthened by the members of the parliamentary commissions. The right of appeal, suppressed by the minister, was reintroduced and the right to a defense lawyer was reaffirmed. Unlike the Netherlands, where the

accused were only entitled to a Dutch defense attorney, German war criminals had access to both German and Belgian attorneys.

The practical organization of the recourse to German defense attorneys created at first a serious obstacle, delaying the first and highly symbolical court case of the German war crimes against the civilian population in Stavelot.[11] The Belgian authorities had first formulated a request to the American occupation authorities seeking to procure a list of available German lawyers willing to travel to Belgium to defend their compatriots. The American authorities, based on their own experience, strongly dissuaded the Belgian government from appealing to German lawyers and refused to participate in their travel expenses or grant any other logistical assistance to this operation. In a second instance, the Belgian ministry of justice would find British Authorities ready to produce a list of lawyers from its occupation zone and travel arrangements would be made through the Belgian army stationed in the British zone. To assure their security, the lawyers would be housed in barracks of the local Gendarmerie. Finally in November 1948, the regional ministry of justice [*Landesministerium der Justiz*] of North Rhine-Westphalia agreed to finance the fees and expenses of the German lawyers defending compatriots standing trial for war crimes in Belgium. In the end, the Ministry of Justice calculated that the recourse to German lawyers was far less costly than the alternative, namely translators at the expense of the Belgian taxpayers.

The challenge created by this law for the military courts was formidable. The military justice apparatus had been increased over tenfold, from four chambers before 1940 to 134 by 1947, and the investigating magistrates from a few dozen to more than 600. This young and inexperienced workforce was faced with constant legal and judiciary innovation, since most of the charges were either unprecedented, or substantially modified by wartime legal amendments. In the absence of jurisprudence to fall back on, the central services of the military justice, the *Auditorat Général* produced a whole set of concrete instructions, circulars, statistics, a sort of do-it-yourself kit or "prêt-à-juger" for local magistrates in Ypres or Tournai, that is, in places where military justice had never before been established. These packages detailed which legal articles corresponded to which offense and which sentences were appropriate, offering, for example, fixed rates for SS volunteers, army nurses for the German Red Cross, denunciators, etc. In this context, the task to prove culpability—simultaneously before national and international law while faced with extremely assertive German lawyers and considerable pressure from their hierarchy to meet international standards of justice—was almost insurmountable.

The legal problems were manifold. The first difficulty was identifying a corpus of international conventions and jurisprudence allowing the establishment of the perpetrated act as a violation of generally accepted norms. The archives of the *Auditorat Général* show, through the abundance of international jurisprudence gathered and analyzed, that it took this task very serious. In this unprecedented work of legal analysis, one can see the emergence of an international form of justice,

[11] See Dussart 2005.

whereby the reference to foreign jurisprudence, be it the International Military Tribunal at Nuremberg, the consecutive Allied national military courts, the Dutch, Italian, or Luxembourg courts, becomes the central framework in which to formulate the line of conduct of national judges. Far from a triumphant and vindictive legal discourse, the tone is defensive and even, at times, hesitant. The criteria laid out in the law were extremely ambitious intellectually; the task was entirely without precedent and the prosecutor's staff initially ill-equipped to face it.

Some of the central problems concerned international law, which was and is not a coherent, consensual, and exhaustive corpus. Some of the central crimes were not codified as violations of international law, notably torture, which would only be mentioned in the Geneva Convention of 1949. Moreover, the sentences foreseen in the national penal code seemed utterly inappropriate in the case of the systematic torture by Gestapo agents, since the maximum penalty for *coups et blessures* (blows and injuries, Article 398–400 of the *Penal Code*) could only be doubled in the case of systematic repetition, in the absence of permanent disabilities, and the death sentence could only be pronounced in those cases where torture had caused the death of the victim. The sentence for torture, in short, was not substantially different from that for a brawl in a bar. The shooting of hostages was another notoriously difficult case. The American Military Tribunal paradoxically reasserted the legitimacy of this practice in the so-called "Hostage Case," condemning the Wehrmacht command in the Balkans, by judging the disproportionate nature of the retaliations or the absence of "solitary responsibility" between the authors of "terrorist attacks" and the victims of the retaliatory executions. In the *Fosse Ardeatine* case, the Italian judiciary reached a similar conclusion. Alexander von Falkenhausen's "moderation" in the choice and number of hostages appeared on the rebound all the more respectful.

A further complication was the defense attorneys' potential recourse to the notion of "superior order," which is much stronger in Belgian law and jurisprudence than was admitted in the Nuremberg Statute, for example. Only in cases of "flagrant violations" could an official, officer, or soldier be held accountable for the execution of an order; that is when it was beyond a possible doubt that the order constituted a transgression of fundamental norms of international law and humanity. In short, the defense could play on an almost unlimited legal armory in both Belgian penal law and international law, exploiting particularly the incompatibilities between both.

Appeals Courts and the Supreme Court frequently overturned decisions, notoriously so in invalidating the recourse to Article 118bis. This article, defining "treason" and "intelligence with the enemy," was a catch-all category that was almost systematically invoked as a legal basis to find guilty a great diversity of offenses committed by Belgian nationals and it would have served as a legal expedient in many of the war crimes cases, too. However, "treason" is defined as "a breach of duty of loyalty towards the State" and no enemy subject can be expected to show loyalty to the Belgian State.[12] The legal argument by which R. Hayoit de Termicourt,

[12] Cass. (2° Ch.)1948–1949.

first advocate general, invalidated the application of this article to enemy nationals in July 1949 was later cited as an exemplary case distinguishing the Belgian judiciary in the eyes of the international legal opinion.[13] Henceforth, only foreign nationals who had been Belgian residents before May 1940 could be held accountable under Article 118bis, estimating that, as residents, they had contracted a duty of loyalty.

8.4 The Judicial Process

As stated above, Belgium did obtain the extradition of 513 German citizens to stand trial for war crimes, either as suspects (314) or as witnesses (219). The first prisoners were delivered to Belgian prisons before the end of 1945, more than a year and a half before the Belgian legislature disposed of an adequate legislation to try them.[14] By August 1946, more than a hundred German nationals were thus in irregular detention since they had not been charged properly with a concrete offense, up from a dozen in December 1945. The peak in the total number of German war crimes related prisoners was reached in February 1948: 390 individuals. This was followed by a rapid decrease in the ensuing months: less than 300 by April and less than 200 by August of the same year. By September 1949, their number would again plunge under the bar of 100, to remain relatively stable until early 1951. One year later, though, only eleven German convicts remained in Belgian prisons and two had been executed.

The British authorities granted the vast majority of the extraditions to Belgium: 370 of a total of little over 500; the Americans extradited 92 and the French authorities about 50.[15] The evolution of the German prison population in Belgium was not primarily dictated by the speed of the court proceedings, however. The first extradited prisoners were released in April 1946, one year before the vote of the legislation allowing for the organization of the trials. By June 1947, when the law was voted, 56 extradited Germans had already been repatriated. The Belgian judiciary discovered a number of erroneous identifications, e.g., of individuals carrying the same name as a suspect without ever having been stationed in Belgium during the occupation, but more fundamentally, the prosecutor's office had to drop numerous cases because of a lack of evidence, or because the law did not permit sentences acceptable to the public or indeed to the Belgian penal system. The inherent difficulty of Belgian law, whereby exceptional crimes in exceptional times had to be requalified in terms of the regular penal code, was a major obstacle. Under Belgian law, the time spent in "preventive detention" was counted double and deducted from the final prison sentence. Since court proceedings had been

[13] Verhaegen 1985, pp. 1441–1452.

[14] See Dussart 2005.

[15] Ibid.

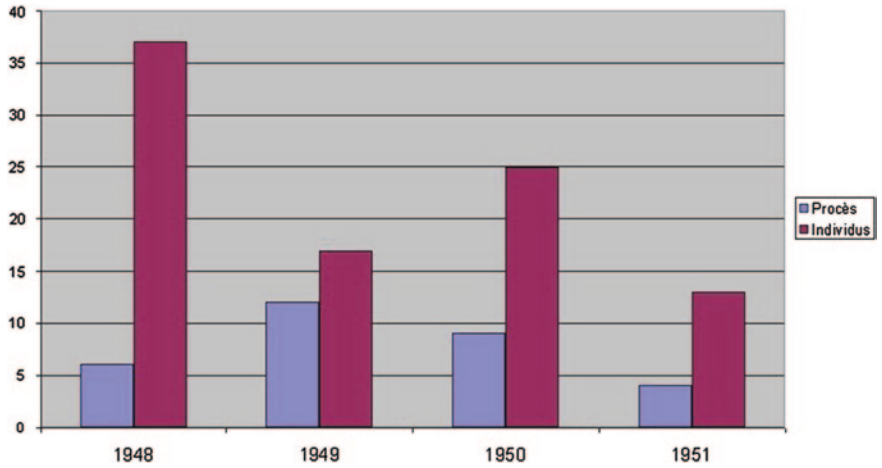

Fig. 8.1 War council by year[16]

delayed until the law was voted in June 1947 and only started in the course of 1948, the prosecutor's office was forced to cancel any case in which the maximum sentence for the charged offenses was less than 6 years. For any lesser sentence, the preventive detention would have represented more than half of the final prison sentence and the defendant could sue the Belgian State for indemnification for unwarranted detention. The Supreme Court decision to invalidate the recourse to Article 118bis, which foresaw the death sentence for high treason, deprived the prosecutors of one of their only strategies to avoid this dilemma.

Of the 370 individuals extradited by the British authorities, only 39 effectively stood trial in Belgium.[17] After having spent years claiming the extradition of suspects and witnesses, the Belgian authorities thus were faced with an opposite problem when trying to accelerate the repatriation of suspects against whom they had dropped the case. In July 1949, the American authorities suspended repatriations from Belgium to their occupation zone for four months, claiming adequate information on the motivation for their release and the nature of the dropped charges.[18] As a result, some individuals ended up spending up to three years in a Belgian prison and were released without ever being formally charged or put to trial.

A closer look at the trials organized in Belgium in the four years from 1948 to 1951 reveals the tremendous challenge these proceedings constituted to the Belgian judiciary (Fig. 8.1). In our research project, we have so far identified 34

[16] The statistical analysis and graphics were realized by Blairon, Mahillon, and Lefèvre. Blairon et al. 2005.

[17] Ibid.

[18] Ibid.

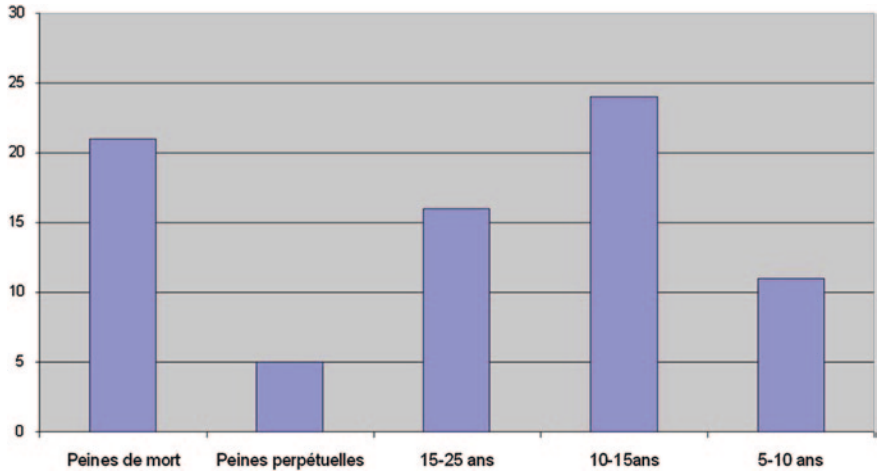

Fig. 8.2 Criminal sentences at the war councils[19]

court cases involving 103 individuals. In this stage, we cannot exclude that there were other, minor, trials involving Germans accused of war crimes, but new discoveries are unlikely to fundamentally modify the picture we can draw so far. The overwhelming majority of suspects, 83, were German nationals, 4 were Austrians, 3 Polish, one Romanian, one Luxemburger. Fourteen of the convicts were Belgian nationals whose crimes were innately related to war crimes by German suspects. The average age of the suspects at the time of their trial was 45—certainly not a profile of young recruits. The first year of court proceedings, 1948, also saw the highest number of individuals standing trial (37), especially in the collective trials of the Stavelot massacres and the SIPO Charleroi. In the course of 1949, twice as many trials [*procès*] concerned only half the number of individual cases [*individus*]. In 1950 and 1951, 25 and 12 individuals stood trial respectively, followed by a full stop of court proceedings and accelerated liberations.

The preliminary selection of cases, pursuing only those cases liable to result in serious condemnations, clearly shows in the sentences meted out. In our sample, only 8 of the accused were acquitted, while 7 others received minor sentences of less than five years.

The criminal sentences are represented in Fig. 8.2.

A majority (61 %) of those sentenced by the *Conseil de Guerre* (war council) appealed to the higher court, the Military Court (one-third of which were on the initiative of the prosecutor's office). Discounting those acquitted and those sentenced to light prison sentences by the war councils, resulting in instant liberation,

[19] The sentences are: death, life, 15–25 years, 10–15 years, and 5–10 years of prison. The lighter color bars are trials and the darker are the number of individuals affected—NdT.

this represents almost the totality of those condemned to the death penalty and those condemned to prison sentences beyond the double of their preventive detention. Since the average delay between the first instance and the appeal was short by 1952, all appeals were closed. In only one-third of the cases, the judges increased the sentence. A small minority resulted in acquittals, while the vast majority of appeals were to the benefit of the accused, with a reduction of their sentences. Of those who appealed for their first verdict, about half went on to the Supreme Court, a costly and, for the defense attorneys, extremely demanding procedure. In only three cases the appeal was denied and the case sent back to the Military Court for a re-trial, but the exceptional rate of recourse to the Supreme Court shows the extent and the determination of the German defense attorneys' support for the accused.

Beyond the process of judicial revision, individual measures of anticipated liberation and the commutation of death sentences to life sentences account for the very early liberation of the German war criminals. Part of the explanation is the peculiar chronology of these trials, which were organized after the first period of severe and expeditious justice of Belgian collaborators in the years 1944–1947. The military courts were at that time engaged in a process of massive revisions of earlier verdicts, with substantial reductions of sentences and acquittals. Moreover, by 1947, the Belgian judiciary returned to its peace time practices of converting death sentences into life sentences, as it had consistently done since 1863, and of liberating prisoners who had served one-third of their prison sentence with good behavior, as stipulated by the *Loi Lejeune* of 1888. The German war criminals thus benefited from a coordinated effort at moderation of the judicial process and at reduction of the prison population that was inspired by an earlier phase of severity which they had escaped because of the legal vacuum that existed until June 1947. In that respect, their case was not exceptional. However, the fact that in application of that law only one individual who had committed particularly heinous crimes in the torture camp Breendonk was executed and that by 1952 only 11 others remained in Belgian custody, cannot be explained by a mere return to routine procedures of clemency. Two additional factors undeniably played a role: political pressure by West German authorities, confirmed by numerous interventions with the Ministry of Foreign Affairs, and the enduring legacy of the sacrosanct principle of sovereignty, which set the judgment of foreign nationals clearly apart from the matter of a Nation judging its own citizens who had betrayed their country. These two aspects clearly deserve more research.

8.5 Major Trials

The first trial organized in Belgium on the basis of the law of June 1947 took place in Liège in June and July 1948.[20] Two officers and eight soldiers of the SS Division

[20] See Verschueren 2005.

Leibstandarte Adolf Hitler stood accused of a series of crimes committed in the Stavelot region in the Belgian Ardennes region during the von Rundstedt offensive, in which, between 18 and 20 December 1944, 60 men, 47 women, and 23 children were killed. The symbolic importance of this trial was obvious. In July 1946, an American military tribunal in Dachau had condemned soldiers and officers of the same unit for the central charge of the killing of a hundred American prisoners of war: 43 to death by hanging, 22 to life sentences, and another eight to lengthy prison sentences. The trial and the severity of the verdict stirred a huge controversy in the United States. The American defense attorney Everett, soon relayed by Senator McCarthy, accused the prosecutor's office of using torture to extract unfounded avowals and insinuated that Jewish judges on the trial had harbored an anti-German bias.

The Belgian Court's challenge was thus not only to repair the neglect of crimes against Belgian civilians by the American military court, but also, in the wake of the controversy, to show the capacity of the Belgian courts to respect the legal due process in the face of world opinion. This explains, for example, the postponement of the start of the trial to permit the presence of German defense lawyers, which was by itself a demonstration of legal superiority compared to the American military procedure. In any event, this unprecedented trial served first and foremost to show the scrupulousness of the Belgian judiciary, by paying attention to the arguments of the defense regarding the legal value of the "forced" confessions while in American custody and by recognizing part of the validity of the argument of superior order, all the more so since eight of the ten accused were rank-and-file soldiers, three of whom were not even eighteen years old at the time of their crimes. One of the ten was acquitted, while the others were sentenced to ten to fifteen years of forced labor. With the deduction of their preventive detention and the application of the Loi Lejeune, all had been liberated by April 1952. None of them appealed the verdict and the prosecutor's office, who had claimed much more severe sentences, was prevented from appealing to the higher court on order of the head of the Military Justice, with the argument that this court, on the basis of the available evidence, risked reducing the sentences even further.

One month later, in August 1948, the War Council of Mons reached its verdict in the trial that involved the highest number of individual suspects: eighteen members of the SIPO (*Sicherheitspolizei*, or security police) staff of Charleroi, an industrial town in the mining region of the Hainaut.[21] Between them, the Stavelot and SIPO Charleroi trials totaled one-third of the total number of German citizens tried for war crimes in Belgium. The SIPO Charleroi trial was a challenge of a different order: the precedent to be created here was the judgment of officers of the German police forces in the occupied country and their role in the repression of the resistance, political persecution, the systematic use of torture, execution, and deportation, none of which corresponded to traditional definitions of war crimes. Eight of the accused were sentenced to death and another four were sentenced to death in absentia—rather an exception in the Belgian trials. The remaining six were sentenced to life in

[21] See Gilbert 2005.

prison, forced labor, or shorter stays in prison (2 years in one case). In July 1949, the Supreme Court would invalidate the charge of high treason (Article 118bis), thereby annulling the precedent the trial aimed to establish and returning the case to the Military Court which could only pronounce much reduced sentences. Consecutive trials against SIPO officials in Antwerp, Dinant, Liège-Arlon, and Brussels and trials of the *Geheime Feldpolizei* (secret field police) in Liège, Ghent, and Brussels further highlighted the difficulty of qualifying charges of torture and deportation in terms of Belgian penal law and the quite distinct challenge of qualifying hostage shootings in terms on international law.

Undeterred by these hurdles, the Belgian judiciary even embarked on an ambitious course of action to test the limits of extraterritorial justice. In 1946 and 1948, the Belgian legislature had affirmed its legal authority to pursue the individuals who had committed crimes against Belgian nationals or nationals of the Allied nations while outside the national borders. A first trial in November 1948 sentenced Richard Winter, a camp guard in Missburg, to death. Two other trials held in 1950 involved crimes committed by six prison guards in Wolfenbüttel and another by the head of the Lagerunion in Dortmund. Clearly, the Belgian authorities expected to complete the judicial action of the major Allies by focusing on minor camps and prisons which had escaped the latter's attention. If the focus of these trials were Belgian victims, they included nonetheless charges of crimes committed against Russian, French, and Danish victims. The difficulty in qualifying cruel treatment or the inadequate provision of food and clothing under penal law are again manifest in these trials.[22] They also illustrate the strong resistance to the principle of extraterritoriality by the German defense lawyers. Interestingly enough, Ernst Köppelmann's lawyer, in the Lagerunion Dortmund case, succeeded in having the Danish citizen Hansen's charge of manslaughter invalidated, arguing quite rightly that at the time of the crime, Denmark was not an ally of Belgium![23] Obviously, with three trials of very minor camps and prisons and a grand total of eight accused, the Belgian judgment of crimes committed in Germany fell short of the ambitions affirmed by its legislature and by 1951, this part of the program, like all others, was no longer pursued.

To sum up, the prosecution of German war crimes in Belgium focused on primarily two types of crimes. First of all, there were "traditional war crimes," massacres of civilians as "collateral damage" of military engagement. This "collateral damage" concerned three short episodes: the invasion, particularly with the trial of the suspected perpetrators of the massacre of one hundred civilians in Vinkt and Meighem on 28 May; the liberation and the battle of the Bulge; and the Stavelot trial. The qualification of these crimes as violations of international law was straightforward; however, the identification of the perpetrators, who most often only passed through Belgium in a large scale military operation, proved very difficult. The second type involves the security and police apparatus of the German

[22] See Duelz 2005.

[23] Ibid., p. 21.

occupier. While the identification of these perpetrators was easier, since most officers remaining in their posts for several months or years, the qualification of their crimes as violations of international law was much more difficult and provoked detailed discussion of the legal or illegal character of the standing practice of *verschärfte Vernehmung* (enhanced interrogation techniques) and the major difficulty of inculpating torture when it had not provoked the death or permanent disability of its victims. Belgium did obtain the extradition of notorious Nazi criminals, such as Eduard Strauch, condemned by an American military tribunal for his role in the killing of 55,000 Jews in Belorussia, who finally died in a Belgian prison in 1956 for his role as a SIPO officer in the last months of the Belgian occupation, or Julius Lippert, former Oberbürgermeister of Berlin, found guilty of complicity to murder in his function as *Kreiscommandant* (district commander) in Arlon.[24] Still, most of the accused were "small fry," occupying subordinate positions or, at the most, leading positions at the regional level only. Moreover, in both types of criminality distinguished above, at issue was the transgression of certain rules and regulations, not the legality of the occupation regime itself.

The two major trials closing the series of war crimes trials in 1951 are an exception to the norm. The first was the case of Constantin Canaris, head of the SIPO-SD during the first two years of the occupation; the second, the so-called *procès des généraux*, brought to justice the heads of the *Militärverwaltung* itself: Alexander von Falkenhausen, Eggert Reeder, Bernhard von Clear, and Georg Bertram. Von Falkenhausen in particular came to symbolize many of the contradictions of the Belgian war crimes program, and beyond that, of Belgian-German relations in the 1940s–1960s.

8.6 Decent and Endearing Alexander von Falkenhausen

In September 1960, an inhabitant of the Belgian industrial town of Verviers was struck with incredulity upon reading the publication of the marriage announcements regularly posted on notice boards of the town hall, as stipulated in the matrimonial legislation.[25] The announcement concerned the wedding of Alexander von Falkenhausen, 82 years old, with Cécile Vent, 54 years old. There was more than the age difference that set both partners in this marriage apart.

Alexander von Falkenhausen (1878–1966) had pursued a remarkable career as a German officer. In 1900–1901, he served in the German expeditionary corps during the Boxer Rebellion in China, and he was later appointed military attaché in Japan in 1912.[26] During the First World War he was promoted chief of the General

[24] One year before his death, Lippert published his polemical memoirs under the title *Lächle und verbirg die Tränen: Erlebnisse und Bemerkungen eines deutschen "Kriegsverbrechers"* 1955.

[25] See the file of press clippings, CEGES, BD KD 2271.

[26] See Liang 1978.

Staff of the 7th Turkish Army and dispatched to the Caucasuses and Palestine. From 1934 to 1938, he was military advisor to Chiang Kai-Shek. Recalled by the German Army in July 1938, he was appointed military commander of Belgium and the North of France in May 1940 and stationed in Brussels. His involvement with the conspirators of 20 July 1944 led to his dismissal and arrest. He spent the last year of the war in the special quarters for prominent personalities in Buchenwald and Dachau, where he would have earned the sympathy and respect of former French prime minister Léon Blum, who would intervene in his favor after the war.

Held in custody by the British, and later the American Army, he was extradited to Belgium in 1948. The American offer to extradite von Falkenhausen took the Belgian judiciary somewhat by surprise. Early 1948, in the prosecutor's office, there was no clear case made against the general and, by proxy, of the *Militärverwaltung* as such. In the 2 years between his extradition and the trial, the preparation of his case was the object of considerable pressure. In his own memoirs, von Falkenhausen mentions that his lawyers announced to him early 1949 that the case would be dropped and the suspects released. However, the trial did finally begin on 25 September 1950 and ended, after 61 sessions, on 9 March 1951. Von Falkenhausen and Reeder were condemned to 12 years of forced labor, Bertram to 10 years of the same, and von Clear was acquitted. Complicity in the arrest and deportation of Jews, the organization of forced labor, the hunt for labor draft dodgers and the execution of hostages were the charges against the first two. The proceedings were characterized by the courteous and respectful treatment of the accused by their judges, who, at times, were intimidated by the high-profile defense lawyers. The prosecutor was quoted saying to one of the latter: "Naturellement, maître, je ne suis qu'un petit magistrat de province." (Naturally, sir, I am only a little provincial magistrate.)[27] Considerable legal argument and a disproportionate share of the total time was devoted to the question of the shooting of hostages. Faced with recent jurisprudence in the case of the American "hostage case" against the German high command in the Balkans and the Fosse Ardeatine case, the prosecutor could not easily establish that shooting a hostage constituted a "flagrant violation" of international law. The argumentation thus focused on the shootings of hostages not motivated by retaliation for attacks on German military personnel, but on those cases where the *Militärverwaltung* resorted to the shooting of hostages in retaliation for attacks on Belgian collaborators. The protection of their political allies was not part of the vital national interest of the occupier nor of the protection of the security of its troops and could not be justified on the grounds that it contributed to the maintenance of public order, since they precisely sparked off a spiral of retaliatory violence.

[27] Van Nuffel 1997, p. 35. Van Nuffel's contribution, based on press archives, is an otherwise highly tendentious presentation of honorable Germans wronged by a biased Belgian legal system, with the hidden agenda of seeking to discredit Belgian court proceedings against Flemish collaborators.

The verdict might not have been the outcome of a negotiation, but both sides could seem to live with the compromise. Criticized as unjustly severe in Germany, and incomprehensibly light in many quarters of Belgian public opinion, it allowed for the instant liberation of von Falkenhausen and his repatriation three weeks after the verdict was pronounced. Most importantly, by agreeing to this early liberation, the general abstained from appealing the judgment, clearing the way for a quiet dismantling of the whole process of German war crimes trials in Belgium. It was certainly no coincidence that in the same month of March 1951, Belgium re-established its diplomatic relationships with the German Federal Republic.

Von Falkenhausen had grown into a German hero, emblem of the military honor and resistance against Hitler, through the 20 July conspiracy, which would increasingly become the consensual symbol of the "other Germany" in the Adenauer years.[28] His condemnation had been bitterly denounced by the German press, but even in Belgium his trial had been controversial and his lawyers had mounted a high profile defense. Nor was the general willing to make an act of contrition during his trial or at the occasion of his liberation. Crossing the border into Germany after his release, he ceremoniously wrote down in an improvised "roll of honor": *Ingrata Belgia non possidebis ossa mea* ("Ungrateful Belgium, you will not have my bones").[29] He later gave several interviews on the world situation, denouncing the indictment of German officers at a time when the fate of Europe depended on the rebirth of a German army, adding, characteristically: "The French today are worse soldiers than they were in 1940. We also should not forget that in wartime, the army is constituted of civilians in uniform and simply mention here that 30–40 % of the French are communists."[30] In 1974, Jo Gérard, a Belgian right-wing publicist published and prefaced his quite apologetic memoirs in a French translation.[31]

Cécile Vent (b. 1906) was one of the rare women to have been regional commander of a Belgian resistance movement, the intelligence network Tégal.[32] Arrested by the Gestapo in 1943, she spent eight months in the prison of St. Gilles (Brussels). After the war she was awarded the war cross with palms (*croix de guerre avec palmes*) for her resistance merits. Separated from her husband, a textile industrialist, since 1933, Vent was subsequently appointed to the administrative commission of the prisons of Verviers. These commissions had an important role in the surveillance, re-education, and anticipated liberation of former collaborationists. After the first wave of severe sentences pronounced by the military courts in the first years following the liberation, the administrative commissions, staffed in great part by unsuspected patriots, i.e., resistance veterans, issued

[28] See Überschär 1998.

[29] See the file of press clippings, CEGES, BD KD 2271.

[30] AFP, Bonn, 13 August 1952, CEGES, BD KD 2271.

[31] Von Falkenhausen 1974.

[32] See Debruyne 2003, pp. 131 and 155.

recommendations on the anticipated liberation of inmates.[33] In this capacity, Vent made very regular visits to prison inmates in Verviers and in Liège. It is at these occasions that she met von Falkenhausen, who was suffering from severe depression in 1948. Von Falkenhausen's wife died in March 1950, after a long illness, and the general was allowed a last visit to his suffering wife. The romance that meanwhile blossomed in prison was destined to last, leading, almost 10 years after his liberation, to their marriage.

The couple had wished to keep their plans secret, but the news soon made the headlines as a sensational photo opportunity. *Le Soir Illustré* and the *Libre Belgique* published major articles and *France Soir* even sent its special envoy Philippe Labro to the couples' home in Germany, erroneously presenting von Falkenhausen as *Gauleiter* for Belgium (a function reserved for annexed territories), with headlines: "Elle: héros de l'ombre—Lui: général anti-Hitlérien."[34] The wedding offered a perfect opportunity to celebrate the reconciliation of Germany with its former victims: Belgium, France, and beyond that, in varying degrees, Italy, the Netherlands, Denmark, and Norway. The story, however, was not that of the victim forgiving the perpetrator in an act of love. The articles stressed their shared experiences and shared values. Both were heroes of the resistance against Hitler and both had experienced imprisonment. As such, Vent and von Falkenhausen embodied a new narrative of a common Western European experience of war, an honorable war of law abiding nations. Von Falkenhausen's trial had contributed no little to the creation of such a narrative.

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[33] See Huyse and Dhont 1991.

[34] *Le Soir Illustré*, 8 September 1960; *France-Soir*, 3 September 1960, CEGES, BD KD 2271.

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Chapter 9
From Revolution to Restoration. Transnational Implications of the Greek Purge of Wartime Collaborators

Dimitris Kousouris

Contents

In the midst of a public debt crisis that evolved into a long economic and social crisis during June, 2011, one could read on the walls of downtown Athens the slogan: "Gallows for the *dosilogoi*."[1] Most likely intended to stigmatize the current Greek government for allowing the International Monetary Fund (IMF) and the European Central Bank (ECB) to gain control over the finances of the country, this

[1] The term *dosilogoi* was introduced in the Greek political and legal language in the late nineteenth century, signifying the person who, having held public office, is bound to answer for his acts (see Koumanoudis 1899). The term first acquired a "juridical" sense after the Greek-Turkish war of 1919–1922. During the Second World War, the word was first used by the puppet government (!) in 1941 against the "legitimate" government that had fled the country together with King George II. During the first years of the occupation, the term traitor and its derivatives prevailed until 1944, when the word *dosilogos* started being used as a more technical/legal term referring to the postwar legal order.

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slogan was used for the first time in 1944–1945. Back then, the country was exiting a 3 year foreign occupation by the Axis powers and dealing with the question of how to punish those who had collaborated with the occupiers. *Dosilogoi* is a word used to designate the collaborators of the occupying forces during World War II and, as in various other European countries that experienced foreign occupation, ended up to stand more generally for *traitors*. All the same, unlike most other cases, where the word used was either "quisling" or a variant of the French political term *collaborateur*, the Greek term was borrowed from the contemporary Greek juridical vocabulary.[2] This chapter will argue that the Greek judicial purge exerted a strong influence on public representations of wartime. Specialists dismissed the subject for decades, largely due to a generally held assumption that, on the brink of and during the civil war (1946–1949), collaborators got off with little or no trouble; many even held public office and leading positions in the postwar state apparatus.

This impression was not false. Yet a brief quantitative comparison of the purges in various European countries[3] shows that, even if the rate of those convicted for collaboration in Greece figures among the lowest in Europe, this does not mean that the Greek purge was exceptional. The common denominator and what constitutes the novel character of the post-World War II European purges was that, while a large range of individuals and acts from all spheres of social life were within the legal purview, the number of those convicted for acts of collaboration remained in all cases limited to a minority. In other words, as any legal historian or theorist would immediately posit, the actual aim of the purges was not as much, or not primarily to fairly punish wrongdoers of the outgoing regimes, but to render official justice fast, in order to moderate emotions of revenge, to rehabilitate state authority and to lay the foundations of a new political order.

That the legal purge was conceived and implemented as a remedy to internal conflicts was not a Greek particularity either. The long-lasting foreign military occupation, the brutalization of warfare, and the gradual abolition of the boundary between civilians and the military had shaken the pre-existing social hierarchies over large parts of the continent, transmuting the war in Europe into a gigantic and highly diversified set of civil conflicts, often described as a "Second thirty Years

[2] "Quisling" was a British-coined term following then Nazi occupation of Norway and the formation of the puppet government by V. Quisling in April 1940. The French term was introduced by the Chief of the French State of Vichy himself, Marshall Pétain, in his Montoire discourse in October 1940.

[3] Using the statistical elements of Dahl 2006, p. 148, Franzinelli 2007, and my own research in Kousouris forthcoming, pp. 253–254:
Convicted for collaboration per 100,000 inhabitants

Greece	Italy	France	Denmark	Belgium	Netherlands	Norway
~95	14	90	333	582	553	573

War," and an "international or European civil war."[4] By criminalizing the internal enemy, these forms of extraordinary penal justice depoliticized the civil conflicts and limited the number of wrongdoers. In this way, these judicial transitions decisively assisted the construction of several similar national narratives, according to which the vast majority of each nation was opposed to (or victim of) the foreign invaders and "a handful of miserable traitors."[5]

The emergence of these legal norms and procedures during the Second World War was transnational and synchronous. Below, I will demonstrate how this and some other shared legal and political concepts were assimilated within the Greek context through the different moments of preparation and implementation of the emergency legislation against wartime collaborators. A first, short section of this chapter will introduce the reader to the main particularities of the Greek experience of the war and occupation. In the beginning, the two camps of the internal conflict did not name themselves "resistance" and "collaboration;" this happened only gradually starting at the end of 1943, as the stakes of the conflict were being internationalized.[6] Following in chronological order, the next section will examine the emergence of the conceptual dichotomy resistance/collaboration as a product of negotiation for the "Law on Sanctions," between the leadership of the internal pro-communist national liberation movement and the British-backed government-in-exile. While both camps in the internal conflict spoke in terms of "freedom," "justice," and "rule of law" and adhered to a pacification process borrowing legal norms and concepts from other European purges, a fight raged on in the background. During the autumn of 1944, the armed forces of both camps that had participated in a government of National Union waged a war of positions over the newly liberated national territories. In December 1944, the question of the disbandment of resistance troops provoked a major political crisis and the conflict began anew. A mass British military intervention tipped the scale against EAM *(Ethniko Apeleftherotiko Metopo*, or National Liberation Front). The third section illustrates the plasticity of legal norms and the porosity of the line between legal concepts and political practices. By presenting the debate on the retroactivity of the law and the adventures of the

[4] Both terms were in use since the 1940s, e.g. Winston Churchill wrote in the first lines of his *Second World War*: "I must regard these volumes as a continuation of the story of the First World War […] Together, if the present work is completed, they will cover an account of another Thirty Years War." Churchill 1948, p. vii. Cf. Neumann 1949. For an interpretation of the period 1914–1945 as a Second Thirty Years War, see Mayer 1981 and 1988. For a critical assessment of the different uses of the concept of international civil war, cf. Losurdo 2007, pp. 13–24 and Traverso 2005.

