Between Impunity and Show Trials

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When former President Milosevic began his defence at The Hague on Tuesday, 12 February 2002, there was no reason to be surprised by his chosen tactics. By turning the accusing finger towards the West, in particular the members of the North Atlantic Treaty Organization (NATO), for their alleged complicity in first destroying what Milosevic called "mini-Yugoslavia" (Bosnia-Herzegovina) and in 1999 conducting an aggression against his own country, he aimed to avoid conducting his defence under conditions laid down by his adversaries. At the same time, his manoeuvre highlights, once again, the difficulty of grappling with large political crises by means of individual criminal responsibility and gives reason to question the ability of criminal trial to express or conserve the "truth" of a complex series of events involving the often erratic action by major international players, Great Powers, the European Union, the United Nations, and so on. The Milosevic trial — like international criminal law generally — oscillates ambivalently between the wish to punish those individually responsible for large humanitarian disasters and the danger of becoming a show trial.

J.A. Frowein and R. Wolfrum (eds.),
Max Planck Yearbook of United Nations Law, Volume 6, 2002, 1-35.

I. Why Punish?

Bringing Milosevic to The Hague has been celebrated as the most significant event in the international efforts to end the culture of impunity, under way since the establishment of the Yugoslavian and Rwandan war crimes tribunals in 1993 and 1994, the adoption of the Statute of the International Criminal Court in 1998 and the commencement of criminal procedures in several countries against former domestic or foreign political leaders. The record of these events is mixed. But there is no doubt that they manifest a renewed urge today to think about international politics in terms of domestic categories. The universalisation of the Rule of Law calls for the realisation of criminal responsibility in the international as in the domestic sphere. In the liberal view, there should be no outside-of-law: everyone, regardless of place of activity or formal position, should be accountable for their deeds.[1]

Yet, as Hannah Arendt pointed out during the Nuremberg trials, "[h]anging Göring is certainly necessary but totally inadequate. For this culpability ... transcends and destroys all legal order."[2] What she meant, of course, was that sometimes a tragedy may be so great, a series of events of such political or even metaphysical significance, that punishing an individual does not come close to measuring up to it. In nearly all the criminal prosecutions concerned with crimes against humanity committed during or after World War II, some observers have doubted the ability of the criminal law to deal with the events precisely in view of their enormous moral, historical, or political significance.

The philosopher Karl Jaspers, for instance, wrote to Arendt in 1960, a few months before the opening of the Eichmann trial, pointing to the extent to which the events for which he was accused "stand outside the pale of what is comprehensible in human and moral terms" and that "[s]omething other than law [was] at stake here — and to address it in legal terms [was] a mistake."[3] The same argument was heard occasion-

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1 The description of the campaign for ending the culture of impunity as an aspect of the legalist-domestic analogy is usefully discussed in G. Bass, *Stay the Hand of Vengeance. The Politics of War Crimes Tribunals*, 2000, 8-36.

2 Quoted in N. Frei, "Le retour du droit en Allemagne. La justice et l'histoire contemporaine après l'Holocauste – un bilan provisoire", in: F. Brayard (ed.), *Le génocide des Juifs entre procès et histoire 1943-2000*, 2000, 57.

3 L. Kohler/ H. Kohler (eds), *Hannah Arendt – Karl Jaspers. Correspondence 1926-1969*, 1996, 410. Quoted also in L. Douglas, *The Memory of Judg-*

ally in connection with the more recent trials in France of Klaus Barbie, "the butcher of Lyon" in 1987, and of the two Frenchmen Paul Touvier and Maurice Papon, in 1994 and 1998 respectively. And today, it seems clear that whether or not Milosevic goes to prison is in no way an "adequate" response to the fact that over 200.000 people lost their lives — while millions more were affected — by the succession of wars in the former Yugoslavia. If the trial has significance, then that significance must lie elsewhere than in the punishment handed out to him.

Because this is so plainly evident, it is often argued that trials involving genocide or crimes against humanity are less about judging a person than about establishing the truth of the events. While the prosecution of Eichmann in Jerusalem in 1961, for example, was almost universally held to be necessary, few thought that the necessity lay in the need of punishing Eichmann, the person. He was, after all, only a cog in the Nazi killing machine. Instead, the trial was held to be necessary in order to bring to publicity the full extent of the horrors of the "Nazi war against the Jews",[4] especially as that aspect of the German criminality had, in the view of many, received only insufficient attention in the Nuremberg process. For the State of Israel, the trial was to bring to light a central aspect of the nation's history, and to take a step towards explaining how it all could have happened.[5] What was to be Eichmann's fate after the trial would be of secondary consequence. Indeed, Elie Wiesel suggested that Eichmann should be simply set free, while Arendt advocated handing him over to the United Nations.[6] His death would in no way redress the enormity of the crime in which he had been implicated. It might even diminish the extent to which the special nature of that crime lay in its collective nature as part of the official policy of the German nation.

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ment. Making Law