[5] The famous phrase of Charles de Gaulle set the standard for the diverse official national narratives on the war, in France, but also elsewhere in Europe. For the role of the attempted judicial purges in the construction of those myths in the aftermath of the war, cf. Déak's introduction and Gross's contribution, "Themes for a social history of War Experience and Collaboration," in Deák et al. 2000, pp. 3–35.

[6] The gradual politicization and alignment of diverse local, ethnic, political, and class conflicts to the division between resistance and collaboration might be a fruitful means to discern how the local dimension was gradually intertwined with broader national and international political stakes.

attempted purge of the judges, I will provide a sketch of how legislation conceived with a view toward normalization was finally implemented to restore the authority of the prewar elites. Finally, drawing some provisional conclusions concerning connections and parallels to other national cases, I will argue that the Greek case offers insight into the transnational dimension of the European postwar purges. In that sense, the purges might be considered both as a technique of transition and as a precursor of the most recent forms of restorative (transitional) justice.

9.1 Revolution and Counter-Revolution

The postwar purges seemed to accomplish a modern version of what N. Loraux called the "political task par excellence," i.e., "the mutual forgetting of the civil strife" which serves as a prerequisite for the constitution of any republic.[7] The outcome of these purges was inherently imperfect, incomplete. Expunged memories, taboo subjects, and explicit silences were established in the public sphere, often followed by periodic resurgences of oppressed—or forbidden—memories: an "ever-present past" that continues to haunt like malaria or chronic fever.[8] Moreover, the common lament that "*here,* unlike other countries, many collaborators escaped punishment" became commonplace in the collective memory of many countries. Therefore, the Greek purge does not appear less effective than others if one judges from its strong and controversial trace in the collective memory all through the postwar period. On the contrary, the persistence up to contemporary times of the same old rhetoric may even be considered a sign of success.

Thereby, in order to grasp the role of justice in a transnational perspective in the aftermath of the Second World War, one should adopt a critical stance toward the common *doxa,* or "common sense" or knowledge as the starting point.[9] In that sense, it might not be a simple coincidence that probably the most decisive particularity of the 1940s in Greece is an aspect that has been so commonly overlooked by scholarly research: namely, that a social revolution broke out under foreign occupation.[10]

Situated between the war of 1940–1941 and the liberation of the country in autumn 1944, the conflict led gradually to a dual-power situation that might

[7] Loraux 1997, pp. 39–40.

[8] Cf. Rousso and Conan 1998 or the comments on the Dutch and Belgian cases in Huyse 1995, pp. 51–78.

[9] Bourdieu 1987 and cf. the "Translator's Introduction" to Bourdieu's text by Richard Terdiman 1987, pp. 805–813.

[10] Despite the fact that the concepts of *revolution* and *counter-revolution* were dominant in the historical conscience of the actors themselves, scholarly approaches rarely use them as analytical categories. One of the rare examples is Richter 1973. Most often, the use of the term "social revolution" refers to an attempted revolt or coup by the Communist party against the legal government. Cf. Iatrides 1972.

be considered a process of social revolution and counter-revolution. The military operations of 1940–1941 and the subsequent division of the country into three zones of occupation destroyed critical transportation infrastructure and fractured the branches of the state apparatus. While trade networks between the productive rural areas and the cities were already short-circuited, the naval blockade of the Axis-occupied territories, imposed by the Allies, cut off the country from vital food supplies coming from abroad. The murderous famine of the winter 1941–1942 was the beginning of an enduring food crisis that thoroughly subverted social hierarchies, triggering a popular insurrection in the productive rural areas, as well as several strikes in the big cities.[11] In order to counteract the growth of the revolutionary movement, members of the prewar political elite took over the puppet government in spring 1943 and mobilized domestic armed units. After the capitulation of Italy in September 1943, the pro-communist forces of EAM (*Ethiko Apeleftherotiko Metopo*, or Front of National Liberation) obtained control of about 40 % of the nation's territory. The regions of "Free Greece" were initially governed by autonomous local committees. But as EAM expanded and stabilized its control, it moved toward organizing general elections in early 1944. In March, the local representatives convened a "National Council" that, in turn, appointed a "Provisional Committee of National Liberation," better known as the "Mountain Government."

9.2 A Tumultuous Return to Normality

> The first and foremost task will be that of conducting the revolutionary flood onto the normal river bed.[12]

As the tide of the war turned decisively in their favor, in October 1943, the foreign ministers of the three Allies signed the Moscow "Declaration on Atrocities." Considered the foundation of the Nuremberg trials, this document was conceived as a basis for the legitimacy of numerous summary trials and executions organized by partisan units and state officials alike.[13] Thus, during the whole of this last and

[11] Cf. Hionidou 2006 and Margaritis 1993.

[12] From the memorandum of the writer G. Theotokas to the then Prime Minister G. Papandreou when the latter landed in Athens in October 1944, as published in Theotokas 1987, p. 501.

[13] The paramount importance of this text is the introduction of individual responsibility in international penal law. Of course, general international law recognized individual responsibility for acts of piracy, breach of blockades, or the activity of paramilitary troops. As for individual responsibility for "acts of State," the post-World War I efforts (Articles 227 and 228 of the Treaty of Versailles, Washington Treaty relative to the capture of commercial ships) had all proven abortive. See Kelsen 1944, pp. 71–124. At the peak of WWII in Europe, the Soviets forced the pace immediately, by unilaterally organizing and publicizing the first trial and execution of German officers in Kharkov (Ukraine), in December 1943. On the rest of the continent, the first summary trial and execution conducted by official state authorities was that as of the former Vichy minister, P. Pucheu, organized in Algiers, in March 1944 by the French Committee of National Liberation. Cf. Kochavi 1998.

most murderous stage of World War II, the designation of *war criminals* was not yet clearly defined, and the phrase could often be used interchangeably with "traitors," "quislings," and "collaborators," depending on the different political affiliations of the actors involved. This blurring of categories was also seen in Greece.

As the Liberation approached, the question of the successor regime became the thread connecting the destiny of different actors involved on the local and international levels. *Dosilogoi* gradually came to signify *traitors* and/or *collaborators* primarily so that by late 1943, and during 1944, it was part of an official political vocabulary expressing a republican consensus between internal resistance and the government-in-exile for the legal persecution and punishment of collaborators. The first public appeal for the punishment of collaborators had appeared in the fall of 1943, in an underground pamphlet published by a royalist pro-British group.[14] In early January 1944, the government-in-exile published a decree stripping members of the Athens puppet government of their Greek citizenship. By March, the Mountain Government promulgated Legislative Act no. 4, a text that, in the name of "the national and Allied struggle," drew its legitimacy explicitly from the Moscow Declaration. That law, enlarging the definition of collaboration to "those who had gained profit from the Occupation through their economic collaboration with the enemy" and "those who had received weapons from the enemy to fight against the National Liberation movement," was the first to be effectively applied in the country.[15]

After a "national contract" for the creation of a "National Union" interim government was signed in Lebanon, the punishment of collaborators became the central political stake of the negotiations between EAM and Cairo representatives. While Prime Minister George Papandreou procrastinated the whole summer of 1944, EAM increased its pressure, intensifying its armed activity in the country and stating that its ministers would not take a position until a "Law on Sanctions" against collaborators was voted. Finally, only a few weeks before the final departure of the Wehrmacht, in September, the interim Minister of Justice publicized a draft law that, borrowing heavily from the French law promulgated late in August, threatened collaborators with heavy sentences. The three left-wing ministers agreed to take up their duties joining the "National Union" government. For a moment, the clouds of civil war seemed to dissipate. Wishful thinking.

With the hindsight of seven decades, several hundred scholarly publications, memoirs, and political essays on Greece during the 1940s, the conflict appears as if it could hardly be avoided. At the moment of liberation, both camps—the pro-communist EAM and an aggregate of anti-communist forces—spoke the language of (international and social) peace, of (civic and political) liberty, of national freedom and restoration of the rule of Law. But the internal fight never ceased. Before even establishing his government in Athens, Papandreou consulted with Churchill and met various anti-communist leaders preparing to prevent a

[14] Ellinikon Aima 1943.

[15] Act no 4, 24 March 1944 in PEEA 1976.

communist takeover and to "hit and disband" ELAS once the timing would seem propitious. At the same time that the forces of the latter were obstructing the German retreat, they were fighting on three other fronts: against anticommunist resistance groups for control of the Ionian islands, against a special unit of the Greek Royal Navy in the Aegean islands, and against collaborationist paramilitary bands in Greek Macedonia. But the epicenter was in the capital. During the months both before to and after the German retreat, street fights and clashes occurred occasionally in the daytime, while "rare were the nights in which one would not hear gunshots."[16]

Meanwhile, Themistocles Tsatsos, lecturer of administrative law at Athens University, and Minister of Justice from May to October 1944, drew directly from the French experience to shape the legal procedures adopted to restore republican legality.[17] Among the government's first priorities was to purge the civil service and to ask professional unions to make lists of their members who had collaborated with the occupiers. Constitutional Act no. 1, "On the sanctions against those who collaborated with the enemy,"[18] created *ad hoc* Special Collaborators' Courts, assigning harsh sentences for ten different cases of collaboration. A novel charge of "national indignity" was adopted creating the punishment of "national degradation," which involved loss of civic rights, professional ban or property seizure.[19]

The Sanctions' Law intended to stop summary executions and to take over state authority. Papandreou's Liberation speech, promising an "implacable National Nemesis," in fact accentuated the "guarantees provided in order to prevent vindication and satisfaction of instincts." Moreover, his affirmation that "unlike in other countries […] in Greece, there [is] only a minimal number of collaborators" merely repeated the pattern which was to be established all over the continent.

The law was intended to put the "fighting nation" on stage, through a citizens' jury of six that had the majority over three professional judges in the composition of the Court. However, only one such "popular"—as they were called at the time—court, was convened, for the judgment of a Greek Special Security torturer in Athens on 4 December 1944. The timing is revealing as this was the day of the mass funeral of the victims of a joint police and paramilitary attack on an EAM demonstration the day before, and the first day of the Battle of Athens between EAM on one side, and British troops and Greek anticommunists on the other.

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[16] See the diary notes of Theotokas, p. 497. For Churchill and the British tactics in Greece and the Balkans, see Sfikas 1991, pp. 307–334 and Resis 1978, pp. 368–387.

[17] Tsatsos 1973.

[18] Constitutional Act no. 1 (6 November 1944) published in the *Government Gazette (GG)* no. 12, 31–36.

[19] Simonin 2003, pp. 37–60. Cf. Elster's qualification of a "low-grade" punishment in Elster 2004, p. 60.

9.3 Restoration of the Pre-War Status-Quo

The three cabinets that governed until the general elections held in March 1946, which were composed of representatives of the pre-war political elite, had an extremely precarious legal status, as they lacked a proper constitutional basis or the political legitimacy of the "National Union."[20] Thus, one of the first concerns of the cabinet led by General N. Plastiras was to replace the "Law on Sanctions" with a new one, which essentially repeated word for word the previous law,[21] but with two major modifications.

The first modification limited the participation of citizen jurors in the courts' composition, entrusting the administration of the purge instead to professional judges. The role of the judges was becoming extremely important in the new situation, not only for the implementation of the law on sanctions, but also for the restoration of legality over the regions of the national territory, a large portion of which were still administered by the authorities previously established by EAM. According to the clauses of the armistice signed in February, an amnesty was granted for all political crimes committed during the "communist mutiny" or "December uprising against the State."[22] For the rest of the crimes, the constitutional provisions guaranteeing political and civil liberties—a prerequisite for the conduct of free elections—would be reinforced only once the administrative and judicial authorities of the official state had been completely restored. In practice, this led to the establishment of ordinary administrative and criminal courts which, more often than not, had to treat complaints lodged by nationalists against leaders or whole local branches of EAM for crimes committed during the occupation.

In that context the outcome of the purge of the judges became an ambiguous struggle between the tenants of the executive power and the high-ranking magistrates, who had previously put up with the previous regime. On the one hand, the initial declaration of Papandreou proclaiming the bankruptcy of the state's intellectual elites and promising a deep purge of the university and judicial bodies was soon forgotten in favor of much more nuanced statements affirming the integrity of a vast majority of judges. On the other hand, anticipating the purge of the judges, *Thetis*, the oldest and quasi-official judges' journal, launched a counterattack resuming its publication soon after the battle of December. Its director, Christos Pratsikas, Professor of Civil Law at the University of Athens and a fervent royalist, published an editorial article that criticized the retroactive effects of the "Law on Sanctions," by highlighting the revolutionary character of a legislation "dictated by Greek-speaking Slavic communists." Pratsikas argued in favor of

[20] For the legal and constitutional aspects of the governments see the work of reference by Alivizatos 1979.

[21] Constitutional Act no. 6 (20 January 1945), *GG* no. 12.

[22] This was the legal formula, used by the government to describe the 33 days of the Battle of Athens military clash of December 1944.

a limited purge against members of government and military commanders-in-chief, based on the clauses of the existing Criminal Law against "High Treason." Moreover, he utterly politicized the debate, by claiming the resignation of the Minister of Justice and the abrogation of the Law, calling the judges to boycott its implementation. Furthermore, in the same issue, the journal published articles arguing in favor of a limited interpretation of "political crimes," in order to facilitate the criminal prosecution of communists.[23]

Such positions prevailed in the ensuing months. According to the survey of the British Legal Mission charged to assess the performance of the Greek judicial system, the number of resistant fighters held in Greek prisons in late 1945 doubled that of the (alleged or convicted) collaborators.[24] Interviewed on the subject by some British Labor MPs, G. Mavros, interim Minister of Justice in early 1946, stated that "Justice cannot work, because 90 % of the judges belonged to the far right."[25] This was not exactly the case; however, there were several judges of a democratic or left-wing orientation as well as those who simply wanted to avoid explicitly political interpretations and to promote the principle of equality before the law. As a matter of fact, the gradual establishment of the official authorities all through the first half of 1945 followed a wave of White Terror in its first—and most uncontrollable—phase, which here and there replaced the more or less violent removal of the authorities previously established by EAM. Consequently, the only form of justice the state could effectively render was the one that was sanctioned by the royalist squads. Judges who did not act in accordance risked their career or, in some cases, their life.[26]

The overall position of the low- and mid-ranking judges was already extremely precarious. While their monthly income, as that of all public servants, was subject to the fluctuations of hyperinflation, in most cases the subsequent "reorganization" of the judicial services deprived them of their ties to local society. As a matter of urgency, the method of rotating judges from one region to another proved very effective in erasing the traces of the recent past, to help state justice moving and to facilitate the supervision of each single section or judge from the Athens headquarters. At the same time, as was the case in other European states too, the

[23] Pratsikas 1945, pp. 1–4.

[24] The numbers of different categories of detainees in October 1945 were as follows, according to the Report of the British Legal Mission to Greece (17 January 1946), pp. 17–18:

Alleged collaborators	2,896
Members of EAM Resistance	6,027
Criminals	7,721
Total	16,464

Cf. Voglis 2002, p. 57.

[25] Dodds et al. 1946, p. 12.

[26] This was the case of the attorney in Corfu, K. Ghidas who was assassinated by EDES troops in December 1944 for having tried to enforce the law on collaborators in the island. EAM, *Lefki Vivlos 3*, p. 21. For other sorts of physical violence and disciplinary punishments, see Délaportas 1978, pp. 78–80. For further details on the purge of the judiciary see Kousouris 2012, pp. 31–47.

construction of the legal apparatus that carried out the purge became gradually specialized and fragmented into different legal mechanisms, administrative, professional and fiscal measures.[27] The gradual development of this legal apparatus rendered the services of high-ranking judges indispensable, thereby steadily consolidating their positions toward the attempted purge. Except for some minor reshuffles on the top of the hierarchy, the composition of the Supreme Court and the Council of State remained virtually intact. After all, after the consecutive military coups and countercoups of the interwar years followed by 3 years of foreign occupation, the high judiciary had managed to preserve its continuity and, in the midst of general disintegration of state institutions and of revolutionary turmoil, it seemed to be the only public sector able to take action in order to restore the continuity of the state apparatus. This is probably why, facing similar problems in Greece, as in all European states that experienced foreign occupation, the successor elites made that unprecedentedly extensive use of legal means in their effort to re-frame the nation on a new political basis and to rehabilitate the state authority.

The story of the Greek purge of the judiciary illustrates well why, as noticed by Claudio Pavone discussing the Italian case, the continuity of the state should not only be viewed as immobile.[28] Treated separately from the rest of the public sector, the judicial body was "restructured" through a series of twelve consecutive laws, amendments, and decrees issued on the matter in 1945. The first law, authorizing the Minister of Justice to suspend unilaterally any judge whose conduct had been allegedly "unpatriotic," was replaced by a new law in the spring. That law provided a variety of disciplinary penalties for those compromised with the occupation regime and/or with the prewar dictatorship, as well as for those who were involved or sympathized with EAM. After a series of decrees and amendments, CA no. 83 restituted the vast majority of the judges previously lustrated for their conduct during the dictatorship or the foreign occupation.[29] After all, more than 85 % of the judges serving during the occupation continued to hold a position in the judicial body—all but those leaning most ostensibly to the Left and some members of the "old guard" who enjoyed an honorable retirement.

Ofcourse, the immunity of the judicial body was an ordinary exception[30] at that time in Europe. In Greece, the process reveals a transition negotiated between the long established heads of the judiciary and the new masters of the executive power,[31] which ended up with a trade-off: immunity for legitimacy. The pact was ratified early July 1945, with a resolution issued by the Council of State on the

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[27] Cf. Bancaud 2003, pp. 63–64.

[28] Pavone 1999, pp. 5–20.

[29] The principal laws on the purge of the judiciary were the Constitutional Act no. 27, *GG*. no. 94, 16 April 1945, the CA no. 63, *GG* no. 154, 7 July 1945 and finally CA no. 84, *GG.* no. 318, 29 December 1945.

[30] Bancaud 2002.

[31] As in most cases, this element coexists with those of other types of transitions, following the typology of Elster 2006, p. 12.

Law of the Purge of the Military. The resolution considered the law anti-constitutional and canceled it; in return, the preamble resolved the conundrum of the constitutional legality of the government and, erasing 8 years of dictatorship, war, and foreign occupation, ordained that the government was legally appointed, in continuity of the constitutional order interrupted in 1936. As Bourdieu put it, the juridical field is like a reserve of authority, providing legal guarantees and political legitimacy, in the same way a central bank guarantees currency.[32]

Thisviewpoint reveals critical aspects of the social engineering carried out by those procedures. First came the symbiotic relationship between the political and economic elites. Among several stories, that of Kollias[33] is probably the most emblematic. Attorney general during the occupation and indicted for persecuting resistance members after liberation, he was not only never suspended while his case was pending, but he was also assigned to organize the work of the Special Collaborators' Courts (SCC). He was finally acquitted solemnly by his colleagues some months later, with praise "for carrying out his duties under the irregular conditions of foreign occupation." By September 1945, many members of the political and economic elite were acquitted via a series of preliminary orders.[34] Most cases were cleared by the special commissary before ever reaching a public hearing.[35] Symptomatic of the connivance of state and economic elites was the case of the General Commissary of the SCC, Tsiabassis, who was suspended from his duties in August 1946, after being caught *in flagrante delicto* taking bribes from the wife of a rich industrialist indicted for acts of collaboration.

The flip side of these acquittals is that the relatively few who were finally punished generally belonged to the weakest and the poorest of society.[36] Yet again, that the official justice consolidated pre-existing power relations is a truism: the essential particularity of the Greek purge lies in the way in which its recent

[32] Bourdieu 1987, pp. 823–824.

[33] A public figure symbolizing the continuity of the judicial and state apparati in postwar Greece, Konstantinos Kollias became better known for his later feats as attorney general who tried to stop the inquiry on the murder of a left-wing deputy Lambrakis in 1963 and as Prime minister of the colonels' junta in 1967.

[34] Among the most prominent figures acquitted were as the former dictator Theodoros Pagkalos, and several industrialists, most often with the argument that : "they could not collaborate with the enemy in order to become rich, as provided by the law, as they were already rich before that!" See Kousouris forthcoming, pp. 158–161.

[35] Only 15 % (2,200 out of 16,000) of the cases ever reached a public hearing—most of them having been cleared by preliminary instruction.

[36] Even if most of the SCC records were written in a rush, we dispose of a partial (17 %) though representative sample of the professional status of the indicted whose trial arrived at a hearing:

Workers, small shopkeepers, wage-earners, farmers (%)	49.7
Civil servants (%)	29.3
Liberal professions (%)	15.4
Industrialists, large retailers (%)	5.4

revolutionary experience was accommodated into the new official narratives. These judicial rituals performed a model of consensual narratives, not in the sense of a discourse beyond any criticism but precisely as a model to which any critique or justification in the postwar period had to refer. As a form of both judicial and public pedagogy, the purges criminalized the internal enemy and limited the number of wrongdoers, thereby depoliticizing the civil conflict, delivering a healing moment of closure,[37] and paving the way to the various myths of an antifascist majority. If justice was an active component of propaganda and dissuasion during the war, then the quest for judicial retribution set the limits of the body politic, i.e., who would be included in and excluded from the national community rising from the ashes following the war. In most other cases, the national myths were simply tales of inclusion of individuals or groups who actually had not participated in the Resistance; however, the Greek purges validated the myth of a "total and unanimous" national resistance through the exclusion of the principal resistance organization, in the same logic that the Council of State had removed eight whole years of dictatorship, war, and foreign occupation, in order to repair the broken constitutional continuity.

As already explained, the drastic limitation of civil jurors was the first step in excluding civil society, and specifically the Resistance, from the judicial procedures. This goal was highlighted by the second major concern of the law, to judge members of collaboration governments as soon as possible in a trial that, from the very beginning, had exhibited features of a show-trial. For 100 days, from February to June 1945, this trial, known as "the trial of collaborators," was highly publicized and constantly appeared in the headlines of the daily press. The staging was highly revealing. The public prosecutor named 35 accusation witnesses, politicians, journalists, and high-ranking civil servants, setting the fighting nation against fascist aggressors within the stage of the courtroom. In spite of that, EAM, the main resistance movement, was excluded from the scene. During the 100 days of the trial, the courtroom occupied the role in the public sphere normally belonging to parliament, as it became the site of debates between former prime ministers, government ministers, military leaders, and prominent journalists concerning the country's recent past: not only the foreign occupation, but also the successive interwar dictatorships and military coups. The hearings as well as the verdict outraged a large part of the public who demanded retribution for the sufferings of the occupation. But an essential purpose had already been accomplished: the creation of a new public, political sphere without EAM. A larger view of the SCC activity reveals a political economy of the penalties that further consolidated this exclusion. EAM was also kept out of the community of victims: the Courts convicted only those who had murdered or denounced anticommunists, while the ones who had committed similar crimes against members of EAM were acquitted under various mitigating circumstances: the most popular of them was "due to stupidity,"

[37] "A trial, it was believed, has the unique capacity to bring the past to the national stage. […] The verdictive speech act combines the costative act of making a statement about the past and the simultaneous altering of one's relation to this past." Horsman 2011, pp. 133–134.

while the most outrageous was that the victims were not Greek citizens, but agents of foreign powers.

9.4 Toward a Model of Republican Transition?

Thusthe judicial purge participated actively in the gradual emptying of the notion of "fighting nation" of its historical content, and its substitution with the fiction of continuity of its legal and administrative apparatuses. After all, the distinctive trait of the Greek purge stems from the specific context in which it unfolded as an active component of an ongoing process of revolution and counter-revolution. To use Bourdieu's terms, "as in science, art, or politics, the creative power of representation never manifests itself more clearly than in periods of revolutionary crisis."[38] In our case, the involvement of justice in the creation of the official representation of the wartime past reveals a high effectiveness rather than an inefficient implementation of the law.

The way in which justice "legalized" the reintegration of the collaborationist militia men is highly suggestive. In order to counteract the criticisms on the retroactivity of the "Law on Sanctions," the introductory ministerial directive determined that by defining the collaborationist governments as the executive branch of a military government established by the occupying powers, their penal responsibility emanated directly from the Article 43 of the Hague Regulations of 1907, according to which the occupant holds the legitimate power only to: "take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."[39]

With that logic, the Greek puppet government's only legitimate action taken was the creation of armed militias against the communist rebellion, which was viewed as troubling the public order and compromising the collective security of Greek citizens. Such was the court's ruling in the trial of collaborationist governments, which was the major judicial precedent for several hundreds of acquittals to come.

Of course, in the words of Bourdieu, the representations produced by the judiciary field announced what was set to occur, as they are "not so much the midwives as the recording secretaries of history." Following the course of violence, the judicial ritual granted to current historical realities the status of a "fully recognized, official existence."[40] This becomes even more visible if we take account of the geography of the penalties. The rate differs dramatically from region to region and, the closer we

[38] Bourdieu 1987, p. 839.

[39] Scott 1915, p. 123. For the discussion on the Law of Occupation, cf. Lemkin 2005 (first ed. 1944) and Benveniste 1993.

[40] Cf. Bourdieu 1987, p. 840.

get to the northern frontiers of the country, the harsher the retribution.[41] Close to the northern borders with Albania, Yugoslavia, and Bulgaria the law was implemented to collectively convict *in absentia* ethnic minorities who, having collaborated with the enemy actually or fictively, had already been violently expelled from the country by partisan troops at the moment of the Liberation.[42] The Truman doctrine was announced in response to the Greek Civil War. Thus the northern Greek border became also an international frontier between two world systems. The SCC played an important role in the formation of this frontier, pushing the legislator to adopt as official state ideology a geostrategic version of anticommunism, the theory of Slavo-communism, identifying the internal enemy with the external one. By the end of 1945, some regional SCC occasionally judged and convicted members of the left-wing resistance, painting them as collaborators with the Bulgarian occupier. This evolution paved the way for a series of special anticommunist laws inaugurated in 1946, which penalized Greek communists as agents of the northern Slavic neighbors and sent them *en masse* before the firing squad for high treason.[43]

As an active component of the bloodiest episode of the war's aftermath in Europe, the Greek purge describes the making not of an authoritarian regime, but that of a liberal republic. Inactive political amnesty, in combination with the limited range of these judicial rituals, is a key component of a symbolic appropriation of the revolutionary emblems and political values (state of law, freedom, democracy, etc.) by an alliance of Royalists and Republicans against Revolutionary Terror. They correspond, in other words, to a full-fledged Thermidorian reaction decreeing the end of the Revolution, tarnishing or erasing its memory.[44]

The shared legal norms, concepts, and forms, as well as the overall transnational implications of the Greek purge, offer a standpoint that helps us put those transitions in historical perspective. As we saw above, the Greek state got rid of the country's most discomforting legacies (left in the country by the circle of wars and civil conflicts) that had started 35 years earlier. The variety of the conflicts that had to be resolved in the troubled periphery of the continent offers an ethnic,

[41] Rate of convicted for collaboration per 100,000 inhabitants in Greek regions:

Athens	75
Kavala	65
Dráma	1,175
Thessalonica	95
Thesprotia	3,080

[42] Albanian-speaking Tsams in Thesprotia, and Slavic-speakers in Dràma, violently expelled by the EDES and ELAS troops respectively, in autumn 1944. Cf. Margaritis 2005.

[43] Discussing the liberation episode in Greece, Mazower speaks of "Three forms of political justice" in 1944–1945: the anticommunist purge and two versions of antifascist justice, by the official state and the partisan forces (Mazower 2000b, pp. 212–231). A broader view reveals how the establishment of a formal antifascist emergency legislation prepared and legitimized an effective anticommunist "state of exception."

[44] Cf. Baczko 2004, pp. 5–31 and Lefebvre 1952, pp. 198–199. Also: Brown 2000, pp. 503–535.

social, and political panorama of that Second 30 Years to the European Civil War, marking the painful passage from the almighty multi-national empires of olden time to the Europe of nation-states.

If the Greek purge escaped flew under the radar of the researchers for several decades, it was because it laid under the "foundation myths of a Europe liberated from history, expunging the awkward memories in order to assert the inevitability of freedom's triumph."[45] Meanwhile, the historicization of those myths, following the end of the Cold War in 1989–1991, renders some critical aspects of the Greek experience visible as a precursor of the most recent forms of legal mechanisms used to carry out republican transitions. Justice did not manage to appease the civil conflict, as happened elsewhere but acted as an active component of a legal civil war. Seen from the perspective of 2012, the very aspect that previously seemed to be most strikingly irregular or exceptional simply corresponds to the most radical novelty of the post-World War II judicial purges: a form of justice whose purpose is not to interrupt the political sequence of the division, hate and bloodshed so as to deconstruct the conflict and exorcize it with the use of legal means but, as an active component of an international civil war, canceling the distinction between war and politics and reproducing the rationale of stigmatization and retributive revenge.[46]

The post-1945 judiciary transitions might be considered retrospectively as a process of "judiciary reconstruction" of Europe, as the largest experience of *transitional justice* ever applied simultaneously in Europe or elsewhere. The very limited range of convictions is rather suggestive of a model of justice in which what counts most is not to punish, but to establish a consensual official truth for the past. It is a model that later, applied in various post-colonial, post-communist, and other republican transitions, would gradually evolve into a technique of pacification and conflict resolution. In that sense, the ill-fated Greek purge seems to announce prematurely the latest form of this model, the *Truth and Reconciliation Commissions* and the persistent reality of impunity for the vast majority of perpetrators[47] of serious violations.

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[45] Mazower 2000a, p. xiii.

[46] Cf. the remarks on Iraq in Zolo 2009, p. 165.

[47] Among the growing critical literature, see, for example, Hazan's assessment, especially on the forms of "transitional justice" sought in contemporary Africa, Cambodia, and Middle East (Lebanon, occupied Palestinian territories) in Hazan 2010, pp. 160–170.

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Chapter 10
The Defense in the Dock: Professional Purges of French Lawyers After the Second World War

Liora Israël

Contents

When one analyzes legal purges, it is often to depict national processes through which a nation dealt with its previous elites during a period of transition. Concerning such an issue, as in many cases, it could be useful to frame the subject differently or, to quote the famous title of a book by Jacques Revel, to pay attention to "games of scales."[1] This is why, little by little, more attention has been paid to what can appear as secondary issues, such as economic, professional, or institutional purges. In France, it took 50 years to realize the necessity of taking into consideration the totality of the *épuration,* with its multiple layers, in order to comprehend the real social and political impact of the process. The book edited by Marc Olivier Baruch (2003), whose title makes ironic reference to a quote by General de Gaulle, *A handful of*

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[1] Revel 1996.

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scoundrels,[2] offered the first general survey of this phenomenon among various social groups, thereby completing the insights provided by Henry Rousso and Alain Bancaud on the judiciary[3] and by Gisèle Sapiro concerning writers.[4]

This chapter is based on a socio-historical study of the purges of legal professionals after World War Two in France. In the last part of my Ph.D. dissertation,[5] devoted mainly to the study of legal resistance during the war, I focused on the postwar era, in order to analyze the memories and legacies of this period in the legal professions. I was surprised to observe, at a first glance, that there was almost no memory of the resistance or consciousness of the fate of those who were compromised by the Vichy regime and their allies. In fact, there was no academic scholarship filling this absence of memory on the part of lawyers, especially judges, contrarily to other professions. Of course, it could be explained by the lack of interest in such a process, or, as many people told me during the course of my research, because nothing had happened. On the contrary, I was interested by the fact that something *had* happened. It was not only important to fill a gap in the historiography of the period: it was also crucial for a better understanding of the legal profession. Indeed, lawyers have often been analyzed in their relation to politics. In the nineteenth century, Alexis de Tocqueville noticed that jurists had played a prominent role in the development of American democracy,[6] and he predicted that the French republic would also depend heavily on legal professionals. Indeed, they were so successful in their contribution to the French Third Republic (1876–1940) that this period is often called "The Republic of Lawyers."[7] The name comes from the over-representation of lawyers in Parliament and in ministerial cabinets, and it is often justified by the analogous skills associated with both professions, legal and political, such as eloquence, legal abilities, contact with various social groups, etc. The presence of legal professionals in the political domain is still at the core of current debates in the social sciences. To synthesize a vivid debate, particularly in the "Law and Society" movement, the controversy opposes a conception of the lawyers as the better agent of political liberalism, insisting on their values and disinterest, to a more critically oriented analysis insisting either on the "hidden project" of the profession, or on the contingencies of political commitment. Those three options can be associated with some major books. The link between lawyering and political liberalism has been developed notably by Lucien Karpik, first solo and thereafter with Terry Halliday,[8] in their project on political liberalism. More critical approaches, insisting on economic interests and professional projects, range from

[2] Baruch 2003.

[3] Bancaud and Rousso 2001.

[4] Sapiro 1997.

[5] Published as: Israël 2005a.

[6] de Tocqueville 2004.

[7] See notably Le Béguec 2003.

[8] Karpik 1999; Halliday and Karpik 1997.

ecological approaches to the neo-Bourdieusian.[9] And the third broad ensemble of works relates to the cause lawyering framework,[10] analyzing the minority of committed lawyers who defend political and social causes, in and outside the courts.

Even if it can be considered as somehow very distant, the episode of the purges of lawyers (by lawyers) in postwar France can add some elements to the debate. Indeed, the period of the Second World War itself was a direct challenge to the representation of the profession as being intrinsically committed to political liberalism. This crisis gave some credence to the conception of the profession as one driven by its members' self-interest, since the Vichy regime openly rested on the denial of liberal values, and largely enjoyed the approval of legal professionals, at least at the beginning. Nevertheless, adopting a sort of anachronistic "cause lawyering" approach, a minority of lawyers chose to resist, and developed tactics to mobilize the law as a form of resistance. But since it had to be clandestine, legal resistance cannot be considered a public defense of liberal values, even if those values could be used underground to justify the subversion of legality.[11]

Thus, how the state-imposed purges were organized and realized among the French Bars was an occasion for the lawyers to recast what happened, to reify an interpretation of the war, and to redefine their professional identity after this major breach in their self-definition as defenders of liberal legality.[12] In this regard, this critical moment can be reintegrated into the larger context of the twentieth century in order to develop a better understanding of the relationship between law, lawyers, and politics. In doing so, the game of scales, from the national to the professional level, offers insight into the impact of a historical event over a professional group. However, this scale of analysis also provides a better understanding of the ways of dealing with the past and of the manner in which to locally mobilize the general categories imposed by the state.

10.1 From the War to the Resurgence of Republican Legality: Enacting New Principles to Face a Problem Without Precedent

In exile, first in London and then in Algiers, the French Government led by the General de Gaulle discussed the question of how to organize legal purges in the liberated territories after the end of combat. This question sparked several

[9] Abbott 1988; Dezalay and Garth 2002.

[10] For a short synthesis of this broad collective enterprise, see Scheingold and Sarat 2004.

[11] Israël 2009.

[12] The debates over the political identity of French lawyers is somehow polluted by the double meaning of "liberal." Whereas Lucien Karpik, for example, refers to liberalism in the eighteenth century (or French) sense of the term, he sometimes has been (wrongly) criticized in the name of the contemporary American sense of the term (approximating "leftist"). This misunderstanding can be identified in Abel's comments in this article: http://jurist.law.pitt.edu/lawbooks/revnov98.htm#Abel. Abel 1998. In this chapter, I refer to liberalism in the French sense of the term.

more: What sort of activities should be punished?; Was direct collaboration with the German occupier to be more strongly condemned than obeying the supposedly legal Vichy government?; Was it possible to apply positive law existing before the war, or was it necessary to formulate retroactive laws to condemn notably the "intellectual collaboration" contradictorily to the republican laws granting freedom of opinion? All these questions were at the core of the debate from the period of the war itself.

Far from pretending to tell the whole story of those debates, I will only focus on the fact that the professional purges were one the building blocks of the multiple-stage process generally called the *Épuration*, or Purge. Whereas judicial purges are usually at the core of the study of the process, such as in Alice Kaplan's study of Brasillach's trial,[13] professional purges have often been neglected in the historiography. This raises an important set of questions, especially concerning the lawyers. In anachronistic but clear terms, could "cause lawyering"[14] in favor of the German occupiers be condemned after the war? Was the defense before German military courts or Vichy's special courts to be praised as an act of courage, or despised as an exploitation of families' despair when lawyers asked for fees? How was the frontier between political advocacy and professional lawyering to be defined after such a social and political trauma? How did the professional rules of discipline play out in this definition? And how did professional institutions, namely the Ministry of Justice and the French Bars, interfere in the process?

The examination of this very peculiar process is then to be questioned as a test of the social, political, and professional definition of lawyers in postwar France; first on the basis of the principles proclaimed to conduct those purges, second in consideration of how those principles were concretely applied, and third to take into account the memory of the period in this profession. This was not a short-lived experience, but a process which ended in the early 1950s. The purges are not to be considered only as the consequence of the war, but as a process—as such with its own contingencies and turning points—to be studied.

As far as I know, the professional purge of lawyers after World War Two is the sole occurrence of such a process in history of this profession in France. To the contrary, the French judiciary had frequently been politically weeded out, especially after the French Revolution and at the beginning of the Third Republic.[15] Self-organized since the thirteenth century,[16] lawyers had never endured such a trauma. Indeed, this specificity can be easily understood by taking into account the different statuses of those two professions: members of the judiciary are supposedly faithful to the state while lawyers are defined by the act of defense and the independence of their liberal profession. Nevertheless, this statutory opposition

[13] Kaplan 2000.

[14] For an historical analysis of French lawyering using the cause lawyering framework, see Israël 2005b.

[15] Association Française pour l'Histoire de la Justice 1993.

[16] Cf. Karpik 1999.

did not prevent the lawyers from being purged after World War Two. There are several possible explanations. First, the fact that professional purges affected all the major professions, including doctors, accountants, writers, and actors, on the basis of an extended definition of collaboration based on concrete professional experiences during the war (civil forms of collaboration as opposed to the symmetric multiplicity of civil resistance). Second, lawyers in particular could be questioned on the basis of their traditional political activities. Indeed, the presence of lawyers in the political arena endured under Vichy. Many of the regime's main characters, including pierre laval, were lawyers from the Paris Bar.[17] Xavier Vallat, the first General Secretary for Jewish Affairs and responsible for crafting much of the anti-Jewish legislation, was a member of the *Conseil de l'Ordre*, the elected directory of Paris'—and the country's—most important bar association. Next to those famous figures, some lawyers were also under the scope of the Resistance for professional reasons, mainly according to members of the Judiciary Resistance who warned their colleagues during the occupation to adopt appropriate political and professional attitudes.

The wartime activities of some prominent lawyers can explain why the profession was under political scrutiny, but not how and by whom the principles of the purge were enacted. Indeed, to understand this process, it is necessary to go back almost two years before D-Day, to what happened in colonial Algeria after the Allied disembarkation in September 1942; indeed, those liberated territories served as an experimental laboratory. Almost a year passed between the liberation of the Algerian territory and the decision to create a *Commission d'épuration* (committee in charge of the purge), on 18 August 1943. Created in Algeria by the Gaullist government in exile, this committee did not concern itself specifically with private lawyers, but instead with elected people and civil servants. The committee and the relevant *commissariat* or subcommittee discussed the fate of individuals and lawyers fell under the jurisdiction of the Justice subcommittee.

As noted above, the legislation passed in August 1943 did not concern lawyers as such, but elected people or civil servants, who were supposedly more deeply involved in the political process. Accordingly, the only lawyers pursued were members of local political elites or members of Algerian bar councils, who were elected by their colleagues. This specificity created many distortions: some lawyers deeply engaged in the policy of collaboration could not be pursued; lawyers in small cities were more likely members of the local bar council than their colleagues in the major cities such as Algiers; and the size of the council was proportionally larger in small professional communities. Moreover, even if lawyers were designated as such, in relation to the Justice *commissariat*, the profession in itself was not central to the accusation process, as I observed in the 26 files found in the

[17] In French urban areas, lawyers register in the local *barreau* (bar) attached to appeals court. Their elected leader, the *bâtonnier*, is responsible for maintaining ethical standards of the local bar. Members of the *Conseil de l'ordre* (bar council) are elected and are charged with maintaining professional standards and rules—NdT.

archives.[18] Only four of them were finally punished—one fired from the profession, the three others prohibited from practicing law for 6 months—and the motive was always the same: participation in the military struggle against the Allied disembarkation in September 1942. This first professional purge in Algeria did not sanction any professional activity. On the contrary, the process in liberated France was to focus on professional abilities, and it was assumed by the professional authorities themselves, namely the bar councils. How does one explain these differences? What was the basis for the condemnation of lawyers in such a context? How did the bar councils judge the members of the profession they administered?

10.2 The Self-Purge of French Bar Associations

In contrast to what happened in Algeria, metropolitan French bar councils did participate intensively in their own political "purification." Indeed, even before the enactment of the laws that would frame the process, they began, just after the Liberation, to sanction the most compromised of their members. For example, as early as October 17, 1944, the Paris Bar Council disbarred Pierre Laval, the former *Président du Conseil* (Prime Minister) of Vichy. The motivation for this sentence, based on the disciplinary rules of the profession, was treason against France, a crime deemed incompatible with the group's code of ethics.

By judging Pierre Laval and a few other lawyers on the eve of the new republican regime, lawyers from the Parisian bar council and their chief, Charpentier, a member of the underground resistance during the war, declared to the public authorities that they could take charge of the purge of their profession. And indeed, that is what happened. Thanks to two promulgations (the *circulaire* of 20 October and the *ordonnance* of 6 December 1944), the French bar councils gained the right to purge their profession.[19] Indeed, it was the sole profession to have this paradoxical privilege: civil servants were dependent on the administrative jurisdiction created in all the ministries, whereas other professions were to be purged by special commissions, often including members of the Resistance, created for the purpose. The members of the bar councils responsible for the purge had been elected before the war. Nevertheless, the public authorities did not acknowledge, as the Parisian bar had tried to convince them, to consider those professional purges as part of the disciplinary rules of the bar councils. Technically, the Ordinance of 6 December 1944, formally delegated the Ministry of Justice's

[18] Dossier "Barreaux Afrique du Nord Épuration 43-44 Alger," Archives Nationales BB 30 1738. Before the war, 559 lawyers were registered in colonial Algeria; 130 Jewish lawyers were expulsed from the profession and additional lawyers migrated from the continent during the war.

[19] A *circulaire* delineates how a new law, decree, or ordinance is to be implemented; an *ordonnance* had the legislative value of a decree-law during this period of reestablishing the French republic—*NdT.*

power over the purge of lawyers to the bar councils. This meant that the purge was under the purview of the Chancellery, and virtually defined by the same laws as found in other professions.

When it came to the professional judgment of lawyers, the judicial process itself also limited the independence of the bar councils. Indeed, this most traditional form of transitional justice pertained to lawyers as collaborators, as citizens, independent from the professional dimension of the question. It meant that the bar councils, which benefited from some isolation when judging their members, did have to take into account what happened in judicial courts. It notably concerned a new crime called "national indignity."[20] To be declared guilty of national indignity entailed the interdiction of becoming or remaining a lawyer, among other civil and professional prohibitions. The bar councils considered this an attempt on their sovereignty over their members: public authorities had to constantly ask the bar councils, which were reluctant to purge themselves, to sanction lawyers compromised on the basis of the punishment of collaboration.

It is impossible to depict in these few pages the whole process of the professional purge of lawyers. To put it in a nutshell: first, there was tension between professional authorities and the Ministry of Justice and their Attorneys General; second, differences existed among the French bar councils depending mainly on what happened during the war in the different regions. These two dimensions can explain both the heterogeneity of the phenomenon, and its relevance for understanding the structure of the profession which was in tension with the state.

The example of the Parisian Bar is particularly interesting, since the most politically compromised lawyers were Parisian: Vichy ministers, heads of anti-Jewish services, writers in the main extreme-right newspapers. Paris had been the center of collaboration with the Germans, and the traditional links between the profession and the political *milieux* explain why so many lawyers were implicated in Vichy's government and administration. Nevertheless, such reasons were not sufficient to judge those lawyers on the basis of their profession.

Indeed, most of the bar councils did not react to the demand to purge their ranks on a professional basis. Some, like Toulouse's, declared that it was not part of their duty. Others, like Aix-en-Provence's, having not experienced professional "collaboration," pretended that they were not concerned. Many bar councils, like Paris', expelled a handful of compromised lawyers and then considered the question closed.

A long process ensued throughout France between the reluctant bar councils and the Chancellery. The first two Ministers of Justice after the war, François de Menthon and Pierre-Henri Teitgen, tried to control what happened in the bar councils by the intermediary of their Attorneys General. In the judiciary or beyond, many spectators mentioned the fact that French bar councils were not very efficient: the corporatist spirit of the profession made the lawyers reluctant to sanction their colleagues. There were also practical difficulties, notably the fact that some

[20] Simonin 2008.

bar councils simply no longer existed. Indeed, elections were suspended at the beginning of the war in October 1939, and the Vichy Regime never restored the right to vote, even for professional elections. After the war, the new republican regime decided that professional elections had to wait for the purge of any professional body before new elections could take place. This meant that the bar councils at the end of World War Two were often deprived of one or many of their members (dead, disappeared, sick, having moved to other regions, etc.). Fernand Payen, President of the National Association of Lawyers, divulged on many occasions that bar councils were unable to assume their duty, notably in Montpellier and in Le Havre.[21] Legally, it meant that the Appeals Courts should have taken charge of the process instead of the bar councils. Some bar associations nevertheless decided to organize new elections: in Le Havre it was quickly canceled by the Ministry of Justice, whereas the new bar in Marseille was allowed to organize its own purge. This difference can be explained by the fact, in the latter case, that the local organizations issued from the Resistance approved the process.[22]

The difficulty of specifying which professional behaviors should be sanctioned on a professional basis presented another major obstacle to a smooth process. To take one concrete example: the Chancellery decided in February, 1945, to enact a circular detailing what sort of lawyers should be put under scrutiny in order to accelerate the purge process. More specifically, they targeted lawyers who had been registered to plead in German tribunals in occupied France during the war. This criterion was precise. It isolated the most compromised lawyers who had benefited financially from their knowledge of the German language in those cruel tribunals. Nevertheless, this criterion rapidly appeared unfair: if some lawyers had sought excessive fees from the families they represented in those difficult circumstances, most of the attorneys who pleaded in front of German courts appeared as courageous defenders who supported members of the resistance until the very end, even in front of the German military authorities. Even clandestine members of the judiciary resistance pleaded in those jurisdictions.

It was thus particularly difficult to identify rigorous criteria of lawyers' professional collaboration. On many occasions, lawyers decided to quit the bar in order to escape sanctions; however, bar associations occasionally refused to accept such resignations, often at the urging of the local prosecutor, and the latter maintained jurisdiction over the cases at stake.

If one examines the result of the process in the Parisian Bar,[23] it is possible to understand that two main factors interfered in the sanctioning of lawyers. Most of the attorneys who were finally expelled, temporarily or definitely, from the bar,

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[21] Letters of Fernand Payen to the Chancellery, Archives du Ministère de la Justice, C6722.

[22] Declaration of the "Groupement Patriotique Judiciaire du Sud Est," joined to the deliberation of October 2, 1944, Registre des délibérations du Conseil de l'Ordre des Avocats de Marseille, Archives du Conseil de l'Ordre.

[23] Dossier "Épuration des avocats," Archives de la Ville de Paris, 1320 W 134–135. Ninety-three individual files have been examined.

had been judged and sanctioned in parallel in judicial courts as direct or indirect collaborators with the Germans. Most of the time, the bar council was required to convert this judicial sentence into a professional one, but it was reluctant to do it. In order to demonstrate their independence from the state, the professional authorities often behaved as if they did not have to take into account the judicial decisions. They took their time implementing them, or even reformulated the sentences in their own terms, as an independent decision reaching the same sanction. Occasionally, decisions taken by the bar councils in this context obeyed a different logic. Some lawyers, even if they were not pursued by the judicial authorities, were castigated on the basis of incorrect professional behavior during the war: excessive fees demanded of families, denunciation of colleagues, inappropriate declarations heard in the hall of the Parisian Law Court during the German occupation, work on behalf of high-ranking German clients, etc. Among the 93 files I studied for Paris, 18 lawyers were expelled and 13 suffered a temporary exclusion from the bar. From the documents I have seen, I estimate that around four percent or around 100 Parisian lawyers out of 2,500 experienced this process.

Concerning the rest of France, my study of the purges is based mostly on the private archives of various bars (Marseille, Aix, Toulouse, Nancy, and Lille) and on the archives of the Chancellery. The main result that I identified is that the purges reflected the variety of administrative situations during the war—non-occupied, occupied, annexed zones—and local particularities, such as autonomist tendencies encouraged by the Germans. The purges revealed the peculiar situation of each territory. Prominent people in their communities, the lawyers were particularly involved in collaboration as members of the local elite. Some critical situations emerged at the Liberation regarding regions that had been partially or totally under Nazi rule. For example, Metz, the capital of the Lorraine region, was in the annexed zone, and some lawyers joined the German-led Nazi organization of jurists. Moreover, a number of the remaining lawyers, unlike those who fled the zone, appropriated the files, and subsequently the clientele, of their former colleagues. Was this theft of clientele or a symbol of solidarity between colleagues and of good will to assume the defense of clients' interests?[24] Lawyers deprived of their files wrote the Chancellery to ask for justice when they returned to the city. Those questions were very sensitive, all the more so since the register of the bar council's decisions had mysteriously disappeared. (It is impossible to know whether the head of the bar had interfered or not in this affair, as it was sometimes said.) The Appeals Court and the Chancellery were preoccupied by this situation. Complicating matters, a former member of this bar, Louis Bodard, was in charge of civil affairs at the Chancellery during the postwar purge and he was one of the lawyers whose files have been "appropriated" by his former colleagues. This affair was finally overseen directly by the judicial court on the grievance of theft.

[24] Dossier "Metz," Dossier Épuration, Dossiers ressorts des Cours d'Appel, Archives du Ministère de la Justice, C6722.

On 1 February 1946, a single lawyer was condemned to one month of jail for theft of material supplies.

The example of Metz stresses the divisions in each bar association created by the experience of the war. Some lawyers had joined the Resistance, or had been excluded from the bar as Jews, and after the war they sometimes interfered in the purge process (for example in Marseille). They sought better control of those responsible for their fate, and often advocated for a less consensual approach of the period than the one that the bar associations often promoted.

Purges, at the level of each bar, reproduced and sometimes strengthened cleavages of the war. Even if they were rather privileged in comparison to other professions, lawyers generally considered the necessity of purging themselves as a burden and a threat to their cohesion. That is why they tried, as often as possible, to requalify politically oriented practices in favor of Vichy or the occupiers in terms of their professional norms, political commitments, and their consequences. For example, in many cases they excluded colleagues whom were jailed, not because of the reasons surrounding their imprisonment, but because they no longer practiced law or did not answer their convocation (for e.g., in Toulouse). More generally, bar associations were more severe, first in the cases that could be redefined as professional misconduct, second when the facts could be redefined as anti-patriotic (especially in Paris). This last dimension related, for example, to the participation in economic collaboration, or personal involvement in the defense of German interests. On the contrary, the bars were very reluctant to punish anything related to political opinion, even if antisemitic, and referred to their liberal tradition in defending this position.

10.3 Professional Purges, Legality, and Memory

When did the purges end? Usually, the end of the trials marks the closure of the process. Even if the trials themselves lasted several years after the Liberation, one must take into account what happened later on, especially in terms of amnesties and appeals. It is a process that Alain Bancaud and Marc Olivier Baruch, in their study of French administration, call the "unpurge" [*désépuration*] in order to stress the fact that this reverse process partially erased some consequences of the purges.[25] Among the 93 files concerning the Parisian Bar that I studied, 18 appeals were launched, either by the defendant or by the judicial prosecutor, or even by both parties, when they considered that the sanction was inappropriate. If we consider the result of those appeals, we cannot reach unambiguous conclusions. Five decisions were in favor of the defendant, but four led to an aggravation of the sanction. For the last five, the sanction remained unchanged. Three files were not taken into consideration, either because the lawyers resigned or because of amnesty. If

[25] Bancaud and Baruch 2003, pp. 480–512.

the effect of the appeal process was not one-sided, the amnesty laws were, on the contrary, more powerful in nullifying legal consequences of the judicial process. A certain number of lawyers, expelled from the bar as a consequence of their condemnation for national indignity or for disciplinary reasons linked to the war period, asked for reintegration after the amnesty laws (of 1947, 1951, and 1953), or clemency decisions from the President of the Republic. In 1947, at least two of them were reintegrated in Paris.[26]

More generally, after 1947, the climate of clemency infused by the passing of the first amnesty laws led bar councils to drop lingering charges. Thus, if one takes into account the purge process as a whole, from the period of the war itself through the lengthy purge trials and ensuing amnesty laws, we can observe that, contradictorily, the profession's self-examination lasted longer than expected although the passage of time partially erased the relative severity of the first decisions. As a process that is a recurrent subject notably in the discussion of the bar councils, the purges certainly had a significant impact on the life of the bars. But in Paris, as in other jurisdictions, few lawyers actually experienced a real sanction. The most severely condemned were, in the majority, politicians who had already been imprisoned or even executed, such as Pierre Laval.

Little by little, in the first years following the Liberation and mainly on the basis of the ambiguity of the term "defense," lawyers *appeared* to have collectively resisted during the war. (Some) Lawyers had "defended" (some) activists from the underground movement or Jews in front of repressive (German and French) tribunals during the war. On the basis of this image of "defense," that could be ambiguous as we have seen through the example of German military jurisdiction, lawyers as a group successfully constructed an over-arching representation that became popular and accepted in the public's consciousness. In 1947, the Parisian Bar received collectively the French resistance medal, as if it had resisted as a group, despite the fact that this same bar councils had actively participated in the exclusion of Jews from the profession[27] and had also supported they Vichy government's re-organization of the profession in June 1941. Furthermore, while several prominent members of the Vichy government and administration had been members of the Parisian Bar (notably Laval, Vallat, and Bergery), communist lawyers, such as Joë Nordmann, who had been at the core of the main movement of the judiciary resistance, were *not* invited to the medal awarding ceremony. (It was the beginning Cold War.) But the profession, led by the Parisian Bar Council and its head Jacques Charpentier, a former member of the Resistance movement, was strong enough to promote this distorted image and to gain legitimacy and the approval of the political authorities.

This distortion and reclaimed legitimacy explain why a five-year long (or more) process of professional purging was so quickly forgotten. Every bar association I

[26] The Parisian Bar did not give me access to their official records, so I cannot estimate how many lawyers were reintegrated in total.

[27] Badinter 1996.

visited, people—even former member of the resistance still alive at the time of my research in the late 1990s and early 2000s—told me in the beginning that I would not find anything and that no purge had occurred. It was always the opposite. Nobody remembered how tense the relations between the bars and the Ministry of Justice had been for many years. Even judges do not remember how their predecessors tried to pressure the bar councils of in their courts to condemn compromised lawyers.

To sum up, two main ideas must be isolated. First, the assimilation of lawyers to the "defense" is a very strong argument for the profession. Indeed, having been in charge of the defense of political enemies turns out to be a collective good when the regime changes. This may explain why so many lawyers in the political arena emerge unscathed after a political transition (Chili, Argentina…). Stephen Ellman reached a similar conclusion when he dealt with the general issue of lawyering under repressive regimes.[28] Second, the definition of the political limits of the legal profession is unclear, between the independence before the state and the limitations imposed by professional rules. Indeed, the difficulties encountered in sanctioning professional lawyers revealed, even more than the traditional corporatism of the profession, the difficulty in assuming that political and professional commitments were often synonymous, including in favor of anti-liberal values.

10.4 Conclusion

One of the most powerful lines of argument in the sociology of professions has been to focus on the professionalization process on a historical basis, be it adopting an "ecological" (Abbott) or a neo-Weberian (Sarfatti Larson) point of view.[29] In this perspective, the professional purge of lawyers that I examined can be considered as something accidental or anecdotal, a consequence of history that tells more about history than about the profession. On the contrary, I think that this episode is representative of many very important characteristics of the legal profession, at least in France. As we have seen, the professional purge of lawyers was delegated to the bar councils themselves, contrarily to every other profession. This demonstrates the very powerful collective identity of the professional group and its capacity—due to its long history—to appear self-regulatory. Indeed, lawyers as a group, unlike magistrates, did not appear as collectively guilty at the end of the war. The process of the profession's self-purification was a critical moment that revealed, at the same time, the divisions created by the war, whose scars were still painful, and the capacity of the profession to re-unify in the name of its "eternal" values embodied by the concept of defense. The paradoxical privilege

[28] Ellmann 1995, pp. 339–348.

[29] Respectively, Abbott 1988 and Sarfatti Larson 1977.

of being authorized to purge itself, almost without counterpoint, facilitated this storytelling, locally dependant upon the political equilibrium of forces during and after the war, but nationally and durably associated with the profession's remaining independence.

In the context of the legal profession's fate, the game of scales, from the political to the professional, from the national to the local, provides useful insights concerning its political identity. The lawyers' capacity for self-purification process helped them to overcome the obstacle, by producing a retrospective war narrative, emphasizing their independence from the state during and after the hostilities. They proceeded by punishing those members most directly committed to Vichy's politics, or, on the contrary, guilty of charges that could be recast as traditional attempts of professional deontology: denunciation of colleagues to the police, theft of clientele, excessive fees, breach of confidentiality—often in favor of the French or German police. Even if those charges could hide the enormous consequences faced by the victims of such breaches of professional rules (especially concerning denunciation and secrecy), this legal qualification permitted the justification of the necessity to appear faithful to the new regime and to reassume liberal principles, all in the name of the profession's core values. In this regard, this professional purge was not only a diffraction of a more general process; it can also be understood as a critical test to the ability of the professional group to overcome its divisions and to perpetuate its image by forging its own representation of the immediate past. This process implied a redefinition of the appropriate political commitment of the lawyer a posteriori, as well as a reaffirmation of the consistency of the profession over history.

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Part III
Transnational Circulation and Hybridization of Categories

Chapter 11
Law and the Soviet Purge: Domestic Renewal and International Convergences

Vanessa Voisin

Contents

In the wake of the end of the Second World War, "a whole continent made an attempt to settle accounts with its own political crimes and criminals," to quote István Deák.[1] While Europe was liberating itself, the expulsion of the occupier was accompanied by more or less spontaneous reprisals against yesterday's masters and their native accomplices. Acknowledging the vengeful ire of the oppressed against the local traitors, the new national authorities legalized, a posteriori, these improvised forms of justice, thereby hastening the establishment of veritable structures and repressive frameworks, to attempt to channel an urgent and radical need for punishment.[2] Diverse solutions for judging a crime—entirely new

[1] Cited by Frommer 2005, p. 2.

[2] Association française pour l'histoire de la justice 2008; Baruch 2003; Conway 1997, pp. 7–34; Huyse and Dhondt 1993; Virgili 2002.

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in nature, scale, and diversity—emerged according to the country in question.[3] Sought by everyone, the purge was inscribed, however, in a rather shocking logic of political justice, at least for the democrats attached to the notion of the separation of powers. The means of conducting the purge would in effect sketch out the norms on which the postwar society would establish itself. The purge also often became a political weapon to critique the adversaries in power.

In the Soviet Union, estimates of the number of collaborators vary from several hundred thousand to more than a million.[4] At first glance, the legal and political dimensions appear very simple. On the one hand, the Soviet state already had a robust history of political repressions and of adaptive judicial and police structures. That the justice should be "political" did not pose a problem; in fact, since 1917 it was assumed.[5] On the other hand, the absence of political rivals moved the stakes of the repression: it was not about conquering or conserving power, but to earnestly affirm the re-establishment of the party-state, and to re-establish the former forms of communication between the authorities and society.[6] This imperative explains the state's care in proscribing each form of the spontaneous purge.

In spite of its objective to return to the situation before the war, this work of restoration brought new challenges. It was imperative to erase every trace of the occupation in people's minds, to stifle the expectations of the heroes at the front lines and those at the home front, and to redefine the increased demands of loyalty to the regime. The phenomenon of collaboration was poorly adapted to and inscribed in the narrative of the "Great Patriotic War" then being created. Next, contrary to the victims of the Great Terror, pursued for invented "counter revolutionary crimes," people pursued for collaboration were judged guilty of recognized

[3] The known statistics of legal repressions are: for France, 127,750 cases tried in France (Baruch 2003, pp. 39–40); for Belgium, more than 57,000 cases affaires investigated and brought to criminal court, to which one must add the 44,000 people who had forfeited their rights (Huyse and Dhondt 1993, p. 27); for the Czech provinces, more than 32,000 alleged collaborators and war criminals were tried (with 700 condemned to death) and 135,000 cases of "offenses against national honor" were examined (Frommer 2005, pp. 2–3). In the USSR, experts estimate that over 500,000 civilians were punished. This number remains very approximate, however, because it excludes the number of cases tried under Article 58-3 of the RSFSR's Penal Code. For the other two texts utilized, our data present lacuna for certain years. Finally, the number of Soviets condemned for defeatism or for praising the enemy is subsumed into the total number of judgments for "counter-revolutionary agitation" (Article 58-10).

[4] We still do not possess reliable numbers. According to Dieter Pohl, specialist on the question, between 1.0 and 1.2 million Soviets may have served in the Wehrmacht and the German forces of order to which one must add those employed in the occupiers' civil administrations. Pohl 2008, Chaps. 5, 6.

[5] The decree of 28 November 1917 "stipulated that the members of the constitutional-democratic party's leadership, party of the enemies of the people, are outside of the law, liable for immediate arrest and appearance before the revolutionary tribunals." Werth 2007, p. 25.

[6] Admittedly, the proceedings in the eastern margins annexed in 1939–1940 of a "war after the war" (E. Zubkova) testified to the existence of contestations of this power. But this adjournment never reached a national level nor menaced the Communist Party's monopoly over the governing of the country. The party had led the country to a victory saluted by the entire world (Burds 2000).

crimes of anti-patriotism, or sometimes even murder of fellow citizens, and punished by the Penal Code. But the reality of the acts committed did not actually simplify the problem of their just qualification in law.

The historiography has begun to establish connections between well-studied phenomena, such as the repression of collaborators and the struggles against Sovietization by nationalist resistance movements.[7] However, these works were less concerned with the evolution of Soviet law through the legal repression of collaborators, the object of this chapter.[8]

The context of the war during the first years of the Soviet purge (1942–1945) and the experience of the previous repressions encouraged recourse to the analytical legal framework and the anterior practices that one adapted to the circumstances. It is important to mention the simultaneous development of a legal purge and a large-scale extra-legal purge—a duality typical of Soviet political repressions.[9]

Several factors directly linked to the conflict nonetheless influenced this new repression: the accelerated development of Russocentric patriotism,[10] and the conduct of the joint allied negotiations on the future punishment of war criminals. This chapter will defend the idea that the convergence of Soviet and international law resulted in remarkable innovations for both. If the purge first entails all of the attributes of a legal campaign, Soviet style, the purge also quickly denoted an effort of previously unknown nuance that finds its origin in an evolution of the legal vision and in the international issues linked to the prosecution of war criminals. We will deal exclusively with the lot of civilians.[11]

11.1 A New Judicial Campaign

The form that judicial retribution was to take did not pose an immediate problem in the Soviet Union. Article 58 of the Penal Code of 1926 described the different forms of punishable counter-revolutionary crimes. This article was found in the Code's "special section." Originally constituting a separate text, the "Statute on Crimes Against the State (Counter-Revolutionaries and Crimes against 'the Order of Governance' Particularly Dangerous for the USSR)," the article was incorporated into the Code in June 1927. Paragraph 1 defined "treason against the homeland" and para 3 defined "collusion with" and "the assistance to a foreign State or

[7] Denis 2008, pp. 263–296; Naimark 2001, pp. 85–107.

[8] This lies outside the purview of the well-documented Epifanov 2005.

[9] The relationships between these two constituents of Soviet retribution as well as the administrative and professional purges constitute the subject of my doctoral dissertation, "The War Purges in Soviet Union: A Study Based on the Case of Kalinin Province, 1941–1953," prepared under the direction of Professor Marie-Pierre Rey at Université Paris 1 and submitted in November 2011.

[10] On the booming Russocentric patriotism before and during the war, see Brandenberger 2002.

[11] On soldiers who collaborated after their capture, see Aleksandrov 2005 and Smyslov 2006.

with its representatives for counter-revolutionary ends."[12] Similarly, the sentences foreseen by these two paragraphs recall the arsenal later created by other countries for their postwar purges: the death sentence, imprisonment for a variable duration (maximum 10 years for treason against the homeland; more than 3 years for collusion with a foreign state), confiscation of all assets belonging solely to the accused, suspension of civil rights for a variable duration after the sentence served. In addition, the "passport regime," a special Soviet feature defining the zones from which former convicts or other individuals deprived of their civic rights were banned, added to these sanctions an important restriction in the place of residence (and thus of work and study).[13]

In the case of civil collaborators, the inquest was generally led by the Peoples' Commissariat of Internal Affairs (NKVD) after its return to liberated territory. Embedded within each army unit, the NKVD's services followed these units' progression and left the scene of the crime at the moment when they should have proceeded with an investigation. Once the investigation was complete, the dossier was examined at a preliminary hearing in order to verify the justification of the charge. Finally, the affair was brought before a military tribunal whose judgment could not be appealed.

In 1942, the first year of the purge, a report issued by the Head of the Military Tribunals of the Red Army indicated that 9,790 Soviets had been prosecuted under Article 58-1a and 5,953 under para 3. In 1943, the number grew to 100,000 convicted of treason (out of 300,000 people arrested) and 40,000 of collusion.[14]

The examination of 81 cases of collaboration, a sampling of trial records concerning the Kalinin region (present-day Tver), which was gradually liberated between December 1941 and July 1944, reveals the impossibility of reducing the

[12] *Sbornik zakonodatel'nyh i normativnyh aktov o repressiâh i reabilitacii žertv političeskih repressij* 1993, pp. 28–32.

[13] Moine 2002, pp. 87–108; Shearer 2004, pp. 835–881.

[14] For the year 1942, we are referring to the Botvinnik Report, cited by Hilger et al. 2001, p. 182. For 1943: Pohl 2008, pp. 332–333.

defendants' profiles to one, even two, or sometimes three categories.[15] Using the criterion of "social dangerousness" which guided most repressions of the 1930s, the examination is hardly conclusive. Indeed, of the 81 individuals, ten had served in the czarist army and had been held captive by the Germans or Austro-Hungarians during the First World War (contact with a foreigner). Twelve were sons or daughters of orthodox priests, wealthy peasants, merchants, etc. ("foreign" social origins). Nineteen had already appeared in Soviet courts, but rarely for political reasons (common-law criminals). But all practiced a "socially useful" profession or were retired. The sample provides the impression of a sectional view of Soviet society in 1941–1942, but more of the bottom than of the top. One even counts ten members of the Party, two members of the Communist Youth, and three state functionaries among the accused. Moreover, the grounds for arrest were not reducible to a single category just like the circumstances surrounding the decision to collaborate (see Table 11.1).

The current sample provides a glimpse into the small, quotidian collaboration manifested most cruelly by denunciation (never proven in the dossiers consulted) and threats of violence against civilians refusing to do a chore or to give up their assets. Out of forty burgomasters, mayors, and assistant mayors, more than one-third were chosen by the population. Truthfully, these "elections" presented a lot of ambiguity, the community being ordered by the occupier to elect a representative and the elected official being forcefully compelled to accept. Espionage in the true sense held only a marginal place in the sample (one case). Admittedly, these diverse forms of aiding the enemy evoke the accusations of the 1930s by connection with the foreigner (notably the foreign secret services or the White Russian community) and the growing mistrust of the Soviet authorities with respect to all

[15] TCHDNI (Tver Contemporary History Document Conservation Center), f.7849: trial records of rehabilitated victims of political repression. Due to an incomplete inventory of the archival collection, the total number of dossiers concerning crimes of collaboration still remains unknown. Moreover, the collection only encompasses the cases where the investigation had not proven any serious crime. The eighty-one cases studied were thus identified by the criminal qualification of their crime (Article 58-1a and 58-3) from the existing catalog.

Table 11.1 Types of collaboration and aggravating or extenuating circumstances[16]

$n = 81$	A	B: Specific elements					
Nature of collaboration	Total	Commited out of fear	Commited out of need	Elected by the inhabitants	Individual or lists of denunciations	Forced requisitions of private property	Threats or violence towards the population
1. Official posts: administration and police	**50**	**16**	**6**	**4**	**22**	**25**	**12**
Rather important duties (*staršinas,* burgomasters, chiefs)	9	4	1	1	4	5	1
Duties in the enemy's repressive services	1				1		1
Duties in the forces of order (community policemen…)	2	1	2		2		
Modest duties in the adminstration (starostes)	27	7		12	8	19	8
Positions as assistants, secretaries, etc.	4	2	1	1	1	1	1
Interpreters	2	1	1		1		
Concierges and neighborhood officials	5	1	1		5		1
Serial collaboration types 1 and then 2	5	1	2		1	1	
2. Positions of an economic nature, official or unofficial	**14**	**3**	**6**	**1**	**2**	**2**	**2**
Position of responsibility, economic sphere	7	1	4	1			
Minor services for the occupier:	7	2	2		1	1	1
Food and shelter	1			1	1	1	1
Laundry							
Various small tasks	3	2	2				
Associating with the occupiers	3						
3. Cultural positions or acts of propaganda	**4**	**1**	**2**		**1**		
4. Solely denunciations	**7**		**1**		**2**	**1**	
5. Espionage	**1**						
Total	81	21	17	15	28	29	14

[16] In the organizational structure of the administration of occupation, *staršina* designates the individual responsible for a village, canton (*volostnaâ uprava*), or urban district (*rajonnaâ uprava*); superior to *staroste,* who was responsible for the small administrative unit (hamlet, village, or group of hamlets). The categories were created from the totality of each dossier (and not just from the indictment or sentence)

sorts of deviants.[17] Nonetheless, the factors of duress and fear—for oneself, for one's family—and of need were directly linked to the characteristics of the German occupation in Soviet territory and strongly nuanced the political dimension of these crimes. Spontaneous acts of denunciation, which would most closely resemble the crime of treason, were often added to the primary charge and were never proven, except by discovery of the body of the presumed victim.

Despite these differences, from the end of 1941 to the beginning of 1943, the first phase of the legal purge, the repression functioned like the "judicial campaigns" of the previous decade.[18]

The "regular" NKVD (as opposed to the units integrated into the army and/or responsible for "cleaning up" behind the front lines) zealously prepared dossiers at a frenetic pace. Hurriedly investigated to aid the prosecution with no counter-investigation for the defense, the dossiers were sent to judicial authorities who received signals from above encouraging them to crack down without pity.[19] Our sample confirms the severity and the hastiness of these first case preparations. Of the thirty-seven residents of the city of Kalinine, liberated 16 December 1941, twenty were arrested between 18 and 31 December. Thirty-four of the forty-four individuals prosecuted in the region's districts were during the period December 1941–June 1942. For twenty-six defendants from this period, the investigation lasted barely 10 days. Six dossiers lacked witness depositions and two only had one; the majority had between two and five. And yet, more than half of the group was condemned to death (45 individuals). In a completely new fashion, Soviet "campaign justice" came close to the repression carried out in western democracies, which were also shaken by the emotionally charged climate at the beginning of the purge. A major difference was that the Soviet authorities controlled the process from beginning to end, even during the impassioned weeks of liberation.[20] The excesses were not due to popular anger, but to the NKVD's zeal to apply harsh instructions.

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[17] On the fear of criminal or marginal elements, see Shearer 1998, pp. 126–128.

[18] Solomon 1998.

[19] Umanskii 1941, p. 5. In this journal published by the Soviet Procuracy, the author calls for his magistrate colleagues to battle against the counter-revolutionary crimes with a particular firmness, and without pity. The military prosecutors had to pay special attention to this category of crimes, to place them under special surveillance, and to try to swiftly accelerate their repression. To this end, a decree of the Supreme Soviet Presidium of 27 June 1941 accorded to the military councils at the front lines, "in exceptional cases" the right to ignore the ordinary procedure (to inform the Supreme Court of capital sentences) and of themselves ratifying the death sentences. In July and September 1941, this prerogative was extended to the armies' and corps' military councils, and to the division commanders.

[20] One should notice here that "spontaneous" and "popular" reprisals against collaborators did happen very often, but mostly during the occupation and at the hands of the local *résistants*. Moreover, these partisans were officially empowered by Moscow to enforce Soviet law in the enemy rear. For a study of the behavior of Tver *résistants* to the collaborators, see Chap. 2 of my dissertation. For a general overview, I drew on Cerovic 2008, pp. 239–262 and idem.

Peter Solomon underscores judges' initial reluctance when faced with political signals unleashing a wave of repression. Nevertheless, menaced by sanctions, destitution, and even persecution in the event of demonstrating "liberalism," the judges tended to seem ultra-zealous and they carried the campaigns to their apogee. When the Third Reich attacked the USSR, a large part of the country was placed "in a state of war," and the mobilization of the population relied on an intensification of the criminal laws. On 26 December 1941 a decree by the Presidium of the Supreme Soviet increased the repression for violations of workplace discipline, which had been already intensified by a decree on 26 June 1940. In 1942, 1,754,472 people were condemned under one of these decrees; this number represented 51 % of the criminal sentences of the year. In this context, the coupling of the police and judicial systems in the repression in collaboration cases was hardly surprising. More surprising, however, was the tenor of the rather rapid intervention of the judicial high authorities.

In general, the repressive campaigns in the USSR concluded with a political signal followed by bureaucratic directives calling to put an end to repressive "excesses" and to return to the rule of law like at the end of the dekulakization and of the Great Terror.[21]

And yet the purpose of the interventions of the high judicial authorities in 1942–1943 was not stopping the campaign against the "traitors," which had hardly begun and obeyed the constraints imposed by the rhythm of the liberation of the territory, but rather the rationalizing of the repression.

11.2 A Nuanced Investigation in the Middle of the Repression Campaign

On 15 May 1942, the Prosecutor of the USSR sent his subordinates an order "on the qualification of crimes committed by individuals in the service of the enemy, the German-fascist occupier, in the temporarily occupied districts." The text condemned the frequent confusion between paras 1a (treason) and 3 (assistance to the enemy) of Article 58 of the RSFSR Penal Code. Paragraph 1 foresaw the most severe penalties of the Code—the death sentence or 10 years of detention—whereas para 3 envisioned, in certain cases, recourse to lighter sentences (3–8 years in a camp). According to the Prosecutor, individuals deemed traitors were only judged under Article 58-3 instead of under 58-1a: it concerned "individuals in the service of the German-fascist occupier who handed over partisans, communists, and state functionaries, or proved cruelty in respect to the population of the districts temporarily occupied." *A contrario*, Soviets who, "although having held administrative functions under the occupier, [had] aided partisans and Soviets by clandestinely sabotaging the German powers' demands" saw themselves pursued under

[21] On the Kremlin's sinuous criminal policies in the 1930s, and its reasons, see Rittersporn 1997, pp. 207–227 and Solomon 1987, p. 395.

58-1a. The State Prosecutor Bočkov enjoined judicial employees from correcting these errors in the future, and, in addition, to cease pursuing both the collaborators who had aided patriots and those Soviets who had exercised their profession during the occupation, but not to the occupiers' benefit (physicians, engineers, etc.). Demonstrating the attention paid to this correction, at least by the close colleagues of Bočkov, the Central Leadership of the military tribunals in turn issued, 15 days later, a directive specifying the criteria for the charges to be brought against collaborators.[22]

Although far from responding to all of the questions raised by the complex situations of the occupation and of the forms of collaboration, the text tells a lot about the means by which the country's leadership sought to treat the crime of collaboration at this stage of the conflict. Far from wanting to amalgamate the varying behaviors of accommodation and collaboration under a unique category that stigmatized treason, like the first jurisdictions seemed to do, the prosecutor's instructions expressed a willingness for differentiation and nuance. Clandestine aid to patriots thus "compensated" for the initial compromise. The exercise of trades useful to the occupied population was not punishable as long as such exercise did not respond to the enemy's orders nor demonstrate an intention to aid the enemy.

One of the dossiers from the Kalinin region is representative of police and judicial attitudes in 1942–1943. Konstantin Dobrynin, an engineer, was arrested 27 December 1941 and sentenced 11 February 1942, pursuant to Article 58-3, to one of the heaviest possible sentences: 10 years of corrective labor, confiscation of all assets, and five-year forfeiture of civil rights. The regional NKVD, the author of the indictment, charged him with "voluntary collaboration with the enemy": first as the person in charge of the quartier then as municipal department chief of construction for the Novopromyslennyj district (in Kalinine). In this respect, he should have directed the re-starting of diverse workshops that responded subsequently to German orders. Tangled up with charges against four other collaborators, the investigation lasted, in reality, less than two weeks and was exclusively based on the depositions of the other defendants. Twenty-two months later, following several complaints lodged by the Dobrynin family, the case was reopened and examined by the Military College of the USSR's Supreme Court, which decided to requalify the defendant's indictment to the point of annulling the judgment and closing the case. The motive of the dismissal conformed to the order of 15 May 1942: Dobrynin had not collaborated with the enemy because the work to restart the diverse community workshops had benefited only the occupied population and not the occupying army, and he had only acted as neighborhood official for a few days.[23]

More generally, the analysis of decisions to revise judgments for crimes of collaboration by the Soviet Supreme Court, presided over by Ivan Goliakov, or by the Military College, in 1943–1944 confirms both the severity and the confusion of

[22] *Sbornik zakonodatel'nyh*, 39–41 (text of May 15, 1942) and Epifanov 2001, 190 (text of 29 May 1942).

[23] TCHDNI, f.7849, d.11480s, l.19-19ob and 31-31ob.

the judgments by the court with original jurisdiction and the professionalism and nuanced touch of the high judicial authorities.[24]

A commission of high officials from the Soviet state and judicial system was formed at the beginning of 1943, on orders from Stalin, to find a suitable means of punishing Nazi war criminals and their most zealous accomplices. According to the head of state, the gravity and cruelty of their crimes defied existing Soviet law. On 19 April 1943, the project presented by the commission—and very likely revised by Stalin himself—was adopted by the Soviet Presidium and ratified as a decree not published in the press: "On the sentences applicable to German-fascist malefactors guilty of murder and torture of Soviet civilians and prisoners of war, and to Soviet citizen who were spies and traitors of the Homeland as well as their accomplices."[25] The decree envisioned sentence of death by hanging and hard labor for the most egregiously guilty collaborators.

On November 1943, the Plenary of the Supreme Court further refined the distinction between the different crimes of collaboration. It argued that the decree of 19 April had "drawn a distinction between the traitors to the Homeland and the enemy's accomplices."[26] Indeed, a new essential element was added to the rather formal criteria retained up to that point in order to distinguish the crimes falling under paras 1 or 3 of Article 58: the use of violence with respect to Soviet citizens and the direct or indirect participation in murder committed by the Nazis. The charges against the enemy's collaborators, and the sentences incurred, depended thereafter on the level of responsibility in the administrations, military and paramilitary units, intelligence services and other institutions of the adversary; on the actual degree of implication in the violence against Soviet civilians or prisoners; on the concrete consequences of the confirmed acts—favorable to the enemy or to the homeland; on the respective weight of the patriotic acts and of the acts of collaboration (for those who changed their mind or acted as a double agent, etc.). Admittedly, holding a rather high office in a collaborating organization was sufficient to invoke Article 58-1a, regardless if the consequences of this activity were precisely established or not. But simple *starostes* (or village elders), so severely sentenced in 1942, could no longer be treated in this manner, as long as they were not accomplices to serious violence against their compatriots or were not indirectly responsible, for example, for providing intelligence to the Germans. Soviet justice was called upon to apply Article 6 of the Penal Code, which affirmed the absence of a crime in case of insignificant charges. Finally, in order to incur the punishments foreseen by the decree of 1943, it was necessary to be considered guilty of violence against Soviet citizens, whether one held an official office or not.

The crimes defined by the decree were explicitly considered war crimes of an unprecedented nature. The decree's preamble emphatically denounced these crimes and punished them with sentences unprecedented in the history of the USSR.

[24] GARF, f.9474, op.1, d.135-139. For an analysis of these revisionary decisions, see Voisin and Kudriashov 2008, pp. 284–286.

[25] For a detailed analysis of the text's genesis, see Hilger et al. 2001, pp. 177–196.

[26] GARF, f.9474, op.1, d.136, l.20-21.

Nazi criminals and their accomplices directly implicated in the war crimes were to be hanged and their bodies left exposed for several days. Soviet accomplices incurred a sentence of 15–20 years of hard labor. The first punishment was probably inspired by the desire to inflict on the war criminal torment and humiliation similar to that suffered by the partisans and patriots arrested during the occupation. Accounts and photographs published in the press on the sad lot of patriots frequently mentioned this infamous practice of hanging, which had obviously struck a chord. As for the choice of hard labor, it resulted from research carried out by officials of the Gulag's administration on the punishments of the czarist period. The term itself—*katorga*—came from that period.[27] The recourse to these punishments indicated a radical rupture with the principles of post-Revolution Soviet law. In effect, punishment was no longer a "measure of social defense" purely educational in nature as defined in the Article 9 of the CP RSFSR.[28] Henceforth, punishment sought to inflict pain and humiliation.

On 11 June 1943, an order by the chief of the political police created the first forced labor sections in three NKVD camps: Norilsk, Dal'stroj, and Vorkuta. The regimen of detention and work stipulated solitary confinement and reinforced surveillance of these prisoners, along with work of a rhythm and nature more exhausting than the worst of the camps' existing regimens.[29] Without the remission of his sentence, a person condemned to forced labor had little chance of surviving 15–20 years in such conditions. In July 1944, 5,200 convicts were held in these sections, but in September 1947, thanks to the capture of escaped criminals in Europe, this number multiplied ten-fold to reach 60,021.[30]

11.3 The Purge and the Evolving Place of Law in the USSR

The judicial thinking about the punishment of collaborators in the period of 1942–1943 is inscribed in a larger re-evaluation of the role of law, whose premises date to at least 1933–1934. It was then that Vychinski, famous for his role of plaintiff in the Moscow Trials, launched a project bent on restoring a certain number of principles of "bourgeois" law thanks to a repressive lull following the chaos created by collectivization and dekulakization.[31] At that time, Stalin's devoted follower was Krylenko's deputy at the People's Commissariat of Justice of the USSR, and at the same time RSFSR Prosecutor. According to Peter Solomon, the apparent contradictions of Vychinski's positions in 1932–1939 only reflected the twists and turns of

[27] GARF, f.9414, op.1, d.76 and 503.

[28] Gercenzon 1957; Šargorodskij 1958.

[29] GARF, f.9401, op.1/a, d.135, l.170-171ob.

[30] Zemskov 1991, pp. 10–27.

[31] Huskey 1987, pp. 414–428. Francesco Benvenuti locates additional signs of aspiration for a return to legal norms within the judicial authorities. Benvenuti 1997, pp. 1037–1056.

Stalinian policies in matters of both societal control and ruling elites. The Soviet State Prosecutor (since 1935) loyally served his master, to whom he was indebted by previous events, in the successive utilization of legal and extra-legal measures for political ends.[32] This flexible view of legality allowed him to survive each wave of repression in the 1930s, unlike his colleagues Nicolas Krylenko, Ivan Akoulov, and a large number of Soviet jurists.[33] In contrast to his principal rivals, meanwhile, Vychinski did not limit his defense of justice against constant encroachment on his authority by the political police. He easily tolerated the coexistence of extra-legal tribunals and troïkas in 1930, 1935, and especially in 1937–1938. As soon as he could (in 1932, 1934, then in 1936 and 1938), however, he sought to attain justice by paying careful attention to promote respect for legal principles and formal trials, all in the name of his conviction in the pedagogical role of justice for the "popular masses," and, at the same time, in the conviction of the political utility of centrally-controlled justice. But to have moral authority over its actors and spectators, this type of justice had to appear to be legitimate and effective with a certain degree of ceremonialism. "We know of the authority enjoyed by the English justice of the peace among the population of his county. We must achieve not less but more authority for our own judges," he wrote in spring 1936.[34] Adopting a more pragmatic vision of the function of justice in Soviet society, Stalin heartily supported the rapid succession of a man from a university and legal milieu in the realm of political power. On the eve of the conflict, Vychinski acceded to supreme functions: member of the party's Central Committee and vice president of the People's Commissars in 1939, first deputy to Viatcheslav Molotov in Foreign Affairs the following year.

We do not possess sufficient information to appreciate the conception of law of Vychinski's and Krylenko's successors at the head of the Soviet Union's judicial system. V. M. Bočkov came from the upper echelons of the NKVD while Nicolas Ryčkov had made his career in the Military Procurature. Ivan Goliakov, however, who was promoted to president of the Soviet Supreme Court in May 1938, just before the end of the Great Terror, shared Vychinski's conviction in the pedagogical power of justice. Moreover, he affirmed it in the middle of the global conflict.[35] Furthermore, since the Law of August 1938, the Supreme Court possessed the power to revise sentences handed down by any court of first instance, thus becoming the essential arbiter in the debate over the forms and principles of law. Finally, each question or proposition of a juridical nature from these three leaders—like the texts of 15 May 1942 or 25 November 1943—came back up to Vychinski, or even Molotov and Stalin, before ending up in a codified text.

Thus, the efforts at gradation in the definition and sanction of crimes of collaboration appeared to confirm the evolution of the role and of the place accorded to

[32] Solomon 1998, pp. 151–155.

[33] For examples of the judges' and prosecutors' resistance to the arbitrary repression, see Muranov and Zvâgincev 1993, 1996; Rasprava. Prokurorskie sud'by 1990.

[34] Huskey 1987, p. 420.

[35] Solomon 1987, pp. 407–410. Cf. Sovetskij sud kak orudie vospitaniâ 1944, pp. 6–10.

law in the USSR, even if the recourse to extra-legal and administrative repressions continued in parallel.

However, this juridical dynamic undoubtedly did not suffice to explain the attention paid to the just penal qualification of crimes of collaboration, even though the country discovered the horrors of Nazi occupation and assembled all of its forces to doggedly resist the enemy. An international issue became grafted to the question. From 1942 it was clear that Stalin leaned toward a judicial solution to the problem of the punishment of the major Axis war criminals (see notably his declaration of 14 October 1942).[36] Admittedly, his choice can be explained by his concern for maintaining the international prestige acquired by the USSR during the war, his postwar projects for Eastern Europe, and his willingness to confront the aggressors with the "cost" of their occupation with, for example, the creation of a State Commission on Nazi Crimes in November 1942. In any case, he confirmed the Soviet leadership's confidence in the effectiveness of a few large and sensational public trials while the majority of the massive repression proceeded in the confidentiality of closed trials. This duality evoked the Great Terror, even to the point of anticipating the inter-allied initiatives and of staging large public trials of war criminals on Soviet territory starting in 1943.

11.4 Soviet Purge Law and International Law Against War Crimes

The trial of eleven Soviet collaborators, members of the *Sonderkommando* responsible for atrocities in the Krasnodar, Taganrog, and Rostov regions, took place 14–18 July 1943 in the main square of Krasnodar in southern Russia. The trial, the population's reaction to the verdict (eight death sentences), and the executions received heavy media attention in the written press and newsreels. The public hangings attracted 30,000 spectators.[37]

The same scenario was reproduced for the trial in Kharkov, from 16 December to 23 December 1943, which had the benefit of more sensationalism than the previous trial because on the docket were four defendants: three German and only one Soviet. There were echoes of the Declaration of the Three Powers of 30 October 1943 (published 1 November), which condemned the German atrocities in the occupied countries of Europe and laid down the principle of judgment of war criminals by the tribunals of liberated countries. The fate of the major Nazi criminals remained, however, unresolved. According to Arieh Kochavi, the totally new

[36] Ginsburgs 1996; Kochavi 1998, pp. 27–61. Stalin's Declaration of October 1942 was published in Pravda 15 October.

[37] "Prigovor" [the verdict] and "Vozmezdie" [the punishment], Krasnaâ Zvezda (20 July 1943), p. 3. Kochavi 1998, pp. 65–68. The cameraman Mark Troânovskij recorded in his diary the circumstances of the convocation to Krasnodar: Troânovskij 2004, pp. 183–184. The film can be seen at RGAKFD, No 5056: Prigovor naroda 1943. Talking movie, 366 m.

mediatization of the Kharkov trial aimed to test the Allies' reactions. The execution of Axis criminals had in fact already begun in the USSR a few months prior. On 26 November 1943, two Germans were hanged in Kiev, just in front of a hotel accommodating foreign journalists, and their bodies were left on view for an entire week.[38] In Kharkov, the Kremlin notified the Allies of its resolution to publicly punish major Nazi criminals and offered its interpretation of Nazi crimes.

In these two trials, the prosecution used the decree of 19 April 1943 with one exception: the chosen jurisdiction was not a mobile court-martial but a full-on military tribunal.[39] In Kharkov, extremely heavy indictments were brought against the accused: murder of thousands of people in gas trucks, destruction of cities, shooting of wounded prisoners of war, etc. Above all, like at Krasnodar, the Soviet State judged the German elite *in absentia* via the four defendants.[40] The true responsibility for the crimes committed lay with the commanders of the armies and Gestapo services directly involved, and beyond to the leaders of the Reich. The crimes were inscribed in a vast criminal project in which Soviet collaborators constituted the local intermediaries. Several articles published in the Soviet legal press between 1943 and 1946 indicate the means by which the large public trials were to be interpreted. During the Nuremberg Trial, Boris Glebov explained in his journal *The Socialist State and Law* that together the atrocities committed by the Axis Powers were part of a premeditated plan by Nazi leaders. In his eyes, only the decree of 19 April 1943 (which had never been published) permitted the prosecution of *all* participants in crimes resulting from this plan—from the simple performer or local collaborator to the Berlin leader—in a "just" manner, that is, adapted to the gravity of the crimes.[41]

The concept of a vast conspiracy with ramifications for invaded countries troublingly recalls the accusations brandished during the 1930s, especially during the Great Terror, against the Soviet state's new enemy after the disappearance of class enemies: the domestic enemy, the enemy hidden in the ranks of the party.[42] It was as if the fictional crimes of the political trials of the 1930s had become reality. In fact, there was a close connection between the argumentation in Vychinski's closing arguments in the Moscow Trials of 1937–1938 and the legal theory developed during the same period by Aron Trajnin regarding crime against peace (*In Defense of Peace and Criminal Law*, 1937), and, a little later, regarding collective criminal responsibility for participants in Hitler's project.[43] In his *The Criminal Responsibility of Hitlerians* (1944), probably prepared in preparation for the

[38] Kochavi 1991, pp. 404–405.

[39] Since the accessible archives do not provide an explanation, one must suppose the reason was purely technical: the mobile courts-martial followed the active army's advance, at the front lines, whereas the heads-on military tribunals were more in the rear. And yet Krasnodar was liberated in February 1943.

[40] Bourtman 2008, pp. 246–265.

[41] Glebov 1946, pp. 51–61.

[42] Weiner 2001, pp. 35–38.

[43] Hirsch 2008, pp. 701–731.

Allies' trials, Trajnin developed the notion of "crime against peace" thanks to the notion of "complicity." This complex concept included the dangerous forms of participation in an organization, band, group, etc. and would assume the criminal responsibility of each member of the group for each criminal action of the group, whether or not known to the member or not. Such was the logic of Article 58-11 of the RSFSR Penal Code used in numerous political trials under Stalin.

Vychinski had signed a dithyrambic avant-propos for both works, becoming in the meantime the number two of the Soviet foreign affairs. In truth, he had personally oriented Trajnin on this topic after the USSR's entry into the League of Nations in 1934, with the idea of using criminal law to protect the peace. On Vychinski's initiative, the Soviets seemed to have wanted to use the law to promote the Kremlin's projects seeking to restructure the international order, an issue certainly more essential for the Three Great Powers than the fate of the leaders of the Axis. Trajnin's work was translated and discussed by jurists in the Allied countries; he reached the prosecutor Robert Jackson, the chief U.S. prosecutor, and then David Maxwell Fyfe, the British deputy chief prosecutor, before the London Accords. The Soviet idea of complicity was similar to the Anglo-American notion of "conspiracy," and it, along with "crime against the peace," was retained among the indictments against the defendants at Nuremburg. Francine Hirsch can thus argue for the necessity of reevaluating the respective Allies' contributions to the international criminal system in Nuremberg and for giving the Soviets their just due for their under-valued contribution.

The surprising synergy of Anglo-Saxon and Soviet law should not, however, eclipse the early influence Vychinski's and Trajnin's thinking (about the crime against peace) on the formation and utilization of the Decree of 19 April 1943 and the impact of this new text on the national war purge.

11.5 Conclusion

Several decisive factors influenced the legal aspects of the Soviet purge. First of all, there was the legacy of Soviet jurisprudence and judicial practice as they had developed since 1917 and the very first decree "On the tribunals" until the Great Terror, and the impact of this legacy on the Soviet judicial system.[44] Second, the context of absolute war tended to encourage the tendency of the Soviet judicial system to function by "campaigns" driven by the political leadership. These two elements help to explain the promptness and severity of the sentences in 1942, which brings closer together the beginnings of the Soviet and Western European purges.

Meanwhile, the aspiration on the part of certain senior government officials from the early 1930s to re-evaluate the role of law found a means of becoming

[44] Solomon 1987.

reality, in part thanks to the international issues that took on the question of punishing the Axis' crimes. The Soviet government's willingness to make its voice heard in the Allies' deliberations on international law left its mark on the national purge legislation and permitted the partisans of stronger, more litigious, more pedagogical law to impose on the tribunals sensitivity to nuance and gradation without necessarily ending the repression. The punishment of collaborators remained extremely severe in the Soviet Union, whereas western European judicial systems softened their sentences after completing the first year of the purge, to the great displeasure of the national communist parties.

After the trials in Krasnodar and Kharkov, Moscow awaited the opening of the International Tribunal of Nuremberg in order to re-launch the last series of sensational public trials of war criminals of the Stalinian period[45] while a massive and protean purge took place in covert closed political trials.

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[45] Prusin 2003, pp. 1–30. See also RGASPI, f. 82, op. 2, d. 894, l.36-41.

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Chapter 12
Circulation of Models of Épuration After the Second World War: From France to Italy

Valeria Galimi

Contents

12.1 The Purge in Italy: Categories, Definitions, Periodization

"The phenomenon was not very serious." "A machine prepared for the ridiculous defascistization." Such is how Italian historians concluded that the *épuration* was a complete failure.[1] Studies on purges in Italy, in fact, strongly emphasized the continuity of men and institutions during the transition from fascism to the Republic, or, to use a phrase in vogue in Italian historiography during the second post-war,

[1] See Woller 1997 (German edn 1996); Canosa 1999; Domenico 1996. See also Flores 1977, pp. 413–467.

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from fascism to post-fascism.[2] For a long time, the category of "post-war" has been predominant, defining the period from the end of World War II (25 April 1945, the date of the liberation of Milan is considered the end of the war and a national holiday) until 1948 (which marks the victory of the Christian Democrats, the departure of the government of the left, and with it the failure of the political movements rooted in the Resistance).[3]

If for a long time Italian historians have viewed this period only as a failed process, which made the transition from fascism to post-fascism incomplete, there are other useful categories to "break up" this period, and to better analyze its characteristics. Among these are "civil war" or "exit from the war."[4] The term "exit from the war" has been used relatively little in Italy, contrary to the historiographical debates in other countries, like France. Applied to the Italian case, the term is very heuristic, because it allows the emphasis to be put on many aspects. First, the *terminus ante quem* must be located in the years 1943–1945, between Badoglio's Armistice in September 1943 and the final fall of Mussolini and the Repubblica Sociale Italiana (RSI), which accompanied the German surrender in April 1945. These months marked a turning point in the war and then in the experience of war lived by the Italians.

In the months following the Armistice, the Anglo-Americans Allies, with the support of the Italian Resistance, organized violent confrontations against the Nazi occupiers (supported by the neo-fascism of the RSI). The main victims were civilians in the theater of war, especially the central and northern part of the peninsula (about 10,000 victims), along the path of "aggressive retreat" carried out by the former German ally.[5] The war also took the character of a civil war, which saw the confrontation between the fascists of the RSI and anti-fascist resistants.

Another useful decomposition is on the geographical and regional dimension. The exit from the war was highly differentiated in the various regions of Italy, in particular between the north and south, which would in turn produce a strong regional differentiation in the *épuration*. Gabriella Gribaudi's study of Naples and the southern front, but also the recent books on the Allied bombing of the various areas of Italy, show how the experience of war in civilian populations influenced the transition to post-fascism, in a very different way from region to region.[6]

Undoubtedly we need also to rethink the *terminus post-quem* of the war's exit, which we could situate in 1946, both because of the amnesty of the "fascist crimes" promulgated on 22 June of the same year, a few weeks after the

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[2] Pavone 1995.

[3] Ginsborg 2003; see also Judt 2005.

[4] For a recent discussion of this concept, see Traverso 2007. In the Italian debate, a bitter controversy was launched by Pavone 1991 (English edn 2013). For a recent *mise à point*, see Galimi 2013.

[5] The link between the memory of the violence of war suffered by the people and the building of democratic values is underscored by, among others, Paggi 2009.

[6] Gribaudi 2005; Labanca 2012.

proclamation of the Italian Republic with the victory of the referendum of 2 June, and the profound change in the political, social, and cultural climate.[7]

Such a change of perspective not only allows the centering of the analytical continuities between fascism and post-fascism or the failure of the spirit of the Resistance, it also focuses on the attempts made during the early years of the exit from war to build, in a reconstituted democratic framework, a new justice system and a new rule of law.[8]

Further, the study of purges in Italy—the actual implementation and perception by contemporaries—in the broader framework of the process of transition to democracy, opens new ways of interpreting the immediate post-war period, its memory, and its legacy. In this context, a reinterpretation of the purge phenomenon in Italy (especially the precise analysis of the implementation of the *épuration* system, made possible by the availability of new documentation in recent years) remains valuable for understanding the output of war and the period of transition from war to peace, marked by beginnings of a new democratic order. They thus allow a better understanding of the contours of a reconstruction: legal, diplomatic and political, but also social and cultural.

12.2 Italy in Context

Another methodological assumption to analyze the Italian case (that still suffers from a highly polarized debate between fascist and antifascist memory, and is highly subject to public use of history)[9] is to place it in the European context, in a comparative perspective, or of *histoire croisée*, or, how we choose to do it in this chapter, by emphasizing the propagative processes in particular with France. At the same time, even if the purges, after the Second World War, occurred throughout Europe, with different modes and features, we should consider some specificities in this particular case.[10]

At the center of the purges in Italy is, in fact, *not* the fascist regime, which lasted 20 years, but collaboration with the German occupier. Collaboration or the voluntary involvement with the ideological project of the Third Reich to build a new European order was present in all the occupied countries and, in a way, related to the history and characteristics of each country occupied.[11] There are many aspects in common to different national cases. We will limit ourselves to the cases of France and Italy, the definition of collaborationism was complicated by the

[7] Franzinelli 2006.

[8] In this vein, I am currently working on a study about the trials against the collaborationists in Italy (forthcoming il Mulino).

[9] See the contributions in Del Boca 2012.

[10] Henke and Woller 1991; Deák et al. 2000.

[11] Cf Röhr 1994; Benz et al. 1996; Mazower 2008. See also Stauber 2010.

presence of two governments—Vichy and the Italian Social Republic—which had their roots in the pre-war history and a climate of civil war in the last phase of World War II. The so-called "savage" judicial process was therefore probably imperfect but necessary to counter the violence that followed the liberation.[12] But the main difference consists in the fact that in Italy, the will to prosecute the collaboration, and expose the traitors, also served to conceal part of reality. The betrayal was not only in the name of collaboration, but was also a manifestation of a bloody civil war that originated in the clashes between fascism and anti-fascism.[13]

It must be said that the desire to purge Italy faced particular difficulties. In France, where historians have shown the *épuration* was a vast social phenomenon, it is easy to date the period of collaboration with Nazi Germany (between June 1940 and June 1944).[14] In Italy, however, the succession of the fascist regime, which still lasted some 20 years, and the Italian Social Republic formed by the Badoglio government in September 1943 after the signing of the armistice with the Allies, have made more difficult the emergence of a uniform and unambiguous definition of a "collaborator" and amortized disruptions affecting public services and administrative offices.

One must recall that the first political choices about how to deal with fascism at the end of the war had already begun during the war, in 1943, before the defeat of the enemy. The fall of Mussolini's government on 25 July 1943, the ensuing jubilation that followed, and the immediate establishment of Marshal Badoglio's new government were quick, non-violent steps.[15] Fascism seemed to collapse with the Allies' landing in Sicily and in the southern regions, but in fact the gap between Italians and the regime was yawned greatly in the preceding months, during 1942, due to the harsh conditions of the war. Throughout its existence, however, large sectors of Italian society had consented with the Fascist regime.[16] To echo Hans Woller, "if in the fall of 1943 fascism had not risen from its ashes, the people would have been satisfied with the end of the regime, the exemplary punishment of some other fascist, and a complete change in top of society and the state." Furthermore, during the civil war, continues Woller, "the very idea of a showdown came to take on a new meaning."[17] The especially harsh conditions of the Nazi occupation, the violence perpetrated against the population, requisitions, arrests, and deportations to forced labor, coupled with the fascist collaboration of Salò led the forces of the Resistance to think about a system of purges that would do justice

[12] For a comparative glance on the two countries see Galimi 2004, pp. 374–380.

[13] Pavone 1991.

[14] In France there is an extensive bibliography on the subject. Among others, see Baruch 2003; Bergère and Le Bihan 2009.

[15] De Felice 1996; Deakin 1962. Mussolini's fall and the public's response need more in-depth studies.

[16] On the "consensus" of Italian population to the fascist regime, see the contributions in Albanese and Pergher 2012.

[17] Woller 1997, pp. 10 and 11. Author's translations.

for all of these crimes.[18] And is it important not to neglect the presence and pressure of the Allies, as we shall see in the next section.

After a slow start in the Badoglio government, the purge process had a real breakthrough with the liberation of Rome in June 1944, and the formation of the National Liberation Committee government chaired by Ivanoe Bonomi (June 1944–June 1945). While purges were made a priority, limitations emerged: chiefly, the country was still at war and divided in two parts. The spontaneous wave of violence that followed the liberation of the north-central part of the country, which remained under German occupation for 20 months, pushed the government to seek a judicial punishment of collaboration. The Parri government (June–December 1945), the Socialist leader Pietro Nenni, and the *Alto commissariato all'epurazione* tried to limit the extent of the purge.[19] The result was the passage of Togliatti's amnesty, which ended the purge process in the summer of 1946 with the express desire of bringing peace to the country. The shift in Italian politics in 1947—the expulsion of the leftist parties from the government—did not completely halt the purges; however, the remaining trials almost always ended with acquittals. And from this moment, it would be the numerous partisans, accused of acts of violence, who would be brought to trial and sentenced. It was in this context that the "Magna Charta" (Woller) of the purge policy, known as the Luotenenziale decree of 27 July 1944, was issued and applied.

Added to this, is the peculiarity of Italy having been both a country occupied and the occupying country. We must not forget that if the trial of German officers accused of war crimes against civilians was so difficult, it was primarily because Italy strove simultaneously to protect its nationals who were accused of committing the same crimes in countries occupied by it, such as Albania, Yugoslavia, and Greece.[20] Among the trials against Nazi war criminals in Italy, the most famous was undoubtedly that of General Field Marshal Kesselring, who was sentenced in Venice in 1947. The British established its own military court at the trial of those responsible for the Ardeatine massacre (March 1943) and against the generals who were accused of being responsible for the retaliatory terrorizing of the population. The first case was divided into several sections (the trial against Maltzer and Mackensen which had ended in November 1946 with the death penalty of the two generals, one against Kesselring in Venice); the second never reached its end even though there were trials in Padua of the accused the generals Tensfeld, Crasemann, and Simon. None of the death sentences (Maltzer, Mackensen, Kesselring, and Simon) was enacted, and many prisoners were released in the early 1950s. Instead, the British left the cases in involving junior officers to the Italian war crimes tribunals, which implemented five processes between 1947 and 1949, and another five in 1950–1951.[21]

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[18] Klinkhammer 1993. On the RSI, see Gagliani 1999 and Ganapini 1999. On the fascist violence during the RSI, see Rovatti 2011.

[19] On this aspect, see Woller 1997 and Canosa 1999.

[20] Rodogno 2006; Focardi and Klinkhammer 2004, pp. 330–348; Battini 2004, pp. 349–362; Battini 2007.

[21] See, among others, Flores and Galimi 2010, p. 39ff.

In Italy an important historiographical renewal is underway. Some recent publications have, thanks to access to the archives of the *Alto commissariato per le sanzioni il contro il fascism* or the Ministry of Justice, studied various aspects of the purges, including the activity and the position of the political parties, the role of the Allies, and the development of repressive legislation.[22] In these pages, we will focus on an aspect that has been neglected until now, which better illuminates the propagative processes of the systems' models. This is the importation of the French system in Italy, which then gives very different results.

12.3 Propagation/Circulation of Models: From France to Italy

If a comparison of the two national cases—Italy and France—was commonly presented in the historiography, it might be worth to evaluate the propagation, if not direct relationship, of épuration models. Documents of the *Alto commissariato per le sanzioni contro il fascismo*, the office responsible for making the purges in Italy, show the importance of the French model. In fact, the French law dealing with the structures in charge of judging and punishing the *faits de collaboration* directly influenced the development of the Italian law. This was on the basis of very specific recommendations by the Allies, who had carried out a long inquiry into the *épuration* system in France.[23]

A report by Major Palmieri describes his mission in France from the 26 December 1944 until 22 January 1945. The purpose of the visit was to study the legal basis for the purges and how it has been applied by the French government, and how the system works in practice, particularly with regard to elements of improvement that can be adopted in the *épuration* in Italy, he wrote. The Allies visited the cities of Paris, Dijon, Lyon, and Marseille. Palmieri's general opinion about the *épuration* in France was that despite providing the best available structure it nonetheless faced significant challenges due to problems of communication and transport because of military operations.

> The French government has developed a very successful attempt to carry out the *épuration* process in the administrative sphere or in the criminal side, within efficient and systematic legal proceedings. Barriers, that are not able to be removed, should not be overly emphasized. For those who come from Italy, the impression is that the French *épuration* had the greatest development, faster but less ordered than the Italian system.[24]

[22] Among others: Dondi 1999; on administrative purges, see Tosatti 2003 and Melis 2003, as well as Cardia 2005 and Focardi 2005.

[23] Archivio centrale dello Stato, Alto commissariato per le sanzioni contro il fascismo, Titolo II 1945b.

[24] The report, cited here and infra, can be found in ibid. Translations from the original Italian are the author's own.

What strikes the observer is that the French legislators demonstrated remarkable foresight in the creation of such courts and had, to an uncommon degree, an exact feeling of how events would unfold after the liberation of France. In fact, after four years of harsh occupation, the civilian population was expected to generate, according to the report, "a public backlash against those who had collaborated with the occupying authorities, and so it is now. It is about the people and the French Government if this violence has reached alarming proportions." Palmieri's report also emphasized that the decision to establish courts of justice was motivated by the need to restore the rule of law, since "courts martial and military courts did not have the popular character of courts of law." *Épuration* courts were therefore a wise decision for the Allies which proved to be effective, and were therefore recommended to be exported to Italy.

The ordinary courts were in fact unable to deal with the types of cases for which people demanded justice. In addition, the *cours de justice* had more positive elements, including speed, something that would be very useful for Italy: "For anyone who has observed the slow and heavy methods of Italian criminal law, this aspect of the Court of Justice is highly interesting," he wrote. He continued: "The process is quick and is carried out by highly skilled and experienced officers."

Palmieri recommended applying the same system in Italy:

> I strongly emphasize the urgency that a decree is realized in Italy for the organization of a special court like the Court of Justice. I believe that this court would be very desirable in northern Italy where the problem of punishment of collaborators will be substantially similar to the problem that exists today in France.

In his report Major Palmieri suggests some key changes to the system to be imported. First, the selection of jurors should be monitored more carefully by the courts. Among the members of the *cours de justice* were in fact some people with criminal records, as well as some "last-minute résistants," usually political figures were not known.

One aspect of importance in Palmieri's report was the participation of female jurors:

> I would also like to insist on the appropriateness of the participation of women jurors. The presence of women as jurors is a breakthrough in French jurisprudence. French women have had an important role in the resistance movement and are quite acceptable to the public as members of the Court of Justice.

Palmieri's also wrote that one of the things that stood out as problematic in the French system and needed to be changed was the fact that too many cases were considered of little importance, since they were "cases of ordinary crimes with incidental aspects of collaboration." He also pointed out the need to find some "way to coordinate and direct the activities of the committees of liberation in their relations with the execution of the law." Finally, his report made reference to the administrative internment that, in consultation with the Committees of liberation, was the punishment for the traitors in France. From 1 January 1945, 50,000 people were under administrative detention.

The question of *indignité nationale*, with its attendant deprivation of civil rights, was unique to the French context and deserves further consideration. The law of 26 December 1944 established the principle of the crime of *indignité*

nationale, for *collaboration et intelligence avec l'ennemi*. This was considered "quite extraordinary because it involved the indictment for a deed that was not a crime when it was committed." It also stated that "*Cours de Justice* provide for the punishment of persons under rules established by the French Criminal Code that were in effect at the time the acts were committed, even though the indignity national acts did not violate any rules in force in France."

Besides the relevant argument of *nullum crimen sine poena*, the report of Major Palmieri advanced strong doubts about the usefulness of "civic courts." "My opinion is that the sentences are too severe and there are too many defendants to justify absolute praise of this institution." And he added: "Many people complain that because they are unable to earn a living they have committed acts which were often made in good faith and in the mistaken belief that they were serving their country." The report concluded that the French system is the current best attempt and considered the Court of Justice a fast, safe, and effective way to judge those accused of collaboration with the enemy. In addition, the report stated that it was necessary to recognize the agreement of this court with the Italian justice system.

> The French consider the purges as a necessary evil and as something to be completed in the shortest possible time. All the French with whom I spoke, without exception, smiled and showed surprise when I declared that the purpose of my mission was to find ways and means to improve the Italian *épuration*.

As seen from Major Palmieri's report, it is clear that the Italian case was not only a propagation of the French model—predominant in Western Europe as seen in the case of Belgium—but the appropriation of the model.

Structures responsible for judging collaborationism will be very similar in both countries. Starting in October 1944, the *épuration* in France operated within the framework of the *Courts de justice* and *Chambres civiques*. The first committees were formed by a judge and four members appointed by the Committee of National Liberation, and they continued their activity until the end of 1947 (Articles 75 et seq. French Penal Code, treason, sharing intelligence with the enemy, acts against the security of the state).

The *Chambres civiques* had the duty to judge cases of "national indignity." They were removed in December 1949. In Italy, legal activity against the collaborationists was carried out by the *Corti d'assise straordinarie*, created, for a period of 6 months, by the *luogotenenziale* decree on 22 July 1945. They were presided over by a judge appointed by the President of the Court of Appeal and four judges appointed by the Popular Committees of National Liberation. After numerous extensions, their activity was interrupted in December 1947. The High Court of Justice and the *Corte di alta giustizia* were quite similar and were responsible for judging the high hierarchies of Vichy's regime and of Italian fascism. Therefore, the only major difference was represented by the absence in the Italian legal system of *chambres civiques*—heavily criticized in the report by Major Palmieri—as well as crimes of *national indignity* which punished crimes of an ideological nature—a "republican punishment" as it was defined.[25]

[25] Simonin 2003, pp. 37–60 and Simonin 2008.

It was therefore a very similar *épuration* system in the two countries with very dissimilar results starting with the results of the legal *épuration*. In France there were almost 50,000 records judged by the Courts of Justice until December 1948; the conviction rates were more than 80 % and 791 death sentences were carried out. In Italy, there were about 20,000 files, of which only less than 30 % resulted in a conviction, and only 91 death sentences were carried out.

12.4 Conclusions

The French system of *épuration* certainly represented a model for the Italian case. In addition to the aforementioned long report that we know had been prepared by the Allied command, a "very careful study of the French decrees," and also prepared a draft decree of "similar courts."[26] Similarly the CNLAI (National Committee for the Liberation Northern Italy) had been informed about the establishment of these courts.[27]

The proposal to add to the Decree 27 July 1944 was brought to the attention of the government on 17 April 1945.[28] Among the five proposals that were approved on that date, the most important was the decree establishing *Corti di assise straordinari* for the crimes of collaboration with the Germans (*Istituzione di Corte di assise straordinarie per i reati di collaborazione con i tedeschi*). The decree had a long genesis: from the moment it was noted that the courts that dealt with ordinary justice could not deal with judicial trials regarding the purges. In the minutes, the lawyer Giovanni Boeri, general secretary of the *Alto commissariato per le sanzioni contro il fascism*, specifically mentioned the *cours de justice* as a model.[29]

Also involved in drawing up the decree, the Allied military government reiterated its preference for the French system, preferring the name *corti d'assise straordinarie* to "courts for the punishment of fascist crimes." It deemed it was necessary to extend such courts not only in Northern Italy, but throughout the peninsula.

In the spring of 1945, during the implementation of the decree, according to the prime minister Bonomi was taking place an "intense épuration activity, of which perhaps the country has no idea,"[30] in particular through the purge commissions established in the public administration and in the various ministries.[31]

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[26] Conversation between Upjohn and Boeri, 24/02/1945, in Alto commissariato, Titolo I 1945a. See Woller 1997, p. 307.

[27] On this see also Woller 1997.

[28] The escape of Marshal Roatta, accused for war crimes, sped up the decree's promulgation. See ibid. and also Ranzato 1997.

[29] Conversation between Upjohn and Boeri, 24/02/1945, in ACS, Alto commissariato, Titolo I 1945a.

[30] See Seduta del 17 aprile 1945 1995, p. 582ff.

[31] See Melis and Tosatti 2003.

To date, we do not have the general analyses of the High Court of Justice's activities nor those of the *cours d'assise straordinarie*. Unfortunately, we do not possess disaggregated data on complaints lodged in 1945, on the cases that have passed through the stages of the preliminary investigation, nor on how many trials were actually carried out.[32] Studies on the activity in individual provinces, as in the case of Reggio Emilia, or Genoa,[33] and some trials of particular importance, e.g., as in the case of the head of the province of Siena, Giorgio Alberto Chiurco, could help us to reconstruct the political climate and social *milieu* in which these judicial trials took place. We know that after an initial phase in which these trials attracted attention and participation of the population, leading to severe penalties and judgments, in the space of a few months, the popular opinion desired social peace, as evidenced by not only the role of judges in the various levels of courts, but also by numerous witnesses testifying on behalf of the defendants.

In this regard, the President of the Corte d'Appello, the well-known anti-fascist Domenico Riccardo Peretti Griva, commented in 1947: "but we didn't believe that the peace would be best pursued with a healthy dose of distributive justice, which is not an unworthy form of forgiveness that offended many morally pure consciences and left many victims unsatisfied," decrying that the spirit of peace would not have had to go beyond certain limits, "despite of determining an effect clearly contrary to the purpose of the spirit itself, and fail, before history, the educational role of justice."[34]

But the political will of social peace did not concern only the legislators. Comparison with the French case can illuminate some important details. Italy followed France in the application of the judicial system, but Italy was the first country to apply amnesty, with the presidential decree of 22 June 1946, after the victory of the referendum between the monarchy and the republic. In France, however, the amnesty dates to much later (1953). This difference produces a very dissimilar mode of construction of national memory of collaboration with the Occupier. In Italy, the civil war and the experience of a dictatorship lasting 20 years have led to a desire to get rid of the past as soon as possible in order to make room for the reconstruction of the country and to achieve reconciliation. Forgetting collaboration means forgetting the Italians' consent to fascism.

We have already indicated the present difficulty of defining treason during the Nazi occupation. This problem is even more evident in the Italian case. Because this definition of collaboration with the occupying forces did not do justice to the main issue: the existence of the Vichy regime, on the one hand, and the fascist regime on the other. With its brevity, the Vichy experience was much easier to put aside, in order to focus on finding a common desire to rebuild a democratic country. And Italy? Written in the 1970s, Claudio Pavone's words continue to resonate: the judicial épuration was not based "as a revolutionary political operation, which is itself the foundation of law."[35]

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[32] Woller 1997, p. 410ff.

[33] Storchi 2008; Alberico 2007; cf. Chiurco and Galimi 2009, pp. 263–281.

[34] Peretti-Griva 1947, p. 159.

[35] Pavone 1995, p. 126.

Faced with the impossibility of doing justice not only to collaboration, but also to Italian fascism, which would have meant doing justice to Italian society, the choice was made to achieve rapid oblivion and amnesty. This legacy will weigh heavy in the history of the Italian Republic.

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Chapter 13
Reassessing the Boundaries of Transitional Justice: An Inquiry on Political Transitions, Armed Conflicts, and Human Rights Violations

David Restrepo Amariles

Contents

13.1 Introduction

The concept of transitional justice hardly enjoys a consensus within the legal academia and legal practice at national and international levels. The term transitional justice was originally used by Ruti Teitel to describe the role of law in times of political transition,[1] i.e., from illiberal rule to democracy. Yet, the concept has evolved in the legal doctrine and in international law[2] as to apply to legacies of

[1] Teitel 1997, pp. 2009–2011.

[2] United Nations Secretary General to the Security Council 2004, Resolution S/2004/616, p. 8.

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large-scale past abuses and to transitions from situations of armed conflict to peace, irrespective of any political transition. Yet, as originally conceived, transitional justice conveys a different conception of the rule of law to that used in ordinary times, one that is sensitive to the social context and the political conditions of the transition. Teitel argues that the rule of law in times of transition is backward and forward looking, and thus, legal practices during transitions do not respond to ordinary rule-of-law expectations of justice and legality.[3]

Given that political transitions require an exceptional understanding of the rule of law to be successful, it is meaningful to reassess the boundaries within which transitional justice applies, or, in other words, to reappraise its scope of application. Two main reasons call for this analysis. On the one hand, the wide variety of situations, to which transitional justice mechanisms have been applied, created a conceptual disorder in the field, often assimilating the use of the so-called transitional mechanisms to that of transitional justice. On the other hand, the increasing difficulty of qualifying armed conflicts in international law has led to a normative disorder, which is often used to legitimize the application of transitional justice as a legal regime for conflict-termination during armed conflicts or for violence-termination in peace times.

This chapter delves into the nature and function "rule of law" as conveyed by transitional justice in the framework of political transitions and it analyzes whether or not contemporary uses of transitional justice continue to rely on the rule of law as its cornerstone. I focus particularly on the use of transitional justice for dealing with human rights abuses in conflict and post-conflict situations to evaluate whether an exceptional understanding of the rule of law is or is not justified. Should transitional justice apply to situations other than those of political transition? In what other transition-like situations is a *sui generis* concept of the rule of law justified? Can transitional justice mechanisms be used in situations other than political transitions? For giving real grounds to these questions, I will introduce, pursuant to theoretical study, an analysis of the Colombian *Justice and Peace* process.

In the first section, I study the emergence of transitional justice and its relation to the rule of law. To analyze the nature and function of the rule of law during political transition, as well as its formation process and normative content, I particularly focus on the writings of Ruti Teitel. In the second section, I present the main contestations to the nature of transitional justice, which, I claim, have led in practice to a normative disorder. I address the criticisms in a twofold approach, analyzing first, those contestations relating to the nature of the events addressed by transitional justice, and then, those relating to the nature of the type of justice that is rendered in political transitions. The third section delves into the function of transitional justice and inquires into the consequences of its application to asymmetric conflicts. I show how enlarging the application of transitional justice to situations other than political shifts in general, and to ongoing armed conflicts in particular, deprives transitional justice of its normative and transformative

[3] See Teitel 2000, pp. 123–124.

function, for it is meant to ensure order while enabling normative change. In the last section, I present a case study to illustrate the arguments presented throughout the chapter. I analyze the shortcomings of Colombia's *Justice and Peace* process, to show how transitional justice does not hold together when it is used regardless of its implications for the rule of law. Finally, I claim that an enlarged application of transitional justice makes the concept too broad, and renders it analytically, normatively, and descriptively useless from a legal perspective.

13.2 Transitional Justice and the Rule of Law in Context

When Ruti Teitel first coined the term *transitional justice*, she said it applied within the distinctive context of political transition, meaning the process of going from illiberal rule to democracy: "the problem of transitional justice arises within a bounded period, spanning two regimes."[4] She argued that during these extraordinary periods of transition, law is caught in inexorable tensions between the past and the future, and between the individual and the collective. Indeed, the origins of the idea of transitional justice are closely related to law's exceptional functioning in political shifts, as the legal order is captured in-between transformative politics, rendering its normative power and enforceability highly problematic.

Teitel makes a wise move in approaching shifts of regimes in terms of transition, showing that there is a certain degree of legal continuity,[5] in the sense that law is constituted by, and constitutive of, the transition. By doing so, she changes the terms of the debate from those of revolution, which imply a full rupture with preceding ideas, to the foundation from scratch of a new legal order. Her phenomenology of transition, exploring the role of law in periods of political change, is based on an inductive approach. She relies on previous experiences of modern transitions to show the link between the factual conditions of the previous regimes and their legal culture with the legal unfolding of the transition. Hence, she argues, transitional justice should be understood as contingent upon local conditions and culture, without falling into the arbitrary.[6]

The contingency of transitional justice informs a particular conception of the rule of law. Teitel properly identified the greatest legal dilemma in transitional periods when the function of law is to maintain social order while also enabling transformation. She challenges thus two radical and opposite understandings of the rule of law in times of transition. On the one hand, using a vocabulary of transition rather than of revolution, she dismisses the claim that law has no role to play in transitions, because, it is argued, political transitions are solely shaped by the balance of political forces.[7] By means of examples, such as the statute-of-limitations law in Hungary

[4] See Teitel 2000, p. 5.

[5] Teitel 2003, pp. 92–94.

[6] See Teitel 2003, p. 94 and Teitel 2000, p. 223.

[7] See Teitel 2000, p. 214.

allowing for prosecution of crimes committed by the prior regime during the 1956 uprising, she shows existing legal bridges between the pre- and post-transitional periods. In Hungary, the Constitutional Court[8] upheld the principle of prospectivity of lawmaking, and thus, ruled unconstitutional the statute-of-limitations, even if it conveyed the impunity of criminal offences carried out by the prior regime. Teitel argues that the idea of the rule of law as security in the protection of individual rights, paramount for the Hungarian Constitutional Court, was built during the transition, as it sent a clear message that the new regime would be more liberal than its predecessor. She concludes, after examining a number of other cases, that the rule of law acts effectively as a limit to politics during transition, by preserving some degree of continuity in the legal form, while enabling normative change.[9]

On the other hand, Teitel challenges the claim that transitional justice does not convey a particular understanding of the rule of law, and consequently, that ordinary positivist standards of justice equally apply in times of transition. In opposition to the rule of law in ordinary times, synonym of settled law, the rule of law in times of transition is inherently and ultimately contingent. If ordinarily the rule of law grounds the legal order, for "the government shall be ruled by the law and subject to it,"[10] in political transitions, there is precisely a gap between the fundamental values upon which the prior regime enacted its laws, and the values to which the new regime abides. During transitions, the rule of law is in permanent tension between the value of legal change and the value of adherence to the principle of settled legal precedent.[11] Once again, Teitel delves into the recent history of transitional justice to clarify this tension. She recalls the court ruling on the East German border guards who were put on trial for Berlin Wall shootings that took place before unification, dismissing the defense that the shootings were legal under East German law.[12] The Berlin court prized more highly the value of material justice over that of legal certainty, and, thus, interpreted the rule of law in relation to the context of the transition, analogizing the case to those of postwar collaborators previously characterized by the German judiciary as "extreme cases."

Teitel provides a powerful description of the impact social context and legal culture both have on the rule of law during transitions. She attempts to show the "living" rule of law in transitional societies, in opposition to the somehow static understanding of the rule of law in established democracies, characterized by regularity, stability, and adherence to settled law. Her constructivist approach to the rule of law has also a normative value related to the objectives inherent to the transition, and particularly, to the notion of justice. Hence, for Teitel, while the rule of law in ordinary times is a secondary rule underpinning and ordering the legal

[8] Constitutional Court (Hungary), Judgement Magyar Kozlony, No 23/1992. March 5, 1992. English translation available in Journal of Constitutional Law in Eastern and Central Europe 1 1994, p. 136.

[9] See Teitel 2000, p. 21.

[10] Raz 2009, p. 212.

[11] Teitel 2000, pp. 12–13.

[12] Ibid., 16–17.

system, the rule of law in transitional societies is a primary rule that is context-related and function-oriented. Hence, legal practices during transitions are justified differently than through ordinary rule-of-law principles operating in established democracies.

Through this sociological jurisprudence of transition, Teitel rejects both positive and natural law approaches to the rule of law in transition.[13] According to positivists, the justification for adherence to the prior regime's established law is that under prior repressive rule, adjudication failed to adhere to settled law. Such a conception is in line with Pinochet's declaration[14] during Chile's 1990 transition, when he claimed that if any of his collaborators were prosecuted, it would mean the end of the rule of law in Chile.[15] Teitel claims that this abstract notion of legality, grounded merely on formal continuity, overlooks the particular notion of legality that unfolds in practice in transitional societies. Contrarily, natural law claims that the rule of law is related to material justice and not to formal continuity. Hence, the judiciary of the new regime should not enforce rules of the previous regime that lack acceptable moral groundings. This conception conveys the understanding that the role of law during transition is to promote a change in the notion of legality. Teitel argues that the natural law understanding of the transition is inconvenient because it essentializes justice, failing to recognize how the problem is particular to the transitional context. Additionally, by collapsing law and morality, she argues, natural law theories also overlook the importance of transition, as the problem of the relation between legal regimes disappears. She adopts thus a constructivist approach to the rule of law without neglecting its normative value.

This double nature of the rule of law during transitions, simultaneously contingent and normative, underpins the concept of transitional justice. Hence, legal practices dealing with the prior regime's abuses and aiming to stabilize peace and security find justification in this transitional concept of the rule of law. Additionally, the function of the transitional rule of law is different from the one it has in ordinary times. The former ensures order while enabling transformation; the latter ensures order through stability. This conception of the rule of law transforms the source of legality and provides legal groundings to transitional justice mechanisms, that otherwise, could be ruled unlawful or unconstitutional.

The wide variety of transitional mechanisms, such as truth and reconciliation commissions, mixed tribunals, opening of confidential archives, reparation commissions, and other newly established constitutional and legal mechanisms specially designed for the transition, could be highly problematic if analyzed in the light of the ordinary rule of law. These mechanisms often disregard substantive and procedural law of both the former and the new regime in order to ensure an adequate transition. Indeed, mechanisms used during transitions are vast and often *sui generis*, and they are characterized for being mid-way between proper ordinary

[13] Teitel 2009, p. 2021.

[14] See Robertson 1999, p. 281.

[15] See Collin 2010, pp. 70–75.

legal mechanisms and socially constructed local mechanisms with legal effects. Teitel resumes this contrast by stating that:

> whereas rule of law principles associated with ordinary times include clear distinctions in categories of the law regarding procedural and evidentiary rules, as well as the determination of individual status, rights, and duties, the extraordinary nature and workings of transitional law frequently blur the boundaries separating criminal, civil, administrative, and constitutional law.[16]

Teitel seems to be aware that transitional justice rules out the traditional enforcement paradigm and the ordinary rule of law, locating transitional justice in a blurred condition near to the level of a state emergency. Yet, she holds that although prospectivity and continuity are certainly desirable values in established legal systems, political transitions convey an exceptional notion of legality. Transitional law unfolds in the overlapping of core conflicting values of two regimes, severe contextual constraints, and aspirational objectives with the goal of dealing with abuses that occurred in a prior regime, while simultaneously, establishing a new social order.

In the next section I introduce the contestations to Teitel's claim that transitional justice operates only in political transitions. These contestations, implementing a wider definition of transitional justice, have influenced practice without acknowledging the consequences it conveys for the rule of law paradigm. The next section aims to illustrate the conceptual disorder prevailing in the practice and the theory of transitional justice as a consequence of this enlarged definition. I argue that widening the operational scope of transitional justice while overlooking the groundings and consequences of this enlargement for the rule of law could make transitional justice become meaningless.

13.3 On the Origins of a Conceptual Disorder: The Nature of the Quest for Transitional Justice

The idea that transitional justice unfolds during and after shifts of political regimes is supported by a number of political scientists[17] and legal scholars,[18] such as Afshin Ellian[19] and Jon Elster. The latter characterizes transitional justice as consisting of the processes that "take place after the transition from one political

[16] Teitel 2000, p. 216.

[17] O'Donnell and Schmitter do not deal with *transitional justice* properly speaking. Yet, they define transition as "the interval from one political regime to another." Yet they argue that political transition takes place from "certain authoritarian regimes to uncertain something else," which could be political democracy or any other sort of authoritarian rule." See O'Donnell and Schmitter 1986, pp. 3, 6.

[18] Siegel 1998, pp. 431, 433.

[19] Ellian 2009, pp. 285, 283–314.

regime to another."[20] Elster's inquiry[21] on early cases of transition in ancient Athens, as well as on the English and French restoration of the monarchy in the seventeenth and nineteenth centuries, respectively, contributes highly to the clarification of the bidirectional flow of transitions, from autocracy to democracy or vice versa while emphasizing that transitions take place when there is a shift of political regimes.

Yet, contestations to this limited scope of transitional justice, applying only to political transitions, have appeared in recent years, and particularly, since the UN Secretary-General defined transitional justice as the array of mechanisms dealing with legacies of large-scale past abuses. From my point of view, contestations in the specialized literature and in practice are at least of two different kinds. The first group of contestations, and probably the most important one, relates to the nature of the circumstances in which transitional justice should apply, while the second relates to the nature of the type of justice that is rendered in transitional periods.

The first group of contestations, the one challenging the nature of the circumstances that should be addressed, considers that no political transition is needed for transitional justice to apply. Transitional justice, it is argued, does not cope with questions of legitimacy of the *ancien régime*, but with questions of accountability for large-scale human rights breaches, irrespective of any political transition. The UN is particularly keen in supporting this view, and accordingly, defines transitional justice in terms of mechanisms addressing human rights abuses rather than in terms of political shifts. For the UN, transitional justice "comprises the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice, and achieve reconciliation."[22] The International Centre for Transitional Justice, an influential NGO operating in the field, but also with a remarkable academic background, upholds the UN's approach to transitional justice, considering that dealing with large-scale human rights and humanitarian law violations needs a larger frame than the one provided by classic international criminal law.[23] Roht-Arriaza has also explicitly widened the scope of transitional justice. He argues that transitional justice is a "set of practices, mechanisms and concerns that arise following a period of conflict, civil strife or repression, and that are aimed directly at confronting and dealing with past violations of human rights and humanitarian law."[24]

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[20] Elster 2004, p. 1; Elster 2006.

[21] See Elster 2006.

[22] United Nations Secretary General to the Security Council 2004, Resolution S/2004/616, p. 8.

[23] See "what is transitional justice?" section at the International Center for Transitional Justice's webpage. Accessed 27 February 2011a. http://www.ictj.org/en/tj/. Cf. McEvoy's arguments on the need of a "thicker" understanding of transitional justice, as opposed to transitional justice focusing exclusively on positive law and legal dilemmas. See McEvoy 2007, pp. 411–440.

[24] See Roht-Arriaza 2006, pp. 1–16.

This understanding equates transitional justice with the mere use of transitional justice mechanisms aiming to address thereby violations of human rights and international humanitarian law. As I argued before, transitional mechanisms represent an exception to the ordinary rule of law, because they rely on a contingent notion of legality operating in the midst of value-tensions encountered in moments of political transitions. Transitional mechanisms often imply challenging the status, rights, and duties acquired under a prior legal order, as well as other substantive and procedural laws of a state. In that sense, transitional legality is not an artificial normative conception opposed to reality, but rather a socially constructed and context-dependent notion, whose function is to bridge political shifts while dealing with past abuses and the future social order. It is impossible to analyze here each of the existing transitional mechanisms and their consequences on the rule of law, so I will focus exclusively on two accountability mechanisms used during transitions.

Successor regimes may edict new criminal laws either prosecuting or granting amnesties to the predecessor regime, both of which are contrary to the ordinary rule of law. Criminal statues criminalizing offenses committed by prior regimes are often enacted *ex post facto*, imposing sanctions that find no legal basis on existing laws at the moment the acts were committed. Indeed, new political regimes may also enact retrospective criminal legislation, violating the rule of law, principle of legal continuity, and other classic principles of criminal law such as *nullum crimen, nulla poena sine lege praevia*.[25] Additionally, new criminal statues often establish procedural and evidentiary rules inexistent at the moment the acts were committed, such as granting to ordinary courts jurisdiction over acts that under the prior regime would have been tried by military or martial courts. A clear example was the trial of the *Juntas* in Argentina in 1985, when President Alfonsín ordered ordinary trials, instead of military ones, to prosecute criminal offenses committed by the former military juntas.

Truth and reconciliation commissions are another key transitional mechanism dealing with accountability that is problematic from an ordinary understanding of the rule of law. They are temporary bodies, usually with an official status, created with the express purpose of examining the context and events of transitions by means that bring together victims, perpetrators, and witnesses of human rights violations. Contrary to tribunals or courts, truth commissions do not have the prosecutorial powers required to bring cases to trial.[26] Instead, they may provide a written report in which they state an overall account of the transition as a means to prevent any political conflict from breaking out again.[27] Yet, truth telling within these commissions, including perpetrators,' victims,' and witnesses' statements, are not framed in accordance with the ordinary understanding of rule of law, although they often have legal effects, such as for matters of reparation.

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[25] Beccaria 1853, pp. 13–15.

[26] See Chapman and Ball 2001, pp. 1–2.

[27] See among others the CONADEP Report in Argentina (1984), Rettig Report in Chile (1991), Truth and Reconciliation Commission Report in South African (1998), and the Truth and Reconciliation Commission Report in Peru (2003).

Yet, truth and reconciliation commissions are important transitional mechanisms because they seek to create non-political spaces, free from formal questioning of their compatibility with one or another legal regime, where members of society altogether can share their own account of the events and aspire to create the minimum degree of communication required to build a democratic society. Truth and reconciliation commissions have proven to be extremely powerful in achieving these objectives in Latin America and South Africa, although each society may judge, according to its own context and culture, if such a commission is required for truth inquiries, or if other mechanisms would have greater effect.[28] Truth and reconciliation commissions have been paramount in certain transitions and their status and legal effects have been the object of greater regulation in order to better articulate their findings and procedures with other transitional mechanisms. A great effort in this sense was undertaken with the Truth and Reconciliation Commission and the Special Court for Sierra Leone.[29] Such articulations contribute to understanding the objective and function of these institutions, but more importantly, the legal status of findings by one or the other institution, and the actions and procedures they can undertake.

As it has been shown with transitional criminal prosecutions and truth and reconciliation commissions, transitional mechanisms may not meet the minimum standards required by an ordinary understanding of the rule of law. Hence, the use of such mechanisms in an established democracy may jeopardize the ordinary rule of law if no clear justification of their need and conformity with the ordinary rule of law is given. In other words, transitional mechanisms should not rule out the ordinary understanding of the rule of law in non-transitional periods, as it may lead to the opposite effect; they will weaken the rule of law they actually seek to strengthen. In that sense, the great virtue of Ruti Teitel's work is that she properly identified the challenges raised by transitional periods to law, and sought to provide a reasonable justification of transitional justice mechanisms in the light of the rule of law.

The second group of contestations, the one challenging the exceptional nature of the justice rendered by transitional justice, holds that transitional justice is not a self-contained subject. Hence, they call for a wider context of analysis and the inclusion of a comparative perspective with other types of transitions existing in political and legal domains. Accordingly, it is claimed, transitions of any kind, legal or political, do not represent a radical rupture, but rather, they lie on a continuum, of which regime transitions are merely an endpoint. Eric Posner, for instance, holds that the so-called exceptionality of transitional justice is grounded in an insufficient appreciation of the ordinary law of consolidated democracies.[30] He attempts to overturn the underlying assumption of transitional justice, which is

[28] See Teitel 2003, p. 79. She shows that Eastern Europe, in opposition to Latin American countries, dealt with the question of disappeared persons by guaranteeing access to historical records, and not through truth commissions.

[29] See Allen et al. 2003.

[30] See Posner and Vermeule 2004, p. 764.

that legal systems of consolidated democracies run smoothly in settled equilibrium, and that its laws are always prospective with adjudication reasonably following the *stare decisis* doctrine. He claims that both regime transitions and intrasystem transitions share a common nature: they both deal with discontinuities of collective value judgments. He also argues that law's function in any transition is basically the same: to develop pragmatic mechanisms to cope with those discontinuities while "maintaining social order, ensuring stability of expectations and aspiring to see justice done."[31]

According to this view, transitional justice during political shifts should be understood as an application of ordinary justice, and thus implicitly, grounded in an ordinary understanding of the rule of law. Yet, as it has been previously argued, the main assumption of transitional justice is that there is a distinctive problem of law in transitional contexts, because conflicting legal values of two political regimes overlap thereby making law enforcement problematic and uncertain. By collapsing political and legal transitions into a single category, Posner normalizes political discontinuities, but weakens the ordinary understanding of the rule of law. Indeed, transitional mechanisms associated with political transition are far more reaching than mechanisms used in intrasystem transitions. The former include reforms to prisons, police, and judiciary; rectifying human rights violations through trials, truth and reconciliation commissions, reparation and traditional mechanisms; redressing the inequalities and distributive injustices of the prior regime, forcing individuals to disgorge property acquired unlawfully, etc. These mechanisms often unfold within a blurred legal order, since constitution making, law making, and institutional establishment are parallel processes to that of the implementation of the transitional mechanisms. Basically, the only clear legal framework ensuring legal continuity during political transitions is international law.[32] On the contrary, intrasystem transitions, such as those in tax or administrative law, are highly regulated through constitutional principles and case law precedents. Nonetheless, legal transitions may convey normative gaps or challenges to acquired rights that would need innovative judicial interpretations or further legislation to ensure respect to constitutional rights. In that sense, while political transitions imply a rupture in the continuity of state political forms, intrasystem transitions are supported on the continuity of the state institutional setting, which implies an ordinary understanding of the rule of law within the law enforcement paradigm. Here, the rule of law as continuity implies the protection of rights previously conferred.

In this section I analyzed two types of contestations to the nature of transitional justice as understood by Ruti Teitel. I claim both contestations introduce a conceptual disorder in the theory and practice of transitional justice. By defining transitional justice as a set of mechanisms, the first group of contestations claims that it applies to human rights or humanitarian law violations, irrespective of any political transition. This contestation has managed to expand the use of transitional justice to situations in which the ordinary rule of law and the law enforcement

[31] Ibid.

[32] See Teitel 2000, p. 20.

paradigm should apply. The second group of contestations claims that transitional justice, even when applied to political shifts, does not imply an exception to the ordinary understanding of the rule of law. In so doing, it neglects the reality of political transitions in which a transformative notion of the rule of law emerges from the different legal practices bridging the transition.[33] Normalizing political transitions weakens the ordinary rule of law, as it implies that transitional mechanisms, inherently problematic for the rule of law, are actually in accordance with an ordinary understanding of it.

This enlarged conception of transitional justice raises two completely different factual situations—political transitions and mass human rights abuses—to the same level, thereby implying that dealing with the latter cannot be done within the rule of law and the law enforcement paradigm. Henceforth, the concept of transitional justice means at least two things completely different in nature: a type of justice rendered in transitional periods or a set of mechanisms used to deal with mass human rights violation. The first is a normative and contingent concept; the second is merely descriptive and enumerative.

In the next section, I analyze the normative consequences of utilizing transitional justice in situations other than political transitions. First, I briefly present the normative pitfalls that should be avoided when applying transitional justice mechanisms to post-conflict situations in already democratic societies. Next, I focus extensively on the use of transitional justice in ongoing conflicts. Although, it is not yet a wide practice, recent legal and doctrinal developments in countries such as Colombia[34] and Israel[35] show that transitional justice may also be used, in its enlarged conception, during "asymmetric" conflicts. Finally, I claim that this enlarged application of transitional justice, inconsequential to the normative and contingent function of the transitional rule of law, leads to a normative disorder in the field.

13.4 Transitional Justice: A Blurred Legal Field?

Current practice shows that transitional justice, understood as a set of mechanisms, is increasingly used to deal with gross human rights violations in the aftermath of non-international armed conflicts. Although this may not always be the case, many non-international armed conflicts have also led to political transitions like in Sierra

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[33] Ibid., 17.

[34] The most important legal development in Colombia on Transitional Justice is the Law 975/2005, also known as the *Ley de Justicia y Paz* and the Victims and Land Restitution Law 1448/2011 (*Ley de Víctimas y Restitución de Tierras).*

[35] In 2006, the International Center for Transitional Justice started consultations in Israel and the Occupied Palestinian Territory to "examine the value of transitional justice as a potential framework for those seeking accountability for the past, prevention of abuse in the future and a sustainable peace." See ICTJ website on Israel. Accessed March 8, 2011b at http://www.ictj.org/en/where/region5/1727.html.

Leone, Burundi, and Liberia. Yet, an enlarged practice of transitional justice is, in practice, narrowing the gap between transitional justice and post-conflict (restorative) justice.[36] The assimilation of transitional justice to post-conflict justice or *jus post bellum*[37] should be clarified,[38] and eventually dismissed, when applied to non-international armed conflicts in democratic societies.

Transitional justice and post-conflict justice do not fully overlap.[39] A political transition may occur without the existence of an armed conflict, such as in Eastern Europe; while an armed conflict may also take place irrespective of any political transition, such as in Sri Lanka, Uganda, and Sudan. Nonetheless, these two concepts were linked conceptually and in practice by the 2004 UN Secretary-General's[40] definition of transitional justice and the adoption by United Nations[41] of a rule of law tool-based approach for post-conflict states. One may additionally argue that transitional justice is not necessarily restorative, even if legal scholars focusing on the victim's perspective may disagree. Stephan Parmentier,[42] for instance, proposes an analytical model in which truth, accountability, reconciliation, and reparation (TARR) are seen as four intertwined and interdependent key components of transitional justice. Villa-Vicencio[43] and Cunneen[44] also note that restorative justice is an important ingredient of transitional justice, adding that the link between reparations and other responses to human rights violations, and restorative justice, is only a recent finding in specialized literature. Following this trend, the Colombian Law 1448/2011 and the related administrative decrees on *Victims and Lands Restitution* have clearly linked the national transitional justice framework enacted in Law 975/2005 to the issue of reparation.

In established democratic societies, post-conflict justice should respect the ordinary understanding of the rule of law, and thus, it should be clearly distinguished from transitional justice. Similarly, gross human rights violations during non-international armed conflicts in democratic societies should be addressed within the framework of the ordinary understanding of the rule of law and the law enforcement paradigm. The function of the rule of law in political transitions is to articulate the prior and future regime's values and notions of legality with the goal of addressing past abuses, maintaining social order, and enabling normative change. Yet, in post-conflict situations within democratic societies, there are no conflicting

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36 Villa-Vicencio 2006, pp. 387–400.

37 On the different disciplinary definitions of *jus post bellum,* see Stahn 2008, p. 231.

38 See Freeman and Djukić 2008, pp. 213–227.

39 See Uprimmy and Saffón 2005, pp. 221–258 and Quinn 2009.

40 United Nations Secretary General to the Security Council 2004, Resolution S/2004/616, p. 8.

41 Cf. UN Documentary Repository on "Rule of Law Tool for Post-Conflict States: National Consultations on Transitional Justice." Accessed 3 March 2011 at: http://www.unrol.org/article.aspx?article_id=74.

42 Parmentier 2003.

43 See Villa-Vicencio 2006, pp. 388–389.

44 See Cunneen 2006, pp. 355–356, 355–468.

values to be articulated, but rather democratic values to be reinforced and enhanced. Hence, the ordinary understanding of the rule of law should prevail in spite of the implementation of transitional justice mechanisms. Transitional justice, as an exception to the ordinary rule of law, should be distinguished from the implementation of transitional mechanisms in democratic societies under the ordinary rule of law. In that sense, transitional justice-like mechanisms can be used as part of post-conflict justice in democratic societies, as far as they do not entail an exceptional understanding of the rule of law. Thus, no *post facto* criminal law should be enacted to deal with past abuses, neither amnesties nor jurisdictional immunities should be granted, and of course rights and status acquired in accordance to regular law should not be declared void or invalid.

The UN enlarged conception of transitional justice may also be used to deal with ongoing non-international armed conflicts in democratic societies as it is strategically an attractive means to achieve peace talks or to negotiate with perpetrators who are not willing to surrender arms if they risk prosecution. This instrumental use of transitional justice jeopardizes the application of *jus in bello*,[45] while not necessarily ensuring transition from conflict to peace. During non-international armed conflicts, the ordinary rule of law is temporarily overridden by the *lex specialis* of international humanitarian law (IHL), although arguably the largest protection should always be granted when it comes to civilians. According to experts from the International Committee of the Red Cross,[46] however, the lack of political will is the major reason for non-compliance with IHL. The state on the one hand, is reluctant to abide by international humanitarian law, and, on the other hand, the rebels neither comply because they often lack military means to defeat the state in a direct confrontation. Moreover, if transitional justice is used as a mechanism to achieve peace, it should not neglect the fact that crimes committed in non-international armed conflicts are punishable under customary international law,[47] and that the International Criminal Court may also be competent to prosecute them. Hereafter, I will only focus on the application of transitional justice to what in military doctrines is called asymmetric conflicts, considering that existing normative gaps in the field make it a more complex—but more likely—situation to occur.

In armed conflict, asymmetry was originally a military term used to describe inter-state wars in which one actor, be it a state or coalition of states, has an overwhelming military and economic power, compared to that that of its opponents.[48] Largely inspired by the US war in Vietnam,[49] asymmetric war also refers to a stra-

[45] For the limitations of *jus in bello* from a transitional justice perspective, See Freeman and Djukić 2008, pp. 221–223.

[46] ICRC 2003, p. 3.

[47] ICTY, Prosecutor v. Tadić, "Decision on Defence Motion for Interlocutory Appeal on Jurisdiction." 2 October 1995, paras 128–132.

[48] Arreguín-Toft 2001, pp. 91, 93, 96.

[49] See Sullivan 2007, p. 497.

tegic unfolding of warfare during conflicts. I retain two main characteristics of asymmetric wars that are highly important in currently asymmetric conflicts. On the one hand, asymmetric wars may involve a weak adversary's strategy of indirect attacks, versus direct defense,[50] so as to avoid direct confrontation with the militarily stronger opponent and the certain annihilation of its forces. On the other hand, indirect confrontations often involve guerrilla warfare, which is a low-cost military strategy often implemented with support of part of the population with the aim of destroying the will of the stronger opponent.[51]

Today, asymmetric warfare refers to non-international or international conflicts "where the other side refuses to stand up and fight fairly."[52] This definition shows that asymmetry concerns both (military) power asymmetry and status asymmetry. Thus, it provides better explicative factors for confrontations facing a state actor versus a non-state actor, or for the ideological and structural disparities between actors.[53] This new military approach to asymmetric conflicts embraces "war" against terrorism, and conflicts in which confrontation is based on guerrilla strategies or selective military targeting by the weaker power. Examples of such conflicts are Sri Lanka, Colombia, and, arguably, Israel.

The legal qualification of asymmetric conflicts as proper armed conflicts under international law is highly problematic. Leaving aside terrorism, which is not the focus of this chapter, national conflicts militarily qualified as asymmetric conflicts may be proper non-international armed conflicts regulated by international humanitarian law,[54] or simply conflicts characterized by violence[55] that have not reached the threshold required for qualification as armed conflict according to international law.[56] Additionally, this qualification is to be studied on a case-to-case basis.[57] Yet, the particularities of asymmetric conflict render difficult the assessment of the intensity of the violence and the organization of the parties, if these categories even remain appropriate for asymmetric conflicts. While both sides may appeal to private military services, the weaker side's tactics are often less confrontational and may also target civilians.[58] Furthermore, this side often lacks structures of authority, hierarchy, and communication, and it does not require heavy weapons,

[50] See Clark and Konrad 2007, pp. 463, 108; Arreguín-Toft 2001, p. 108.

[51] Arreguín-Toft 2001, p. 103.

[52] Van der Bruggen 2009, p. 355.

[53] Stepanova 2008, pp. 19–27.

[54] Sassòli 2007, pp. 58–59.

[55] John-Hopkins 2010, pp. 473–474.

[56] ICTY, Prosecutor v. Tadić, Judgment Trial Chamber, 1997, paras 561–562; ICTY, Prosecutor v. Limaj, Judgement Trial Chamber, 2005, paras 84–86; ICTY, Prosecutor v. Boskoski, Judgement Trial Chamber, 2008, para 175; ICTR, Prosecutor v. Rutaganda, judgement Trial Chamber I, 1999, para 93; and Tijroudja et al. 2010.

[57] ICTY, Prosecutor v. Haradinaj, Judgment Trial Chamber, 2008, para 49; ICTR, Prosecutor v. Rutaganda, judgement Trial Chamber I, 1999, para 93.

[58] UN Security Council 2010, pp. 10, 11, 29, 32.

extensive manpower, and intelligence units to undertake its attacks. Finally, in asymmetric conflicts, the boundary between peace and conflict is blurred as such conflicts are often characterized by long-term violence in which the intensity, nature, actors, and the means of confrontation vary in time and space.

This characterization of asymmetric conflicts brings forth factual circumstances to which traditional legal categories poorly apply or do not or apply at all, which leads to adjudication based on large judicial discretion in order to determine or to create applicable law on a case-by-case basis. In this sense, judicial intervention builds up on proper normative gaps as judges find themselves confronted to a lack of regulation and not simply to a matter of interpretation of existing law. These normative gaps could also be thought as hard cases[59] in which no regulation applies clearly to factual events, and thus, they require the intervention of an adjudicatory body to rule on the applicable norms. In other words, the lack of legal categories provided by statutory or customary law makes it impossible to determine and to apply the appropriate regulation without the intervention of a judge. With the legal rules available today, asymmetric conflicts are either armed conflicts regulated by *jus in bello*, or situations of violence regulated by the law enforcement paradigm and the ordinary understanding of the rule of law. Yet, as there is factually a situation of violent confrontation, transitional justice may be used in both cases as a legal remedy to end violence, which, in my view, originates a normative disorder.

Transitional justice is a difficult field to seize from a legal perspective. Indeed, it is neither a legal order itself (operating in between national and international legal orders), nor a particular legal regime in national or international law (regulating a self-contained domain). Transitional justice is a set of non-systematized rules applying to a factual situation of political transition in order to ensure accountability for violations of human rights and international humanitarian law, reparation to victims, and restoration of the state, irrespective of the source of the rules from a specific legal order or legal regime. Thus, rules from international human rights, international criminal law, international humanitarian law, constitutional law, civil law, etc., are equally related to transitional justice. The legal rules applying to a situation of transition are not arbitrarily chosen or created, although they are contextually informed and highly dependent on legal culture. This *sui generis* operation of law is underpinned by an exceptional understanding of the rule of law, which is at the same time normative and contingent.

This blurred legal status inherent to transitional justice, should not be confused with the application of transitional justice to factual events of a different nature or to situations difficultly qualified under international law. If we claim that each sociologically different conflict requires a *sui generis* legal regime, we undermine the rule of law as well as the normative and general scope of law. Hence, the lack of a clear regulatory framework in asymmetric conflicts should not be filled with transitional justice, as it is neither its nature nor its function. Transitional justice is not a conflict-terminating legal regime, but a conceptual and normative framework seeking to

[59] Hart 1961, pp. 121–132.

address the legal consequences of political transitions. Using transitional justice in an ongoing asymmetric conflict within a democratic state is to neglect its normative content and to disregard the legal order as a whole, which is completely inconvenient in a society that seeks to re-establish legality and respect for the rule of law.

In any case, transitional justice should not be used in established democratic societies as a mechanism to avoid prosecutions, to pre-negotiate partial amnesties, to violate rights and status acquired under the rule of law, to modify substantial and procedural criminal laws, etc. Transitional justice holds together a society in moments of political discontinuity. This role of transitional justice is informed by en exceptional understanding of the rule of law.

The risk of using transitional justice, without acknowledging its normative content, is that its range of application becomes hardly determined and determinable. A concept defining a characteristic of the rule of law in political transitions is neither synonymous with post-conflict justice nor with transitional mechanisms applied to mass violations of human rights. Transitional justice cannot fill normative gaps in asymmetric conflicts, because it is not a legal regime for violence or conflict-termination. Being deprived of normative content, transitional justice becomes too broad to have any legal meaning, and it loses its ties with the objective of establishing an ordinary understanding of the rule of law. From a legal perspective, transitional justice is in danger of becoming analytically, descriptively, and normatively useless.

In the next section I will introduce the Colombian conflict and the implementation of the 2005 *Justice and Peace Law* as an application of the expanded conception of transitional justice. I will focus on the perverse effects these measures had on the rule of law, in a country in which a democratic political system underpins the law enforcement paradigm and an ordinary understanding of the rule of law. The Colombian experience demonstrates that when transition justice is deprived of its normative content it can be easily instrumentalized and misused.

13.5 Transitional Justice in Colombia: What Consequences for the Rule of Law?

The Colombian conflict is one of the longest lasting conflicts in the world. According to some, it dates from *La Violencia*, a period of heavy confrontation between the Liberal and Conservative parties in the 1940s.[60] Others argue there is a clear distinction between *La Violencia* and the conflict starting in 1964, which saw the emergence of the left-wing guerrillas of the *Fuerzas Armadas Revolucionarias de Colombia* (FARC) and the *Ejército de Liberación Nacional* (ELN).[61] In general, the Colombian conflict is difficult to characterize because it

[60] See Carbó Posada 2001, p. 21.

[61] See Pécaut 2001, p. 38; see, too, Ariza Zapata and Montoya Restrepo 2010, pp. 13–14.

and the actors have evolved from one decade to the next, but also because several theories have been used to explain its roots, dynamics, and consequences.

The Colombian conflict has involved different actors. Left-wing guerrillas with differing ideologies have militarily and ideologically opposed the government since the early 1960s. Besides the FARC and the ELN, which remain the largest anti-systemic actors, other participating guerrilla groups have included the *Ejército de Liberación Popular* (EPL, 1965), the *Movimiento 19 de Abril* (M-19, 1970), and the *Comando Quintín Lame* (1970). These three groups took part in a peace process in the late 1980s, and later, some of its members were elected to the Constitutional Assembly that approved the 1991 Constitution. Demobilization and disarmament were finally made possible with the adoption of *Law 77 of 1989*, which granted amnesties to the members of these guerrillas for political crimes committed during the conflict, without any reparation for the victims. Since the 1980s, the right-wing paramilitary groups, a pro-systemic actor, have appeared in the conflict landscape with the aim of combating the guerrillas. For several years these paramilitaries lacked a central hierarchy and were organized in semi-autonomous cells financed by drug trafficking, high concentration of land, and collusion with state agents and the country's elite.[62] The paramilitaries participated in the Demobilization, Disarmament, and Reintegration (DDR) process in 2005 within the framework of the *Justice and Peace Law*. Since the 1980s the Colombian conflict has also seen the participation of several drug cartels and organized mafia groups. The main drug cartels were struck down in the 1990s, but mafia lords have re-emerged and today they continue to sustain complex relations with other actors of the conflict to secure the drug business. Finally, although often contested as an actor,[63] the Colombian state combats all the aforementioned groups, but it has never defeated any of them militarily.

The conflict itself has gone through different phases. The 1960s and 1970s saw serious violations of human rights, but the intensity of the conflict was considered moderate, meaning that the frequency and duration of the armed confrontation was still far from protracted armed violence. The late 1980s and early 1990s witnessed, on the one hand, an escalating insurgent violence in the countryside coming from leftist guerrillas and paramilitaries, and on the other hand, an increasing influence of drug-trafficking as a source of financing. Additionally, drug cartels contributed to the increase in violence throughout the country, particularly in major cities. During the rest of the 1990s and early 2000s, guerrillas grew in strength and military capacity. Confrontation between national military forces and guerrillas increased dramatically with heavy consequences for civilians: three million people were displaced in the last 15 years.[64] After failed peace negotiations between the FARC and the government of President Pastrana in the late 1990s, the government of Alvaro Uribe established, in 2002, a heavy military plan, supported by the United States, with the aim of militarily defeating *all* illegally armed groups. At the same time, the Parliament approved the *Justice and Peace Law* addressed to all

[62] Uprimmy and Saffón n.d.

[63] Franco Restrepo 2009, pp. 171–172.

[64] ACNUR 2010.

illegal actors, but particularly, to the paramilitaries. Beyond these armed confrontations, Colombia has sorted out many of its political challenges and has kept, to a certain degree, a living democratic system. In spite of the violence of the last 40 years, Colombia elected a constitutional assembly in the 1990s, has held regularly scheduled civil elections, and has managed to guarantee the independence of the judiciary, and in particular, strong Constitutional and Supreme Courts.

From a military point of view, the Colombian conflict could be said to be an asymmetric one. Its dynamics show non-state actors targeting civilians, avoiding direct confrontations, and increasingly lacking manpower and central structures of intelligence and authority. Additionally, the country's economic and political systems continue to run normally, making it often difficult to distinguish the state of peace from the state of conflict.[65] Yet, asymmetry tells us nothing about the legal qualification of the conflict. The variety of actors and dynamics has rendered the legal and sociological qualification very complex.[66] It has been variously considered a civil war,[67] a proper non-international armed conflict,[68] a terrorist threat,[69] and even a "war without a name."[70]

Rather than adding my own qualification to the existing list, I will focus on the normative context of transitional justice in Colombia to show its harmful consequences on the ordinary understanding of the rule of law. When President Alvaro Uribe took office in 2002, he decided to combat militarily all security threats, while denying the existence of an armed conflict. Additionally, the government started negotiations with paramilitaries in 2002 after the Parliament passed the *Law 785 of 2002*. Together with the complementary *Decree 128 of 2003*, this law regulated individual and collective demobilization granting pardons, conditional suspension of the execution of a sentence, a cessation of procedure, a resolution of preclusion of the investigation or a resolution of dismissal to armed groups that had committed "political and related crimes."[71] The *Procuraduria*, the Inspectors General's Office, found that pursuant to this law, 163 paramilitaries charged with human rights violations, including kidnappings and forced disappearances, had received judicial benefits.[72] As a consequence, the Inter-American Commission of Human Rights (IACHR) reported that the country lacked a general legal framework for collective demobilization and disarmament meeting the Organization of American States' (OAS) standards on Human Rights.[73]

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[65] Even if the government continues to deny the existence of the armed conflict, the non-recognition of the armed conflict does not mean the parties can disregard *international humanitarian law.* In the future, the intervention of a judge may shed light on the nature of Colombia's violence.

[66] See Ariza Zapata and Montoya Restrepo 2010, pp. 30–42.

[67] Ramírez Tobón 2000, p. 86.

[68] Uprimmy 2005.

[69] See Gaviria Vélez 2005.

[70] See IEPRI 2006.

[71] Laplante and Theidon 2007, p. 64.

[72] Boletín 408/2004 de la Procuraduría General de la Nación. Républica de Colombia. Accessed 9 March 2011 at: http://www.procuraduria.gov.co/html/noticias_2004.htm.

[73] IACHR Report OEA/Ser.L/V/II.120, 2004.

Facing these criticisms, in 2005 the Colombian Parliament enacted the *Justice and Peace Law*,[74] which established the legal framework of Colombian transitional justice. The law was very generous in terms of the legal benefits granted to the armed actors, and rather unclear on the rights of victims and the effective mechanisms to achieve reparation. It established a new Justice and Peace Unit of prosecutors for investigating crimes and human rights violations, new procedural and evidentiary rules, and it considerably reduced imprisonment sentences and their modalities of execution. Regarding victims' rights, it affirmed the right to truth, justice, and reparation, but it was unclear regarding the means to achieve them. For example, Article 7 states that in the future other non-judicial mechanisms could be created to "reconstruct the truth." The law also created the National Commission for Reparation and Reconciliation (CNRR) with important political and legal tasks, but it lacked a precise framework of action.

In its ruling C-370 of 2006, the Constitutional Court held that the *Justice and Peace Law* contained clear violations of the rule of law. But it was caught in a difficult paradox: either support the DDR process advanced by a popular government or uphold the full respect of the ordinary rule of law. The Court declared some of the law's norms unconstitutional while it explicitly endorsed others by embracing transitional justice. It ruled that new procedural and substantive rules contained in the law to achieve peace, including reductions on criminal punishment, were constitutionally valid as far as they were accompanied with adequate measures to ensure victims' rights. By so doing, the Court ruled out legal imperatives of the ordinary rule of law for the objective of attaining peace. Moreover, the Court included a degree of flexibility in the rule of law by establishing that if a victim's rights were not ensured, the principle of transitional justice was broken, and the legal benefits granted by the law to the perpetrators shall be considered void, or, in other words, contrary to the Constitution. This was not to be a general judgment, but rather a case-by-case judgment. Hence, if a person who had benefited from the *Justice and Peace Law* finally did not contribute to truth finding and reparation, the transitional justice standard would not apply to him, and he would lose the transitional justice benefits. Similarly, recidivism was also sanctioned with the loss of benefits and the application of ordinary standards of the rule of law.

In my view, the Constitutional Court subjected the respect to the ordinary rule of law to a conditionality of truth and reparation. The Court was indeed trying to meet international standards on transitional justice,[75] and particularly, the prohibition of general amnesties,[76] as well as the right to justice,[77] truth,[78] and repara-

[74] Law 975/2005.

[75] Botero Marino and Restrepo Saldarriaga 2005, pp. 19–66.

[76] Inter-American Court of Human Rights, *Case Barrio Altos*. 14 March 2001, para 41.

[77] Inter-American Court of Human Rights, *Case Myrna Mank*. 25 November 2003, para 273; Inter-American Court of Human Rights, *Case Tibi*. 7 September 2004; Inter-American Court of Human Rights, *Case Comunidad Moiwana*. 15 June 2005, paras 145–147.

[78] Inter-American Court of Human Rights, *Case Myrna Mank*. 25 November 2003, para 274; Inter-American Court of Human Rights *Case Gómez Paquiyauri*, 8 July 2004, para 230.

tion,[79] as understood by the Inter American Court of Human Rights. However, these rights within the Colombian context, in which no political transition is taking place, should have been protected without exempting the ordinary understanding of the rule of law. In the 6 years since the *Justice and Peace Law* entered into force, transitional justice has achieved neither its objective of justice nor that of peace; the *Justice and Peace Law* seems to be another case of hidden impunity.[80] Some 30,000 paramilitaries participated in the DDR process, 3,000 of them are currently facing trials, and only one single condemnatory sentence has been issued to date. In 2011 the Colombian Parliament passed the Law 1448/2011 with the aim of ensuring victims' rights and land restitution.

Indeed, the DDR process with the paramilitaries did not bring peace, and the conflict continues to evolve. The FARC and ELN continue their armed confrontation with the national armed forces,[81] while new armed groups have emerged. In 2006, the *Aguilas Negras*, a new illegal armed actor was created. According to information received by the High Commissioner for Human Rights in Colombia, the group would "maintain links with demobilized paramilitary leaders who have accepted the terms of Law 975/2005 [*Justice and Peace Law*]."[82] The High Commissioner says the activities of the *Aguilas Negras* are having great impact on the civilian population in the form of murders, massacres, acts of "social cleansing," death threats, and child recruitment.[83] Many other armed groups have been created since 2006, and former demobilized paramilitaries are increasingly taking part in these organizations.[84]

The Colombian Constitutional Court, the guardian of the Constitution and the rule of law,[85] sent a powerful message with its judgment C-370 of 2006: the ordinary rule of law is circumstantial and legality is flexible. Consequently, the enforceability of ordinary law is negotiable because, in the future, standards of justice *could* be made to measure for each actor. Indeed, a new transitional justice law was enacted in December 2010. The law 1424 of 2010 established the creation of a truth commission as well as new procedural and substantial benefits to demobilized paramilitaries. This law is currently under study by the Constitutional Court, following a claim filed by the *Colectivo de Abogados José Alvear*

[79] Inter-American Court of Human Rights *Case Velasquez Rodriguez*, 29 July 1998, paras 166, 167, 174.

[80] The Inter-American Court of Human Rights has also highlighted the importance of the proportionality of punishments to avoid hidden forms of impunity. In that sense, according to the Court, punishment should not be merely symbolic and the penalties should respect a reasonable proportionality in regards to type of crimes. Inter-American Court of Human Rights, *Case Gómez Paquiyauri*, 8 July 2004, para 145.

[81] United Nations High Commissioner for Human Rights 2008, pp. 15–16.

[82] Ibid., 14.

[83] Ibid.; United Nations High Commissioner for Human Rights 2010, pp. 27, 29.

[84] United Nations High Commissioner for Human Rights 2011, pp. 22–23.

[85] Restrepo Amariles 2010, p. 73.

Restrepo.[86] The claimants consider the law is contrary to the Constitution for it grants benefits to perpetrators of gross human rights violations and creates obstacles for prosecuting and punishing those acts.

Under these conditions, the ordinary rule of law is weakened because it loses its normative nature of ensuring social order through stability and justice. Similarly, transitional justice is deprived of its function. When transitional justice is used within a democratic system to deal with human rights violations, it does not bridge opposing political values, but it is rather instrumentalized. Transitional justice was also use for ensuring softened punishments and impunity, rather than to articulate demands of justice with state restoration. Moreover, contrary to the transitional rule of law, at the same time contingent and normative, in Colombia the transitional legal framework was a top-down process, with little participation of the community and other social stakeholders.

This antecedent of exempting the ordinary rule of law will have enormous consequences for the legitimacy and effectiveness of the legal order in the long run. Today, there are parallel regimes dealing with the same events. On the one hand, criminal prosecutions of politicians for supporting paramilitary groups, as well as civil and administrative claims relating to property rights affected by the conflict are subject to the ordinary rule of law. On the other hand, paramilitaries themselves are subject to an exceptional understanding of the rule of law. This double standard created by the *Justice and Peace Law* erodes the rule of law and the respect for legality by the rest of the citizens. Furthermore, armed actors are right to believe that a transitional law can be enacted anytime for the legal breaches they are committing today as it is shown by the *Marco Jurídico Para la Paz,* a law currently being debated in the Colombian Parliament.

The Colombian *Justice and Peace Law* was a transitional justice law applying to breaches of human rights within a democratic society. For now, it seems that Colombia's law basically fits Posner's interpretation of transitional justice as an ordinary type of justice. Indeed, what the *Peace and Justice Law* did, together with the Constitutional Court ruling, was to embrace within the ordinary rule of law transitional justice standards and exceptions to the principle of legality.

13.6 Concluding Remarks

Drawing from the theoretical analysis of transitional justice as a legal concept and the Colombian *Justice and Peace Law*, I argue that transitional justice should remain limited to political transitions. Indeed, from a legal perspective, transitional justice is a powerful concept with analytical, descriptive, and normative meaning. First, it lays out an exception to the principle of legal certainty and the law

[86] See the webpage of *Colectivo de Abogados José Alvear Restrepo* on the "demanda de inconstitucionalidad contra la Ley de Justicia Transicional." Accessed 13 March 2011 at: http://www.colectivodeabogados.org/Hoy-se-radicara-demanda-de.

enforcement paradigm. Second, it describes the particular way in which the law functions in times of political transition and the standards of justice it embraces. Finally, it conveys a particular nature and function of the rule of law in times of political transition.

In the study of the Colombian *Justice and Peace Law*, I bring to light the legal consequences of using transitional justice when no political transition takes place. I show how under the argument of seeking peace, transitional justice was instrumentalized to obtain an exceptional law-making and application of the law, contrary to the Constitution and the ordinary rule of law. I argue that transitional justice was then deprived of its normative content and used as a device to obtain favorable procedures and criminal penalties for the perpetrators of mass human rights violations. The *Justice and Peace Law* had not so far contributed to peace or to ensure victim's rights.[87] The risks of enlarging the scope of application of transitional justice to a wide variety of events different in nature, is that transitional justice becomes normatively meaningless, blurring the line between what is justifiable under transitional justice and what is not. For understanding the limits of transitional justice I deepened on the nature and function of the transitional rule of law.

I also show that the transitional rule of law is contingent. It is context-dependent and culturally-informed, but at the same, it is normative because it frames the applicable rules to deal with mass atrocities and state restoration from the interplay of conflicting political and legal values underlying the prior and future regimes. The function of the transitional rule of law is to guarantee stability and ensure normative change, and in so doing it may overrule the ordinary rule of law. Nonetheless it replaces neither *jus post bellum* in post-conflict situations nor *jus in bello* in ongoing armed conflicts. Transitional justice does not regulate a self-contained subject such as conflict-termination for its nature is not to be a legal regime.

Finally, I claim that transitional justice for political transitions should be conceptually differentiated from the use of transitional justice mechanisms in an established democracy, such as Colombia. In the first case, transitional justice implies an exceptional understanding of the rule of law with a particular normative content; in the latter, the ordinary understanding of the rule of law and the law enforcement paradigm should prevail. Hence, transitional mechanisms should always meet ordinary standards for the rule of law when they are used in democratic societies. When it does not, transitional justice erodes the ordinary understanding of the rule of law that it aims to reaffirm and enhance in the long run. If strict adherence to the ordinary rule of law may jeopardize transitions to democracy, it is also true that inappropriate use of transitional justice may jeopardize the ordinary function of the rule of law in already established democratic societies.

[87] It must be noted that Law 1448/2011 on Victims and Lands Restitution was enacted to complement the *Justice and peace Law*, but little has it done to improve in practice the respect to victims' rights.

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Chapter 14
The Emergence of Transitional Justice as a Professional International Practice

Sandrine Lefranc and Frédéric Vairel

Contents

Since the 1990s, men from a variety of backgrounds have undertaken, in an increasingly international and institutionalized manner, to write an authoritative *grand livre* on "post-conflict best practices." Its chapters present sometimes contradictory finalities that privilege, for some, society's "top" (the elites' capacity to mutually tolerate one another, or the form and function of institutions) and, for others, the "bottom" (the tolerance, or the frequency of interactions, between "ordinary people" belonging to the warring parties). The promoters of the "big

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L. Israël and G. Mouralis (eds.), *Dealing with Wars and Dictatorships*,
DOI: 10.1007/978-90-6704-930-6_14,

book" approach nonetheless tend toward a unified manual[1] destined to orient the actions of local actors, such as international institutions confronted with postwar or post state repression dilemmas.

One of the manual's chapters is about "transitional" justice. Transitional justice and especially the system of so-called "truth commissions" at its heart have recently become among the most recommended means of building peace in a country having experienced a civil war or violent state repression. To this end, they articulate legal proceedings and non-judicial tools such as writings of an historical account or granting of reparations to the victims of political violence. Transition governments and foreign states intervening in their installation, intergovernmental organizations (United Nations Development Program [UNDP], UN High Commissioner for Refugees, World Bank, European Union [EU], etc.), activists, and employees of more or less "politicized" and critical of foreign intervention non-governmental organizations seem to almost unanimously consider transitional justice as one of the best way to build peace.[2]

Transitional justice, however diverse may be its components, gives a new definition of justice: the rehabilitation of victims, partly through reparations, is generally favored upon judgment of the perpetrators. Even the fact of qualifying the justice that should be exercised in transitional situations implies a premise of exceptionality: for the promoters of transitional justice, this is not a standard form of justice. Produced by experts for "pacted" transitions, i.e., in situations with neither winner nor loser where procedures of ordinary justice were suspended or appeared inapplicable, transitional justice has been designed and formalized in order to reconcile "so far as possible" (to cite a Chilean president) the constraints of the process of democratization (or liberalization) and the exigencies of the victims. From this point of view, transitional justice is a "proto science."[3] More than the sum of homogenous lived experiences, it is a "one-size-fits-all" approach claiming, like other methods of social and political engineering, both universal range and, paradoxically, strong political volunteerism.[4] It also consists of a collection of political prescriptions regarding the form of government, the modalities of its exercise, and the way social links ought to be rebuilt in war-torn societies.

Rather than deliver a review of the "results" obtained by the truth commissions,[5] we will try to understand what transitional justice owes to the context of its invention.

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[1] Like the manual of the International Institute for Democracy and Electoral Assistance, International IDEA, 2004 (to which several academics/experts collaborated).

[2] See, for example, UN 2006.

[3] The term was applied to transitology.

[4] In their ambition to build reconciliation, these systems exposed themselves to the impossibility of reaching the "essentially secondary states" described in Elster 1983.

[5] Review of the result that is very rarely endorsed in an attempt to measure the said results: for lack of knowing well that which must be measured (the "reconciliation," the "truth," its diffusion, the democratization?), for lack of knowing how to measure them, and fault of a sufficient distance. The attempts at measurement are not exempt from bias, for example, in the definition of the objective of commissions and its declination in variables. See, for example, Gibson 2004.

This contextualization implies a sociological observation of the invention and implementation of this "justice," retracing certain "evidence" conveyed by its promoters. We think that transitional justice is the product of a specific composite international milieu rather than the consequence of a process, be it a moral one (a reconciliation between justice and peace thanks to virtuous transnational activists[6]), or a political one, with the mechanical importation of a model judged effective, just, or reasonable.

We will first return to the conception of justice—symbolized by truth commissions—which actors of this international milieu elaborate and promote. Peacebuilding is preferred to the recourse to the state of law and ordinary criminal justice. By "truth commission," we mean an *ad hoc* system by which the executive power (or an international organization like the United Nations) gives reputable men from civil society (rather than those from the political realm) a mandate to establish an historical truth about past political crimes and to elaborate a reparations policy to benefit the victims.[7] Transitional justice is thus inscribed in a logic of dejuridicization and then stressed—starting with the key experience of the South African Truth and Reconciliation Commission—a "soul supplement" furnished by an attempt at public deliberation on History.

Second, we will explore the forms and effects of these attempts at internationalization of the model. This international diffusion (to countries as different as Morocco, Columbia, Ghana, and under the form of "reconciliation" procedures in Algeria, Libya, Iraq) has been made possible by the articulation of international promotional campaigns and local socio-political issues, by actors coming from strongly internationalized social universes sharing skills acquired in the same universities. More than a collection of practices or a (not entirely stable) base of knowledge, transitional justice looks like a space of activist and professional activity for academics, NGO activists (from both the north and south), lawyers, and experts. Recently, this space has been organized around world-class specialized organizations such as the International Center for Transitional Justice (ICTJ), a nongovernmental organization created in New York in 2001, with a permanent staff of one hundred and twenty people and additional offices in Brussels, Cape Town, Monrovia, and Kinshasa. The growing juridicization of this model, contrary to its original characteristics, can be explained by the professional resources of experts rather than by a conversion to criminal justice as the means to treat past acts of violence.

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[6] In this spirit, see Goldstein and Keohane 1993; Keck and Sikkink 1998.

[7] Using a broad definition, experts list nearly thirty experiences in the world: Bolivia in 1982; Argentina, 1984; Zimbabwe, 1985; Philippines, 1986; Chad, 1990; Chili, 1990; Nepal, 1991; El Salvador, 1992; Germany, 1992; Haiti, 1994; Malawi, 1994; Guatemala, 1994; Sri Lanka, 1994; Uganda, 1994; South Africa, 1995; Equateur, 1996; Nigeria, 1999; Peru, 2000; Sierra Leone, 2000; South Korea, 2000; Uruguay, 2000; East Timor, 2001; Panama, 2001; Ghana, 2002; Serbia-Montenegro, 2002; Liberia, 2003; Morocco, 2004; Greensboro, NC (USA), 2004.

14.1 What Justice Does Transitional Justice Provide?

14.1.1 In Lieu of Criminal Justice, Another Kind of Justice

Transitional justice is not an ordinary criminal justice complying with legal categories, but a type of justice suited to the political constraints perceived by the holders of power; its objectives of pacification are contrary to the application of the law on several levels. Whereas the permanent criminal courts prosecute legally qualified events, using legal rationales and applying sanctions, the *ad hoc* truth commissions try to clarify politically defined facts (like "massive human rights violations") that they establish thanks to social sciences tools (databases, narratives, etc.), in order to (morally) condemn but not (legally) sanction their perpetrators. The "lesson of history" replaces the judicial verdict. Unlike in ordinary criminal law, the victims are central figures, at least when they agree not to put emphasis on judicial sanction, or not to express a political opposition.

Truth commissions are originally tools invented when the more satisfying and "natural" solution that is ordinary criminal justice seems to be unavailable. Politically active victims of political violence situated at the margins of the political space of transition (pan-Africanists in South Africa, non-parliamentarian leftists in Argentina …) have eventually considered commissions as systems for suspending the "normal" course of law widely accepted by victims and the rest of the population. One can also see them as systems that postpone, intentionally or not, the application of ordinary justice in waiting for the conditions conducive to justice to be reunited: retirement of implicated security force agents and of those of the magistrates who had chosen to accept the legality of the former regime, evolution of the balance of political power, etc. The "politics of justice" implemented in "post-conflict" situations, can later be reformed. There are good examples of that: the initiatives of Chilean magistrates obtaining a reactivation of legal proceedings, or the adoption by the Kirchner government in Argentina of policies facilitating criminal proceedings, 10–15 years after their suspension.

The most active international promoters of transitional justice show a similar reticence in regard to ordinary justice applied in transitional times. "Strategies for the prosecution of those responsible" figure among the "five key elements of transitional justice" put forward by the ICTJ[8] or the defining criteria of the notion.[9] The establishment of violent acts is nonetheless carried out in the truth commissions "by non-jurisdictional means": the balances of political power and the state of the judicial system indeed often prohibit the criminalization or the political marginalization of silent partners and agents of political violence while the cost of the trials seems disproportionate considering state resources.

The joint emphasis put on the non-judicial dimension and the recourse to non-jurisdictional solutions in the administration of justice leads to a "broadened"

[8] International Center for Transitional Justice, "Vision and mission," www.ictj.org.

[9] For example, see Bickford 2004.

definition.[10] Establishing the truth, implementing reparations, constructing memorials, developing initiatives of reconciliation, and reforming institutions responsible for the violations, replace the sanction of perpetrators.[11] These reparation policies are prone to innovation: the practitioners of reconciliation are according increasing attention to gendered human rights violations and to the collective or "community" dimension of political violence. In Morocco, a National Forum on Reparations—held 30 September to 2 October 2005 bringing together 170 local and national associations—was organized by the Equity and Reconciliation Commission (known by its French acronym IER), with the designation of a local truth commission.[12] This forum designed a reparation program directed at the regions in which the populations perceived their economic and social marginalization to be linked to the perpetration of human rights abuses. The program was notably financed by the EU and the UNDP, the funds being managed by a public bank, the *Caisse de dépôt et de gestion*. With regard to the international success of the truth commission model, this transformation of justice possesses a practical utility: the absence of recourse to criminal justice renders less sorrowful for the perpetrators the unveiling of the truth.

14.1.2 Using Transitional Justice to Deliberate on History

These obstacles help to explain why truth commissions have been established. They also help to explain how, in practice, the complementarity foreseen in the model of resolving the past, between commissions and judicial procedures (civil, administrative, or criminal), changed into a simple substitution for each other. This was the case in South Africa, Chili, Sierra Leone, El Salvador, and Morocco. Such a "transitional" justice would present various advantages to the procedures of ordinary justice, e.g., these include a better quality of the narrative of violent episodes offering individual and collective access to a "right to the truth,"[13] a greater implication of civil society and the victims, more comprehensive reparations (beyond the fixation of a punishment for the perpetrator and the distribution of an indemnity to the victim), better cooperation from both political leaders and perpetrators, a greater independence of the institutions, and a more precise emphasis on how the state's dysfunction contributed to the violations.

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[10] Ibid.

[11] Ibid., pp. 1045–1047.

[12] Subtitled Commission Marocaine pour la Vérité et la Réconciliation. See Vairel 2008.

[13] "Criminal courts, by themselves, may not be suited to reveal the broadest spectrum of crimes that took place during a period of repression, in part because they may convict only on proof beyond a reasonable doubt." Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, pursuant to Security Council Resolution 1564 of 18 September 2004, 25 January 2005, par. 617, quoted in Amnesty International 2007, p. 8.

Experienced during the South African Truth and Reconciliation Committee (1995–1998) and quite vigorously promoted by partisans of transitional justice (the ICTJ or large international human rights NGOs), the public auditions of victims became a reconciliatory panacea. In Morocco, in a manner similar to other experiences, the public auditions had, among other tasks, "to regain the dignity of victims of violations, to create public and official recognition of the sorrows that they have endured, to affirm the values of human rights."[14] Although use of this procedure aims to favor the debate, we must notice that it does not deviate from "exemplary demonstrations of the recognition of the truth centered on the victims."[15] In paying very close attention to the victims, the designers of the IER, like their counterparts from various truth and reconciliation commissions (TRCs), have also made the decision not to mention nominally any of the perpetrators.[16]

The valorization of public deliberation about the violent past has led stakeholders to consider a compromise between negotiators of transitions as a way towards a more sustainable and just peace. If the victims do not at least feel that justice was rendered, they could express themselves and be recognized as victims—and no more as "subversives." This recognition has limits, nonetheless. The "subjective truth" expressed by the victims is narrowly framed by the exigencies of the "objective" truth. In South Africa, the commission selected for public auditions 3,500 victims constituting a sample of socio-political groups and the types of human rights violations. The 20,000 witnesses whose declarations had been recorded in writing had to accept a quickly shortened narrative time and bend themselves to the statistical categories of violations recognized by the databases.

In a more general manner, the "truth" of the victims is not taken into account except on the condition that it, the truth, does not come to weaken the social peace and the new political order. The victims are invited to express themselves in an individual manner—and not in the framework of a collective mobilization—and their discourse is then put into perspective in a manner that renders possible the writing of a collective History. Victims can write their part of History if they consent to enter an individualized process of mourning, which in some aspects prevents the expression of political demands.[17]

The reasonable victim rather than the political fury (for example incarnated by Hebe de Bonafini, founder of Mothers of the Plaza de Mayo in Argentina) is a central actor in transitional justice. At the moment when international norms seem to provide the victim with a larger place in the judicial process, notably in the framework of the International Criminal Court, what is in fact offered to her is neither a judicial treatment of her complaint nor a political space for expressing her claim,

[14] "Les séances d'auditions publiques: document de référence," www.ier.ma, on 23/12/2004.

[15] Du Toit 2003, p. 107.

[16] "Vision and mission", www.ictj.org. The FIDH indicates: "if we pose ourselves the question of who benefits from such a commission, the first answer that comes to mind is 'the victims.'" FIDH 2004, p. 8. Available at http://www.fidh.org/IMG/pdf/Ma396f.pdf.

[17] Wilson 2001, pp. 33–61

but a moral appeasement of her anger through a psychological support. From this point of view, transitional justice individualizes and privatizes accusations of injustice and violence, as well as the story of crimes—the commissions' reports often proceed from compilation of cases. It proposes at the same time a moral re-reading of the violent past. This past is not analyzed in terms of confrontations of socio-political groups, to hierarchize their pretensions to political legitimacy. The violence is also seen and above all interpreted through a moral filter, to disqualify every violent behavior. In envisioning both agents of violence (the "two demons," to use the terminology of the first democratic Argentine government), the commissions often conform to the terms of their mandates, which in turn reflect political compromise between past and present leaders. But this postulate of equivalence (which, of course, does not prohibit a hierarchization after the examination of the crimes committed) is often justified by their members in the name of comprehending individual motivations (even the perpetrator's ones) and of the overtaking of hate.[18]

However, transitional justice expertise and consulting proposed to post-conflict governments and actors are not simply a product of transitological prudence or a mechanical legitimization of a compromise with perpetrators judged inevitable. Transitional justice only became "transitional" when it was conjointly and concurrently harnessed by several groups for their proper logics. More than a key to scientifically understand very diverse social processes, the term "transitional justice" is a tool contributing to organize a milieu of international experts.

14.2 What Internationalization Does to Transitional Justice

Some years ago, the expression "transitional justice" competed against others like "retroactive justice" in academic and expert fields. Since then, the expression has aroused the support of human rights and peace building professionals as well as of the academic milieu (notably jurists, political scientists, and philosophers). An educational curriculum has developed, backed by an abundant literature of expertise focused on the impact and the limits of transitional justice. In a decade or two, the truth commissions have excited the interest of many international policy planners. Yet they are considered as a progress of post-conflict policies by those who choose to stay blind to their ambivalent position regarding rule of law. To understand what precisely truth commissions are, we also need to consider their international transfer sociologically. This diffusion is more complex than the mere effect of a competition between organizations; it is the product of the circulation of actors between several strongly internationalized social worlds (North American universities, international organizations, human rights NGOs).

[18] Tutu 1998.

14.2.1 The Transitional Universal

14.2.1.1 A Tautological Relationship to Contexts

The global peacebuilders communally tend to draw a common picture of the context of their action. When they define their action or evaluate past experiences, the contexts appear as equivalent. This does not mean that these experts of reconciliation confound them; on the contrary, they insist precisely on the attention to local particularities. But they include all the local situations in one same class: countries in transition. This confers to them a hold on the extreme diversity of the political, social, and historical situations in which they mean to intervene. For the stakeholders as well as for the analysts of the processes of reconciliation, the political changes which require reconciliatory engineering are reputed to be of a tenor and of a sufficient thickness for a regime change to take place. This is what means the notion of "democratic transition": each country shaking off authoritarianism can be considered *ipso facto* as headed toward democracy. The argument is all the more important as it corresponds to the legitimate problematic of politics shared by international donors, experts in democratization, sectors of diverse foreign policy *establishments* and political actors of regimes that one qualifies as authoritarian for lack of a better term. Once there is a "transition," the peace builders feel they can legitimately intervene. Reciprocally, a state accedes to the enviable status of a "country in transition" because of the reconciliation policies implemented here.

> As a political transition unfolds after a period of violence or repression, a society is often confronted with a difficult legacy of human rights abuse…[19]

This point is of critical importance for the quasi-missionary International Center for Transitional Justice (ICTJ) enterprise. One thus understands better how the organization has been in a position to lend its "support" to the most diverse experiences of reconciliation. In Colombia, it "socialized" the members of the National Commission of Reparation and Reconciliation to other experiences. In Guatemala, the support of the ICTJ took the form of recommendations (*general conceptual guidance*), experts' missions, and training. Mexico received technical assistance. In Peru, a dozen experts and consultants from Argentina, Chili, Colombia, El Salvador, Guatemala, and South Africa brought their assistance to the establishment of the database—for the elaboration of investigative methods, questions of international law (specifically concerning human rights), the organization of public auditions, and policies of reparations. The commissions' stakes reside in their status as "as if…" commissions—*as if* they indicated a transition toward democracy and *as if* they were to produce on their own initiative a truth acceptable to the victims.

[19] ICTJ 2004, p. 1. http://ictj.org/sites/default/files/ICTJ_Annual_Report_2002-2003.pdf. Accessed 16 May 2007.

Their functioning, the transposition of the model, are nonetheless very dependent on the political and social context.[20]

Morocco looks like the entry point into the Arab world for the promoters of truth commissions.[21] In the framework of the IER, it hosted ICTJ experts from Ghana, Guatemala, Peru, Sierra Leone, South Africa, and East Timor. The public auditions have been the most visible terrain of the cooperation between the IER and the Center. Even before the constitution of the Instance, public auditions were the object of discussions between certain leaders of the National Human Rights Council, an institution appointed by the king to deal with human rights, and ICTJ experts[22]; they were adopted in principle in May 2004 during a closed IER/ICTJ seminar during which the internal oppositions were vanquished. At stake with these auditions was the conformity of the Moroccan experience to the model and, in turn, its capacity to become a model contributing to the international success of the TRC model in the Arab world in a missionary mode, as indicated by the ICTJ's and FIDH's reports on the IER.[23] The holding of public auditions was announced in July 2004 on the occasion of a dinner in honor of the first regional educational workshop dedicated to transitional justice, organized by the ICTJ. Moreover, there was scarcely an aspect of the IER's functioning that was not the object of a follow-up by the ICTJ. In this, despite the fact that the institution is each time reinvented, the difference between a constant bilateral cooperation and the recourse to "anterior models" or the "rigid directives that predetermine the options" could appear quite minor.[24] Translation of international plans of action in the Moroccan context, the IER was inspired by the definition of *international best practices* as much as it contributed to their development therein.

14.2.1.2 The Appropriation of a Governmental Apparatus by International Activists

To the handling of the tautology, the promoters of truth commissions have added a full exploitation of the ambivalence of the model, thanks to the circulation of well-calibrated rhetoric of enchantment, through the channels linking diverse concerned sectors. These arguments show the humility necessary to the credibility of a model which pretends to be adaptable to all post-conflict scenarios. The truth commission model, particularly in the South African way, has thus succeeded in convincing

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[20] Ross 2003.

[21] The declaration of Hanny Megally, director of the Middle East and North Africa Program at the International Center for Transitional Justice, repeats this: "The impact of these hearings, televised live across Morocco, will be enormous, not only in the country but throughout the region," ICTJ press release, 20 December 2004.

[22] Interview with a CCDH administrator, Rabat, March 2006.

[23] FIDH 2004; ICTJ 2005.

[24] www.ictj.org/static/2009/francais/ictj_2008_annualreport.pdf

the pragmatists hoping to see a democratic "consolidation"—at the cost of a compromise with perpetrators of political crimes—just as well as the defenders of the rule of law and the activists advocating for a more participatory and deliberative democracy.

The professionalization of transitional justice has not been able to take place except in narrow connection with the globalization of political causes: here professional careers are also activist careers. And this observation is as true for the "agents of the international" from northern countries,[25] as it is for the cosmopolitan actors from war-torn countries. In the North, the banner of transitional justice has shown its capacity to make human rights activists from very distinct backgrounds work together. Bridges thus have been established between the group of US East Coast liberal lawyers, which created the ICTJ, and some European progressives who had long been invested in the creation and consolidation of human rights networks from the North and the South, often in former colonies. The language of human rights permits dialogue between positions that are not clearly compatible.[26]

In countries having recently experienced a conflict, transitional justice is a tool of effective reconciliation if one takes into account its capacity to joint together activists experiencing a process of political deradicalization and even to permit their rapprochement with or cooptation by those in power, sometimes with certain ones leaving power. But the reconciling power of these policies undoubtedly stems less from the proper language of reconciliation used than from the opportunity of a political "normalization" or of a professionalization that can entail an exit from activism. The power of the Moroccan commission has largely depended on its capacity to reintegrate in a political space undergoing liberalization. Those militants—former Marxist-Leninists and sometimes Islamists—who yesterday were suppressed and today are now concerned with playing the game of dialogue with the Palace. These actors knew how to convert their organizational and activist knowledge promoting their actions thanks to the human rights lexicon and practices. Their perception of the regime has been transformed: the relationship of enmity has been replaced with an adversity in which the goal is no longer the overturn of the regime but its democratic transformation from the inside out. In Colombia, the specialized organizations—the ICTJ associated notably with agencies of the UN and representatives of European governments—serve as bridges between diverse sectors of the opposition to the Uribe and then Santos governments. These oppositions include a legal elite installed in institutions that seek to constrain the governmental practice by recourse to the Constitution and a more fragmented "victims movement" organized notably by the left wing of the

[25] Dauvin and Siméant 2003.

[26] The conference organized by the journal *Mouvements* is a good example of this encounter: the members of the ICTJ defended the pragmatic uses of amnesty that were not necessarily compatible with the strict application of the Rule of law generally maintained by European human rights activists. See Brisset-Foucault 2008.

Catholic Church. They both have entered in a space constructed around the Truth and reconciliation Commission, which has functioned as a dialogue space with the government.[27]

Transitional justice is thus a tool of insertion in some international *milieux* and an opportunity for a process of political "moderation." This is what renders visible a tension sometimes explicitly expressed by the promoters of the model. On the one hand, some transitional justice advocates consider truth commissions as a "social movement" response to the post-conflict dilemmas, moreover contributing to a deliberative deepening of democracies. It was the case, for example, at the occasion of the functioning of the Greensboro Commission. On the other hand, transitional justice is the professional practice of providing council to the political and social elites of a given country, in a manner compatible with both the domestic Realpolitik and the growth of international criminal law.[28]

14.2.2 Transitional Justice as a Tool of Professionalization

The model of transitional justice has thus progressively become a tool constituting and expanding an international job market, extending it beyond the international promotion of human rights. For example, training sessions organized by the ICTJ function as a space toward which "agents of the international" converge, preparing a passage from the governmental toward the inter-governmental just as from the inter-governmental toward the non-governmental (and inversely).[29] The way these diverse milieux have invested in and consolidated this investment by the professionalization of the sector explains the success of transitional justice and its later "judicialization."

The intervention of the ICTJ in more than thirty countries in a short period of time is explained by the talent deployed by members of the organization in order to arouse the interest of varied local elites in transitional justice "best practices." The targeted elites have been legitimate for their scholarly credit, their activist trajectory in various sectors (universities, churches, social work, law, etc.), or their in-depth knowledge of international networks. To the good use of the "multi-positionality" of its recruits, this organization has added a strategy of professionalization: it has organized groups that attracted students, human rights activists, local NGOs leaders, and employees of international organizations; has lobbied closely funding institutions; and has published case-studies and manuals that it distributes to academics and practitioners of international intervention.

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[27] Participant observation, June 2007, Bogotá.

[28] Lefranc 2009.

[29] Participant observation, Brussels, March 2006. Most of the participants in the training session observed came with the admitted objective of being recruited by the organization doing the training.

The professionalization of transitional justice is strongly contributing, moreover, to its formalization in a more legal language. The truth commission model is "juridicized" firstly because of the sociological characteristics of its promoters. From interns to board members, people working for the ICTJ often come from the liberal legal elite of their native country. The board is dominated by top internationalist lawyers and former members of commissions considered as successes. Nearly all of the 87 interns enrolled in the six training sessions organized in Cape Town between 2002 and 2005 were human rights activists, often politicized (university student activists, notorious opposition figures sometimes in exile), acting as leaders in local human rights or "access to law" NGOs. A lot of them were educated in law schools (abroad for about thirty percent). As to the twenty-six members of the research and programming staff at the New York headquarters, almost half of them had studied law, most often at prestigious schools on the East Coast (e.g., Columbia, New School for Social Research, New York University). Before entering the ICTJ, they were academics, experts in international intervention (governmental and non-governmental) and legal counsel for governments. The personnel in the foreign offices (Brussels, Geneva, Bogota, and Cape Town) were also often lawyers trained in American law schools mobilized to defend human rights, sometimes within international criminal law institutions.

Moving from one country or sphere of activity to another, the peacebuilders bring with them "key lessons learnt" from successful reconciliations. The international diffusion of the TRCs has for a backdrop the modification of two spheres of activity: human rights advocacy, firstly, and, secondly, curricula of international law and international relations at North American universities. Many connections have been intentionally woven between universities and the international reconciliation market through the circulation of actors[30]: graduate students, professors working as experts for international organizations,[31] NGO staff that enter or return to academia.[32]

First of all, human rights advocacy has been professionalized. As in similar spheres of activity, for example humanitarianism, volunteers are replaced by salaried employees.[33] Activists are becoming seasoned experts who are no longer connected to a single organization but who instead navigate between one and another

[30] "The ICTJ collaborates closely with human rights organizations, universities, the United Nations, and others, believing that joint projects strengthen the field of transitional justice as a whole." ICTJ 2004, p. 17.

[31] For example, David Weissbrodt and Soledad García Muñoz are professors of law and former members of the international executive board of Amnesty International.

[32] A new academic discipline has sprung up to study the commissions, with courses on the topic now offered at New York University, Harvard, Michigan, and Columbia law schools," Tepperman 2002, p. 129. A list of these curricula established in 2005 was available in August 2007 at: http://listserv.aaas.org/pipermail/tjnetwork/Week-of-Mon-20051212/000463.html.

[33] The different organizations compete against one another in terms of compensation and benefits (health insurance, retirement plans, continuing education, etc.).

during the course of their career.[34] Their most salient social property is their particularly high level of university studies. From then on, while the size of the organizations is growing, communication, human resources management, fundraising, and administrative tasks are given over to professionals. All of the work of documentation, analysis, denunciation, prevention, or publicizing of human rights violations is experimenting in-depth transformations. It is becoming the realm of specialists salaried by the organizations; for example, the violations with gender dimensions are not violations of workers' rights which also differ from violations connected to the anti-terrorism fight.

Then, in the 1990s, the international relations curriculum at several American universities has sought to translate into teaching the (old) idea according to which it is possible to avoid conflicts, and thus to learn people how to avoid conflicts. Courses on "conflict resolution," "conflict management," or "reconciliation" have developed, partly based on the hypotheses of transitology.[35] The ICTJ was created after two events: a New York University's School of Law program on transitional justice and a seminar held in 2000 and organized jointly by the Ford Foundation and Human Rights Watch (HRW). Following this seminar uniting lawyers, human rights advocates, and practitioners of "reconciliation," Alex Boraine, former vice president of the South African Truth and Reconciliation Commission; Paul van Zyl, former executive secretary of the same commission; and Boraine's assistant, Priscilla Hayner, one of the most visible experts,[36] decided to create what would become the ICTJ.[37]

An analysis of the biographies of ICTJ collaborators reveals that universities provide organizations with graduates, as they do for Amnesty International (AI) and HRW. Salaried positions require advanced degrees, but internships and annual fellowship programs do too. In return, the local members of reconciliation institutions are also involved in the instruction: following his experience at the head of the South African TRC, Alex Boraine became a law professor at New York University. There he led the transitional justice program between 1998 and 2001 and, meanwhile, founded the ICTJ, presiding over it during the first three years of its existence.

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[34] Widney Brown is currently the Senior Director of International Law and Policy for the International Secretariat of Amnesty International. An alumna of NYU Law, she previously taught at Yale (2000–2005) and headed the Women's Rights program at Human Rights Watch.

[35] Director of the New York office of the Robert F. Kenney Center for Justice and Human Rights and one of the founding staff members of the International Center for Transitional Justice, Louis Bickford teaches at New York University and has taught at the University of Chili Law School, University of Wisconsin at Madison, City University of New York's Brooklyn College, New School for Social Research, and the University of Hiroshima. He holds a Ph.D. in political science from McGill University.

[36] Hayner 2001.

[37] The funding of its creation comes from among the oldest, most active, and best endowed foundations in American philanthropy: Ford Foundation, John D. and Catherine T. MacArthur Foundation, Carnegie Corporation of New York, Rockefeller Institute for Medical Research, and the Andrus Family Fund.

The lawyer José Zalaquett was named to the National Commission for Truth and Reconciliation by the Chilean president in April 1990. In 1999, he participated in the *mesa de diálogo*, a series of roundtables bringing together defenders of human rights and military officials over the unsolved question of disappearances and violated human rights. Professor of human rights at University of Chili Law School, he teaches annually at the Inter-American Institute of Human Rights in Costa Rica. He also teaches at Harvard University's Law School. A member of the ICTJ's advisory board, he inaugurated, in 2004, the "Transitional Justice Scholars Program," an annual conference on transitional justice held within the Hauser Global Law School Program at the New York University School of Law. The program offers several types of instruction.[38] It offers courses in the master's in law (LLM) program, which provides graduates access to internships in transitional justice institutions, notably the ICTJ. The center also provides intensive training for professionals active in agencies of international cooperation, NGOs, governments, and universities. Lastly, the center offers fellowships to "enable students to undertake research and fieldwork on criminal trials, truth commissions, institutional reform and reparations programs in transitional democracies."[39]

14.2.2.1 Attempts at Juridification

As the main force within these North–South networks under construction, elites valuing the legal resources contribute efficiently to the judicialization of the model and its integration into international criminal law; at the same time, the strong links between truth commissions and the avoidance of the criminal justice imposed by political compromises tend to be forgotten. Transitional justice has thus been recently integrated into a range of post-conflict toolboxes directly connected to the international promotion of human rights and international criminal jurisdictions. With increasing frequency, truth commissions have been presented as a complement to national or international criminal procedures and as rule of law institutions.[40] International criminal law itself has seemed to confirm the acceptance of a reasonable recourse to tools like truth commissions (see, for example, Article 53, §2c of the International Criminal Court's statutes).

The creation of commissions functioning simultaneously with tribunals for example in Sierra Leone and East Timor could, moreover, confirm this judicialization of transitional justice. Yet, these judicialized commissions respond as much as their less legal predecessors did to the necessities of situations where the principal perpetrators of the violence seem to be able to obstruct their prosecution. The legitimacy of special tribunals (including foreign judges) as well as their capacity to successfully complete criminal procedures has indeed been put into doubt.[41] In

[38] http://www.chrgj.org/projects/transitional.html

[39] Ibid.

[40] UN 2006.

[41] Perriello and Wierda 2006; Hirst and Varney 2005.

South Africa, the TRC's Amnesty Committee proved to be quite parsimonious in the granting of amnesties, leaving open the possibility of numerous cases of legal persecution. But trials, and all the more sanctions, were rare. Even when it is said in a more juridical language, transitional justice is not always where law is applied.

The judicialization of the truth commission model thus most often passes by the valorization of a form of justice presented as "alternative" or complementary to retributive justice. For their supporters, truth commissions have become, in a changing political situation, the best incarnation of "restorative justice" as an alternative to retributive criminal law. In this case, the commissions are no more considered as palliatives in contexts impeding the application of law, but as means of rendering another kind justice.

The idea of "restorative" justice is expressed from the very first experiences of transitional justice: lawyers and government experts, like the Argentine Jaime Malamud-Goti, have sketched a conception of justice founded on the rights of the victim, whom is conferred a right to recognition as victim and a right to reparations.[42] But the idea was systematized and incorporated into the truth commission model starting in 1995 by Desmond Tutu, president of the South African TRC, who combined the forgiveness, the amnesty, and the *Ubuntu* (presented as an African tradition of recognizing the humanity of the other), in order to oppose the ordinary retributive logic with "restorative justice." This principle has been rather largely endorsed by members of the Commission.

> We believe, however, that there is another kind of justice—a restorative justice which is concerned not so much with punishment as with correcting imbalances, restoring broken relationships—with healing, harmony and reconciliation.[43]

In this more general acceptance, restorative justice crystallizes the willingness to overtake practices founded on the application of a punishment to the delinquent. In the framework of the routine exercise of criminal justice in the most well-established democracies, it designates a judicial procedure (the *victim-offender mediation* in the U.S., for example) based on a face-to-face between the perpetrator and the victim, sometimes in the presence of members of the "community," in place of the habitual asymmetric relationship between the perpetrator and the judge.[44] Antoine Garapon has shown that beyond the diversity of their ambitions and objectives, the truth commissions "nevertheless are similar in their concern of overtaking the strict judicial logic, and, notably, of exiting the punishment model."[45] Transitional justice has this in common with restorative justice: it seeks

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[42] Roht-Arriaza 1995, pp. 160–170.

[43] Tutu 1998, p. 9. In this framework, the judicial punishment is replaced, according to him, by "public shaming" (ibid.), which directly evokes theories of restorative justice. Cf. Braithwaite 1989.

[44] The latter is used widely in the Anglo-Saxon countries for juvenile delinquency. On the mobilization of/for "restorative justice," see Lefranc 2006.

[45] Garapon 2002, pp. 282–283.

a peace constructed by conciliation. Presented as the application of restorative justice in the exceptional context of transition to peace and democracy, transitional justice can be at the same time "reimported" into the countries of origin of its principle promoters. The experience of the Greensboro Commission, for example, which is the main attempt at applying the truth commissions model in stable democracies, here the U.S., has constantly been associated to the promotion of a "restorative" justice.

More precisely, references to the movement for alternative dispute resolution (ADR), or diverse activist or professional experiences using ADR techniques, have been promoted in order to give the Commission the impact of a judicial experiment bypassing the tribunals. Many of the activists had previously indeed been involved in one of numerous American forms of restorative justice, or, more broadly, in alternative dispute resolution. Supported conjointly by the ICTJ, Greensboro, North Carolina (pop. 237,000) community organizers generally from the activist African-American milieu formerly engaged in the civil rights movement of the 1960s, and private foundations (principally the Andrus Family Fund), the Truth and Reconciliation Commission was created in order to shed light on a local event that occurred 30 years prior: five deaths ascribed to the Ku Klux Klan after its members and those of the American Nazi Party opened fire on participants in a demonstration organized by the Communist Workers Party on 3 November 1979. The report submitted by the Commission in May 2006 concluded the primary responsibility lay with the Klansmen and the American Nazis, but it also blamed the passivity of the police and "white" justice which acquitted everyone. It also highlighted the demonstrators' underestimation of the risk involved. But for the activists involved, the recourse to the truth commission model was justified in large part by a reticence with respect to the tribunals, and a preference for "restorative" justice:

> The overall transition and community reconciliation process can be summed up as a creative people undertaking involving grassroots democracy, restorative justice and community healing and reconciliation.[46]

In the North as in the South, in more or less "ordinary" situations, truth commissions were promoted as means of implementing an alternative justice, a restorative justice as opposed to a formalist, professionalized, statist judicial process… This form of justification is doubly interesting: it permits the attachment of special transitional justice to a legal framework, and to respond to the professionalization needs of the sector's actors, all in preserving an alternative scope, which authorizes these same actors to benefit (and taste) their activist identity.

This first step toward a sociological analysis of the promoters of transitional justice provides a better definition of the category of transitional justice, and the efforts deployed in order to integrate the truth and reparations policies into an international legal framework. The concept has been less formulated to interpret a

[46] Interview given 21 October 2005 by Joyce Johnson (co-leader of the Beloved Community Center) to the Leadership for a Changing World (Ford Foundation), http://www.leadershipforchange.org/talks/archive.php3?ForumID=34, accessed 15 June 2008.

practice than to legitimize its conversion into a model by activists and concerned professionals. Those intend notably to make compatible their adhesion to the rule of law and the promotion of transitional policies that justify, in the name of post-conflict pragmatism, the limitations to a strict application of the law. The sociological reality of the groups invested in the promotion of truth commissions defines transitional justice, more than the hypothesis of the natural diffusion of morally virtuous and politically efficient institutions.

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Chapter 15
The Uncertain Place of Purge Within Transitional Justice, and the Limitations of International Law in the World's Response to Mass Atrocity

Mark Osiel

Contents

In recent years, transitional justice has become a well-established field of activity and reflection, with much fruitful interaction between its real-world practice and scholarly study. Today, intellectual insight into past experiences—produced by such young scholars as those in this book—often informs the present design of institutional initiatives in countries undergoing transition from war to peace and from dictatorship to democracy. Throughout the world, we now do transitional justice in many ways, from criminal trials and truth commissions to the official public commemoration of victims.

Among these several notable expressions, the decision to purge and vet those who directly contributed to grievous wrongdoing has clearly received the least attention. In focusing on this aspect of transitional justice, the present volume hence makes a distinctive and signal contribution. Notably lacking has been close empirical examination how this particular public policy has played out in various

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countries. We must surely grapple with such empirical vicissitudes if we are ever to systematically compare cases and thereby come to understand the sources of similarity and disparity among these many national experiences. Theoretical insight into transitional justice, its essential conceptual core, has advanced considerably.[1] These worthy efforts, however, have lacked much in the way of hard evidence, any rich factual basis, on which to lay a convincing foundation for their elevated, intellectually ambitious endeavors.

That said, along with Jon Elster's contribution in these pages, let me add one brief theoretical reflection on the policy of purge and vet, asking: is that invariably necessary? That is, is it absolutely essential, below the very highest ranks of those who devised and implemented evil policies? To this question, there is something to be said in support of both a "yes" and a "no."

Perhaps those at the middle and upper-middle echelons were genuinely, passionately committed to the ideas informing wretched prior policy. If so, then there is no reason to believe their commitment to it would immediately vanish upon its recent official abandonment. From within the civil service, they could be expected to pose a serious threat to the new government or regime, quietly subverting its aims whenever these conflicted with the goals and programs of prior rulers, with whom such people continue to deeply sympathize. There is no doubt that some such people always exist, and that it is very difficult to identify them, i.e., distinguish them from other bureaucrats whose commitment to wicked goals was more tepid. It is clear, for instance, that many people who actively collaborated at early stages in the imposition of Soviet domination across Eastern and Central Europe were devoted local Communists who ascribed whole-heartedly to the new ideological order of the day. The same could surely be said of those who immediately assumed positions of high rank in the "fascist" regimes of interwar Europe, from Italy to Spain and beyond.

In many countries, however, the alternative hypothesis is at least equally plausible, especially as autocratic regimes age over time, though sometimes even at earlier stages. As the true nature of a dictatorial government reveals itself, its initial enthusiasts—all but the most doctrinaire—often become disillusioned. If they had assumed significant public office at some point, they may continue to serve present rulers and implement current policies to which they do not or no longer subscribe. They do so, however, from mere opportunism and so they never exceed the call of duty, the scope of their legal obligations, narrowly construed. Even where they are free to quit or retire from public service without personal danger, they often harbor career ambitions better advanced by complying with the expectations of those around them. These other people include not only fellow party members with whom they may remain quite friendly, but also family dependents grown accustomed to the comfortable life-style afforded those exercising important official responsibilities. It is irresistibly tempting to get along by going along.

[1] Williams et al. 2012.

Because they have become mere paper-pushing time-servers, such lackadaisical civil servants nonetheless pose no serious danger to a new democratic regime. They might therefore easily be maintained in office, especially where they possess technical skills helpful to new national leadership. Because their ideological commitments were always (or at least presently) shallow and insincere, they will follow the path of least resistance. That path now points their self-interest in a different direction; it will do so, moreover, unless and until the political winds turn about-face. Ideally, new democratic rulers would of course prefer to employ only their own loyal followers, people truly devoted to them and their constitutional commitments. These may at first prove too few in number, though, and the entire displacement of their predecessors too costly. It is also simply unnecessary. There will be no reason, moreover, to provoke the wrath and consequent electoral antipathy of those many mere chameleons who temporize with the prevailing climate of opinion, whatever its passing promptings. Those whose undoubted evildoing was merely indifferent—"unthinking," and therefore genuinely banal in Arendt's admittedly idiosyncratic sense of these terms—can be fairly trusted to go with the new flow.

The political necessity and policy appeal of purge and vet should therefore vary greatly with the measure of ideological commitment still evident among those serving prior rulers when these fall from power. The possibility of determining this commitment, with available evidence, will likewise differ from one national experience to the next. Where such continuing commitment can be adequately ascertained, where is has been generally weak, where there is a dearth of trained replacement personnel, and where there is little likelihood that political winds will suddenly reverse course, there is no good reason to cleanse the ranks of those beneath the very highest levels of public service. Though I have stated all this in normative terms, with a view to future policy-making, it would also be interesting to learn, from detailed historical inquires like those this book ventures, whether this suggestion also works an explanatory hypothesis, helping account for empirical variation between prior experiments in transitional justice.

15.1 The Limits of International Law

Let me now turn, in greater depth, to a somewhat different question: What is international law's proper place in the world's response to mass atrocity? This concern arises acutely, though by no means exclusively, in circumstances of transitional justice. We will therefore examine it in both the narrower context on which this book concentrates and further afield.

Some of the most prominent efforts to restrain and redress mass atrocities in our time, heartening from almost any view of global justice, are largely non-legal and extra-judicial in character. They rely scarcely at all on the application of binding international rules by international courts. They bear only the most equivocal, attenuated, often-tangential relation to international law, and in fact sometimes sit quite uneasily with it. Why is this so? And what does it mean for assessing the

proper place of international law—and its alternatives—in the world's response to mass atrocity?

Consider, in this regard, these recent developments:

1. Under the rubric of voluntary "corporate social responsibility," managers of multinational corporations find themselves increasingly pressed to tread much more cautiously in countries whose rulers covertly employ forced migration and involuntary labor to assist foreigners' construction projects.
2. Fearing the opprobrium of global opinion, military leaders in democratic states are impelled to unprecedented efforts at reducing innocent civilian casualties in war, in ways the international law of war crimes does not itself require.
3. Without fully affirming its legal status, diplomats everywhere earnestly proclaim their countries' "responsibility to protect" the denizens of distant societies from mass atrocity by local despots.
4. Inspired by a growing global expectation of "effective remedies" for mass atrocity victims, national legislators in many countries engage in anguished deliberations over how best to provide such persons with some form of civil compensation or administrative redress.
5. Heads of state in Turkey suffer worldwide chastisement in parliamentary resolutions for failing to acknowledge and apologize for their distant predecessors' policies of genocide, despite the absence of any legal duty to issue such proclamations. Similarly, Japanese leaders have increasingly become targets of official condemnation by regional neighbors, victimized by Japan's crimes of WWII.

These initiatives give rise to a number of questions. To what extent and for what reasons have they evaded or eluded juridicization? What influence, if any, does international law nonetheless exercise upon their workings, if only at the margins? And what influence in turn have these initiatives had, or may likely have, upon law? When does the particular initiative serve to buttress the commitments of international law, to resist such law, and when does it simply stand aloof, charting a different but compatible path? If we compare and contrast the five efforts, what overall patterns emerge and can such patterns be explained by any existing or imaginable theory of international law's place in the world?

The non-juridical aspects[2] of these responses present a puzzle, if not an outright embarrassment, for anyone concerned with strengthening the response to mass atrocity by international law and international tribunals. The mainstream view within the field, and among lawyers and rights advocates more generally, is that atrocity responses should be governed by law and undertaken to a substantial degree by legal institutions, often international ones.[3] Yet much of the most promising and intriguing action today lies elsewhere.

[2] The terms "non-juridical," "non-legal," and "extra-legal" will be used interchangeably here.

[3] This view reaches it apogee in the contention that any genuine "rule of law" at the international level requires a full "constitutionalization," by which all applicable legal sources and rule-making or enforcing bodies are arranged in a single hierarchy. See, e.g., Fassbender 2009 (arguing that the UN charter has constitutional status); Dunoff and Trachtman 2009 (collecting papers discussing world constitutionalism).

To imply that there is a problem here might be to succumb to a certain "legalism"—our professional tendency to view the delivery of justice as properly the monopoly of the state and its law, or of only those international institutions to which states formally delegate law-making authority. Such legalism in responses to mass atrocity has been subject to trenchant criticism.[4] More generously, we might see the "problem" of international law's relative absence from these initiatives as simply a legitimate expression of our desire to lend a helpful hand, with (what we consider to be) relevant expertise, to such morally salutary developments. And since the non-legal initiatives seek to coerce conduct, they necessarily raise questions about the legitimacy of limiting freedom without the accompanying protections of formality, neutrality, and accountability which law may uniquely provide.[5]

International lawyers are not the only people vexed by the curious conundrum. No one thinks international law must truly "occupy the field."[6] Many of their creators and proponents view such initiatives—however successful in certain respects—as unstable, precarious, in need of support and consolidation by international law, through the forms of institutionalization it alone can provide, they believe.

Leading advocates of a "responsibility to protect," for instance, leave no doubt about their wish to see this normative aspiration reflected within customary international law. They seek to curtail the UN Charter provisions with which armed humanitarian intervention would otherwise be incompatible.[7] In fact, all five initiatives invoke plausible moral arguments in drawing up close to the point of demanding much more of international law than has been hitherto contemplated. Why it should not accede to these emergent expectations is no longer obvious to many citizens of the world. And let us grant, without fear of strenuous dissent, that morality demands more of us in preventing and redressing mass atrocity than international law has traditionally required.

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[4] See, e.g., Leebaw 2011 (arguing that optimal responses to mass atrocity have in many places been distorted and misdirected due to liberal law's inherent predisposition to ascribe collective wrong and structural injustice to the intentional conduct of discrete individual persons).

[5] This concern finds keen expression, for instance, in Pauwelyn 2011, p. 3 (pondering whether international lawyers should "insist on formalism and exclude 'informal law' from its scope to maintain international law's independence and stress the point that "informal law" may be inappropriate as a power instrument of the strong…").

[6] In fact, international lawyers have generally been careful to restrict the scope of international legal institutions where national ones can adequately respond to mass atrocity. Hence, under the "complementarity" doctrine, the jurisdiction of the International Criminal Court is limited to circumstances where national courts prove themselves "unwilling or unable" to investigate or prosecute. Eric Posner defines "global legalists" as people who "believe that international political disputes should, as much as possible, be resolved according to law and by legal institutions." Posner 2009, p. 25. Public international lawyers in the real world, however, are much more savvy operators, acutely attentive to such law's limitations, and to the potential strengths of national institutions, than this characterization suggests.

[7] Evans 2008.

Our several non-juridical efforts do suggest, at the very least, that there is little danger that responses to mass atrocity will be effectively restricted to what international law currently endorses. Such law has not achieved any monopoly, in other words, over the range of relevant response. In imagining effective ways to restrain and redress mass atrocity, the undoubted influence of legal analogy and legal thinking—clear, for instance, in the language of a "responsibility to protect"—has not been to narrow the breadth of ethical reasoning and political action. And virtually no one denies that international law has often been grossly inadequate to the task.

In their central aim and overall import, the new non-juridical initiatives sketched above at first seem congruent with the major progress of recent years in holding perpetrators of mass atrocity accountable for their crimes. That progress takes a decidedly juridical form. It finds expression in the creation of several criminal tribunals (international and hybrid national-international), in the significant number of high-profile cases they have processed, and in their judicial development of legal doctrines imposing clearer, more stringent demands upon those who employ force in service of their political aims. The creation of an International Criminal Court, in particular, reflects a great emboldening of international law's moral agenda in this area.

National courts as well, increasingly applying rules of international law, have been integral to the legalizing turn.[8] The upshot has been a growing "juridification" of the world's response to mass atrocity, in the sense of a collective insistence on extricating the terms of that response from the influence of "politics," an influence perceived as almost invariably corrupting.[9] It should not pass without brief observation here, at least, that many millions of people throughout the world now look to these developments with great hope and yearning.

All these considerations make the conspicuously non-juridical aspect of the initiatives mentioned above that much more perplexing, and worthy of reflection. We must ask: are these concerted efforts to improve the world's response to mass atrocity likely to continue in their non-juridical form? Or do they show signs of likely assimilation to the more prominent forces of legalization just noted? If they will persist in standing significantly apart from these forces, do they merely

[8] Under the moniker of international "legalization," political scientists now study the frequent "delegation" by states of policy issues to international institutions with law-making and enforcement authority. See, e.g., Goldstein et al. 2001 (employing a definition of legalization as involving obligation, precision, and delegation of disputes to a third-party decision-maker); Brutsch and Lehmkul 2007. The initiatives examined here, in contrast, involve no such delegation.

[9] International lawyers have also shown, to be sure, acute recognition of the need to accommodate political forces that insist upon the right to influence the functioning of international legal institutions aimed at redressing mass atrocity. These are political forces which, if not placated, could effectively nullify the operation of such legal institutions altogether. This sort of accommodation is particularly apparent in how the Rome Statute for the International Criminal Court accords the permanent members of the UN Security Council considerable influence over the cases and situations that the Office of the Prosecutor may investigate.

represent curious contingencies, anomalous outliers to deeper trends and abiding tendencies, disclosing no general significance, practical or theoretical? Or do they hint at serious and even inherent limits to the process of juridification, suggesting places where it cannot and will never successfully go? If so, then study of these earnest initiatives should help identify the likely future contours of international juridification itself. This in turn will educate us lawyers about where and how we might most effectively press forward and make a valuable contribution—and where we may not.

Despite some significant differences between them, the organized initiatives mentioned at the outset all find their chief inspiration and institutional footing in social forces and political processes—domestic and transnational—largely insusceptible by nature to international juridification. That these efforts have operated in ways exogenous to the field of international law is not a contingent fortuity, but an ineluctable fact. It would be misguided, even counter-productive at key points, to insist on somehow rendering them into international legal form. We international lawyers should resist the temptation to take on board these salubrious responses to mass atrocity, according them juridical recognition and endorsement, in hopes of bolstering their prospects. These efforts will and should remain mostly beyond our professional ken, notwithstanding the revealing and occasionally-fruitful interactions between it and them. International law need not yoke these developments to its professional carriage "so as to remain sociologically relevant," in the telling words of one leading scholar.[10]

This conclusion may at first seem obtuse, even willfully perverse. If the extra-legal developments sketched above hold out some realistic hope for a better world, why should international law not find some way to accommodate them, at least incorporate them by reference, in the process making them formally its own? Why should this burgeoning body of law, preeminently concerned today with confronting mass atrocity, not benefit from and lend sustenance to other laudable achievements to this end now emanating from distinct sociopolitical springs? Why not then, for instance, a legal duty to protect others against mass atrocity, or to apologize after the fact for one's role in its occurrence? There is no longer any self-evident basis for a negative answer to such questions, if there ever were.

Yet differences between the legal and extra-legal responses to mass atrocity ultimately prove more salient, sometimes strikingly so, than the congruencies, limiting the scope of effective interchange and frictionless reciprocal endorsement. Our instances of response to atrocity often find effective expression, take organizational form; in ways that international law fails even conceptually to cognize, much less practically advance. These pragmatic and theoretical "failures," if they may be so described, owe to reasons that no measure of good intentions and professional ingenuity on our part, as international lawyers, can hope—or should therefore seek—to overcome. What might these reasons be?

[10] Pauwelyn 2011, p. 3.

15.2 Reasons for Non-Juridification

Two principal hypotheses—one material, the other ideal—suggest themselves in explaining the lay of the land, the limits of law's reach in our cases of atrocity response.

First, perhaps the limitations lie chiefly in familiar considerations of *Realpolitik*, the sort highlighted by "realist" accounts of international politics. Powerful states have no interest in, and effectively prevent, juridification from going further, on this view, since that process is a means of "moralizing" the resolution of questions which states prefer to leave to the play of power. Such considerations loom vaguely in the background within most of our case studies, to be sure.

Yet these cases also disclose other political forces at work that strengthen, rather than hamper, atrocity-response beyond what international law itself seeks. The relative weight and effect of political power—in both realist and non-realist conceptions—necessarily concerns us, in making sense of where juridification does and does not occur. For instance, the increasing willingness of large, multinational corporations to submit to voluntary UN/NGO monitoring of their labor practices surely reflects at once their power to resist a more juridicized alternative and their fear that altogether dismissing such non-juridical initiatives could ultimately lead to precisely that, whether in home or host states. It is the weakness of states and their inability to press their interests that are most apparent here, as well as the strength of non-state actors to play even the most powerful states off against one another.[11] This is not the world as depicted by state-centric, geopolitical "realists," even if machinations of power do figure ubiquitously within it.

A second hypothesis would be that international law's stance toward these salutary initiatives may be limited not so much by external geopolitical constraints on its sphere of operation as by its own normative commitments, particularly its implicit liberalism, i.e., the moral and political theory underlying much of Western legality. For instance, an official apology for mass atrocity (or other extensive human rights abuse), delivered on behalf of an entire national population, for the misconduct of unelected prior leaders who ruled long ago, over an altogether distinct governmental entity (e.g., the Ottoman Empire vs. modern Turkey), sits uneasily with most understandings of liberalism. So does the extensive public provision of "reparations" to beneficiaries bearing only the most indirect relation to immediate victims of atrocity. Yet mass atrocity often calls forth both such remedies today, in many countries.

In these situations, we have more reason to be concerned about the undesirability of extending international law's reach in requiring such practices than with

[11] Multinational corporations can threaten, for instance, to relocate their headquarters to other countries, thereby potentially defeating the exercise of legislative and adjudicatory jurisdiction (including taxation authority) over them by states of initial incorporation.

the practical impossibility of so doing—the preoccupation of avowed "realists" in the study of international politics. We might understandably wish to see international law take no position at all on such contentious issues, steer clear altogether. For the question of just *how* liberal a national society we truly wish to inhabit—in principled but uncompromising ways that might foreclose such "collectivized" atrocity-responses—is likely best resolved by elected representatives. Such people are more sensitive to domestic public sentiment than us international humanitarian lawyers; our promiscuous proclivity for pronouncing and propagating (what we consider to be) universalistic truths often ill-serves the cause of transitional justice.

A related possibility is that there exists a category of normative claims—Kant calls them "imperfect duties"[12]—that properly influence our conduct in non-justifiable ways. These duties are imperfect in that they are not clear enough about whom they bind, and in which concrete ways, to warrant legal liability for infraction. The "responsibility to protect" potential victims of mass atrocity in other countries is surely a plausible candidate, at least, for such characterization.[13] So are, in differing measure, some of the other initiatives here examined.

The rights corresponding to imperfect duties are best honored and protected, writes Amartya Sen, through acts—both official and unofficial, collective and individual—of "social recognition (via "naming and shaming" of violators),[14] informational monitoring, and public agitation…"[15] Methods of this sort involve "ethical argument" in "public reasoning,"[16] but not as steps toward legislation or litigation. Our case studies of atrocity-response present much evidence of such methods vigorously in operation.

Yet this fact may simply reflect a recognition that extending the reach of international law is currently impossible as a practical matter; it offers no evidence of self-restraint by advocates, no reason for thinking that principled doubts about the

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[12] Kant 1997.

[13] In fact, it may be that many of today's international human rights, particularly social, economic and cultural rights, may fall under the category of imperfect duties. This would mean that "there is a huge world of legitimate human rights beyond the limits of law." Sen 2006, pp. 2913, 2927; see also Sen 2001. "Many human rights can serve as important constituents of social norms, and have their influence and effectiveness through personal reflection and public discussion, without their being necessarily diagnosed as pregnant with potential legislation." Sen 2001, p. 7. Sen is here chiefly examining the nature of human rights, but he can also be seen as implicitly seeking to "save" human rights discourse from self-professed adherents who, in claiming too much for it (i.e., in legal recognition and coercive means of enforcement), threaten to call the larger enterprise into disrepute. Much the same spirit informs the present reflections, in their argument that our several anti-atrocity initiatives do more good by continuing to operate independently of international law than by being given a greater foothold within it. In the relation between these initiatives and international law, each side will often do better without too close a link to the other.

[14] Sen 2006, p. 2925.

[15] Ibid., p. 2927.

[16] These processes, insofar as they affect the self-understanding of states, their leaders, and other relevant actors, occupy a central place in "constructivist" theories of international relations.

desirability of limiting international law's reach into these areas actually explains the shape such limits have taken. Nor does Sen's position tell us much about how to proceed when even the best-reasoned, most urgent calls to honor non-juridical duty fall on deaf ears, as they regularly do.

In fact, there might be good reason to enshrine such imperfect duty formally into law even where there is no genuine intention to implement it coercively. At the domestic level, at least, certain norms of appropriate conduct—once legally codified—sometimes seem to have greater, salutary impact on behavior than if left to float freely, with compliance determined only by informal social sanctions. This is not because the police and courts will thereafter proceed to enforce such rules, which would often be preposterous.[17] Rather, it is simply that the inherent "authority of law" induces greater deference in many people to the norm. It is enough that the norm has passed through the formal procedures necessary to become binding upon members of the community of which they are members and with which they identify.[18] As citizens, after all, we can recognize domestic legal norms as the result of democratic self-determination, and hence an expression of our collective will, even when we may disagree with their content.

It is highly questionable, however, whether many people accord such deference to international law. It is unlikely that they afford it great authority independent of its effective enforcement powers or intrinsic normative appeal—both of which are often uncertain, at best. To be sure, normative appeal does provide international prohibitions of mass atrocity with the considerable legitimacy they now enjoy. Yet international law's inherent authority, its mere status *as* law, does little work either in restraining potential perpetrators or impelling others to resist their misdeeds. The intrinsic authority of international law, as simply the expression of a genuine international community with which all members—as citizens of the world—strongly identify, is slight.[19] It seems that juridifying the relevant norms here has not much enhanced their worldly impact. If so, then Sen's argument against the juridification of imperfect duties, including certain universal human rights, withstands the claim that law's intrinsic authority, and the impact of that authority on conduct, is reason enough to render all such rights into positive law.

We must also consider the possibility that obstacles to further juridification of the world's response to mass atrocity turn out to be quite different in each of our cases, disclosing no overarching pattern, belying efforts at generalization and theorization. If this is true, then international law and lawyers would have to find their way case by case, discovering their possible means of assistance to such initiatives

[17] This is likely the case, for instance, of prohibitions against the spanking of children, conduct formally criminalized in certain Scandinavian states.

[18] On how this may occur, see Raz 2009.

[19] We exclude from this generalization, of course, the countless (but politically inconsequential) professors of international law and academic theorists of global justice who do, to be sure, often accord such intrinsic authority to international law, even when it has not been ratified by states or rendered domestically justifiable through municipal constitutional procedure.

without aid of more systematic understanding, testing the value of their learning and professional tools in an ad hoc fashion. Call this the null hypothesis.

To convincingly answer the questions raised above would go a long way toward a general theory of the proper place of international law in confronting mass atrocity. Such a theory is as likely to emerge from this form of inquiry as by dwelling entirely—as virtually all scholarship now does—on international criminal law's "cutting edge," i.e., where it has recently made, or sought to make, its most ambitious advances. As a methodological matter, we can surely learn as much about international law's necessary and proper role by focusing on responses to mass atrocity—successful and otherwise—that little depend upon such law as by concentrating on its more glamorous moments in the sun, those fleeting occasions when it enjoys the world's enthralled attention.

A full understanding of international law's relative capacity requires that we compare not only its own successes and failures, but also the now-considerable efforts originating elsewhere and operating through quite different causal mechanisms. In fact, the key moral principles and policy aims underlying recent reforms of international criminal law, reforms greatly enlarging and empowering that enterprise, often continue to find stronger endorsement and more effective enforcement through causal pathways that treat legal doctrine and judicial institutions as marginal.

This is true beyond the immediate context of mass atrocity, in the usual sense.[20] A sociologist of martial restraint would be concerned, more generally, with the causes of unnecessary suffering in war. It would treat limitation by belligerents in their use of force as the dependent variable (in the idiom of social science), and regard both law and non-legal considerations as alternative independent variables. The relative causal weight of such competing factors presents an empirical question, open to investigation, permitting quite different conclusions in various historical and contemporary conflicts. We must thus ask, for instance, both how well-juridified is the "proportionality" norm (prohibiting excessive "collateral damage" to civilians), and how much does that legal norm actually restrain battlefield violence, compared to non-juridical factors? Such extra-legal factors may press either in the same direction or in the opposite, i.e., for lesser inhibition on armed force.

The inquiry I here propose could fairly be described as essentially "negative," identifying areas where international law cannot make much headway in enlarging its effective sphere of operation. This method carries us only so far, on its own. It would need to be combined with others' efforts to fathom international law's demonstrable strengths in atrocity-response. A full vision of international criminal justice begins to emerge, then, only from such a conjunction of complementary efforts.

[20] The usual, lay sense of the term would probably be limited to intentional wrongdoing, whereas the act of causing disproportionate civilian harm—excessive "collateral damage," as it is sometimes informally described—can be a war crime (attributable to an individual) or a violation of the laws and customs of war (attributable to states) if the wrongful actor merely knows that excessive civilian harm will result.

Still, putting international law "in its place," one might say, is an essential scholarly aim, at this point. This is not to disparage such law's genuine achievements, past or present, merely to help identify its proper sphere. The contours of that domain may admittedly evolve and likely enlarge as non-juridical practices and the humanitarian movements spawning them begin to influence legal norms (as well as vice versa). Recognition of this dynamic, diachronic relationship between the two realms should give pause to any attempt at atemporal typology, seeking simply to identify the many ways they may interact. An adequate portrait, any comprehensive theory, would have to include some account of change, past and prospective, with all the contingencies and imponderables this entails.

It may be, in particular, that that the informality of recent non-legal regulatory initiatives at the international level, though presently necessary, proves a passing phase in their longer-term development. International law might therefore, as one leading scholar speculates, "insist on its formalities, be increasingly marginalized, but do so in the hope that the tides will turn again and actors will realize that cooperating under law is more sustainable and power-neutral."[21]

One might even take this wishful prediction as something deeper, the claim to discern a latent dialectic by which the very advance of non-juridical response—joined to increasing awareness of the shackles under which it continues to labor—will at some point call forth a recognizable need and irresistible demand for more law. The very challenge *to* law, in this view, would presumably elicit a well-tailored response *from* law. That scenario succumbs, alas, to the logical fallacy in all functionalist social explanation, i.e., to the fact that even the most pressing of a society's "needs"—despite accurate identification and full acknowledgement as such—never possess sufficient wherewithal to ensure their own fulfillment.[22]

We must closely attend both to achievements and disappointments of non-juridical response, asking: under what circumstances do such initiatives emerge and acquire some measure of efficacy? One might be tempted quickly to answer: when legal efforts clearly fail, and the urgent need to "do something" becomes inescapable. Yet alas, many mass atrocities still go entirely without any organized response, belying any such functionalist account of the successes, which remain all too rare. Very often—as with the Asian "comfort women" of World War II and the mass rape of women in today's Congo,[23] for example—neither legal nor extra-legal efforts bear much fruit in prevention of mass atrocity, compensation of its victims, or even eliciting official acknowledgement of its occurrence.

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[21] Pauwelyn 2011, p. 3.

[22] A functionalist explanation is one that sees institutions as coming into being because of the systemic functions they serve, that is, apart from the interests, ideals, and intentions of those who might create, or resist the creation, of such institutions. On the failures of functionalism as social explanation, see Elster 1994.

[23] MacFarquhar 2010 ("Approximately 500 women were raped in eastern Congo in July and August, demonstrating that both rebel militias and government troops used sexual violence as a weapon, two U.N. officials said Tuesday.").

By comparing the results of cases like those listed at the outset, it may be possible inductively to derive some general lessons about the optimal place of international law in the world's response to mass atrocity. This method would focus on those pressure points where these non-juridical responses encounter, run up against, sometimes operate almost at cross purposes vis-à-vis, the workings of a more stolid, conventional, international legal machinery. One would wish, for instance, to contrast the operation of non-juridical UN/NGO-devised mechanisms seeking greater "corporate social responsibility" by foreign direct investors in repressive states with the fully juridicized Alien Tort Claims litigation in US courts, increasingly aimed at the same ends. The latter, lawyerly endeavors prove decidedly less promising, standing alone, than the former, non-juridicized ones. Yet it is also true that the litigation, the prospect of multi-million dollar liability it now plausibly portends, has sometimes contributed to corporate willingness to participate seriously in the UN initiative.

15.3 Democratic Opinion: The Continuing Place of Politics

In recent years, international law has devoted great efforts to reduce, if not quite eliminate, the distorting influences of power politics in how the world responds to mass atrocity. This effort has not failed, exactly.[24] In fact, the aspiration for a body of international criminal law that is morally meaningful and relatively determinate has been so broadly achieved in recent years that the central and harder questions we must now ask of this field are quite different from those of the last century. The proper place of political considerations, of democratic opinion especially, in determining official response to such crimes must be reassessed and, in key respects, revalorized.

The prospect of liability before courts of law, national or international, remains and will remain far less significant than the influence of such political forces, broadly speaking, in restraining and redressing mass atrocity. There is no reason why such political pressures should necessarily find full expression through formal legal mechanisms. This is true even as the pressures at issue work to give additional effect to aims unequivocally embraced by international law as well.

The political processes that make possible our non-juridical responses to mass atrocity are invariably managed by elites. Even so, they generally reflect widespread, well-considered public sentiment throughout much of the world and, in that

[24] To observe this success in rule-creation is not to deny, of course, the frequent failure in implementing such norms, often owing to constraints of *Realpolitik*. As a leading defense counsel in international prosecutions rightly observes, "international criminal justice still operates selectively within the cracks that international politics have opened up for it." Mettraux 2010 at http://www.internationallawbureau.com/blog/?p=1457. See also Allen 2010 (noting how Sudan's President Omar Al Bashir, though indicted by the International Criminal Court, travels officially to several other African states that have ratified the Court's Statute, which obligates them to honor the Court's extradition orders).

sense, can be called "democratic" in spirit. Yet in observing the inexpugnable vitality of politics in these initiatives, the aim here is not to celebrate some agonistic conception of democracy,[25] fearful of dispelling conflict through the rule of law, prizing more raw and robust action. Rather, it is the simple fact that in our five cases we find forces of democratic opinion, national and international, frequently pressing parties toward responses to mass atrocity more exigent and ethically satisfactory than anything international law has ever attempted, much less achieved. For international courts to assay such goals would risk straying perilously from their core commitments. If these innovative efforts could be trained to operate entirely within law's empire, there would be no good reason to banish them from it—certainly not, at any rate, the impulse to preserve them from our disciplinary domestication.[26]

The most compelling objection to international juridification, here as in other areas, has always been its apparent "democracy deficit." This terms refers to the relative unaccountability of international decision-makers to those affected by their decisions at the national level, i.e., those who are "asked" to entrust international legal institutions with governance authority over them.[27] The initiatives here described offer an alluring counterpoint in this regard, for they hold out the prospect of greater accountability to the world community—for both those perpetrating mass atrocity and those claiming authority to redress it—through forms of normative ordering that avoid the delegation of coercive legal powers beyond the nation-state. For that reason these organized efforts may offer the provisional basis for an alternative model of international response to atrocity, or at least a necessary supplement to more juridicized approaches—where the latter give out. This is, at least, a possibility requiring investigation and reflection.

Though our initiatives often display genuine democratic inspiration, some readers may wonder whether a darker force lurks beneath. A common fear is that, though their apparent innocuousness now assures them wide support, their proponents actually harbor a long-term, incremental strategy which is more questionable. This begins with creating non-legalized global authority over the least controversial matters, then juridicizing such response when non-legal measures fail, as they regularly will, finally advancing the law—of international human rights, in particular—into deeply contested issue-areas,[28] by which point it will become much more difficult for countries skeptical of such law's (likely illiberal) direction, to exempt themselves from its widening gyre.

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[25] For instance, Mouffe 2005, p. 20; Brown 2004, pp. 451, 456.

[26] Conversely, neither do the proponents of these atrocity-responsive projects disclose any urgent desire to resist the clutches of juridicizing encroachment, seen as some latent evolutionary process with the wind of history at its tail. To be sure, some proponents occasionally display a certain doubt about whether international law and international courts ultimately have much to offer in furtherance of their efforts. They pose to themselves, in other words, many of the same questions this inquiry also poses.

[27] Rubenfeld 2004; but see Keohane et al. 2009.

[28] These would presumably include prohibition of the death penalty, the criminalization of hate speech, even perhaps a human right to economic inequality, on some accounts.

Thus, mass atrocity—because of its surpassing moral exigency—will enthusiastically call forth voluntary initiatives at first requiring no complex global legal apparatus. Over time their limited efficacy will reveal, however, the unavoidable need to put the world's response to such recurrent crises on stronger institutional footing, an objective which juridification would purportedly advance. Beginning, then, with an International Criminal Court, prosecuting only the world's most grievous wrongdoings, the empire of international law will expand willy-nilly. By demonstrating its increasing efficacy, it will move into territory where staunchly liberal societies like the US may not wish to follow. Whether initiatives like those mentioned at the outset seriously risk our descent along such a slippery slope to "serfdom"[29] is a question over which reasonable readers may differ. It will occasionally press itself upon our consideration, from an ever-present backdrop where it hovers gloweringly.

15.4 False Leads: An Inventory of Tantalizing Missteps

Familiar notions and nostrums come quickly to mind for characterizing the five initiatives. Yet none proves to fit their facts very closely. For instance, none of these efforts operates "in the shadow" of the law, for that term refers to situations where parties negotiate in light of how they anticipate a court, applying pertinent legal rules, would decide their dispute. Here, by contrast, international legal rules are largely absent or not directly applicable, and international courts lack jurisdiction over the parties or contested subject matter.

Second, one might be tempted to say that these initiatives occupy the penumbral zone of normative ordering vaguely called "global governance."[30] That term, however, is not especially helpful here, because our initiatives often lack stable social organization. They reflect more spontaneous, ephemeral outbursts of diffuse mobilizational activity.

A third way to think about these developments, because of their voluntary and extra-judicial character, might be as expressions of "soft law."[31] But that term implies agreement upon some norm, and there yet exists no genuinely settled norm in our cases, as with the demand to apologize for genocide. In others cases, as with the "responsibility to protect," the emergent norm—if it may be so described—finds only very limited expression in any formal document to which

[29] The concern from this perspective is the potential capacity of unelected, life-tenured federal judges to incorporate what they take to be customary international law—on an indulgently capacious and ideologically-driven conception of such doctrine—into U.S. law by way of the notion of federal common law.

[30] On the emergence of global governance and its vicissitudes, as conceived by leading scholarly defenders, see, e.g., Kingsbury et al. 2005 and Cohen and Sabel 2005.

[31] See generally Abbot and Snidel 2000 and Shelton 2000.

states have agreed,[32] a basic element of "soft law." Other endeavors, like the pressure for corporate social responsibility in repressive states, do not originate with states, either those of foreign investors or those hosting such investment. This initiative presents no particular choice for states, then, between hard and soft governance. That is the question of institutional design at the center of all discussions about international "soft law."[33]

Fourth, we might first be inclined to see these initiatives as forms of "law in action," as contrasted with the "law on the books."[34] This distinction refers, though, only to situations, unlike those here, where formal legal sources apply directly to the conduct under examination; it is such possible application that enables us to speak meaningfully of deviations between de jure rules and the de facto operation of practices and institutions nominally governed by them. In any event, invocation of the "law in action" generally sounds in a tragic key, because in practice much law falls short of its drafters' aspirations. Yet in all five cases we find significant advances, in the "societal" response to mass atrocity, beyond anything required—even authorized, at times—by international law.

Finally, it is initially tempting to see our several atrocity-aversive efforts as emanations of what is sometimes called "living law."[35] This term refers to convergent human behavior and norms endorsing it that spring up spontaneously, without design, almost without active human agency, within the social life of organizations and communities. There might thus be—or come into being, at some point—a living law from and for an emergent "international community," in particular. Yet the concept of living or incipient law suggests greater social harmony than we find in the empirical materials of our five case studies, which disclose considerable contestation over how best to treat atrocity. At such times, normative consensus over the optimal response often exists only at the level of glittering generalities.[36]

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[32] In 2005, a UN General Assembly resolution endorsed the concept of a "responsibility to protect," though the nature and terms of this duty remained ill-defined by that document. UN General Assembly 2010.

[33] See, e.g., Shaffer and Pollack 2010.

[34] Pound 1910, pp. 12, 20-1.

[35] See generally Hertogh 2009; Selznick 1968, pp. 50, 55 (writing of "incipient law…implicit in the way in which public sentiment develops or in an increasingly stabilized pattern of organization…a compelling claim of right or a practice so viable and so important to a functioning institution as to make legal recognition in due course highly probable").

[36] Webber 2009, pp. 201–203.

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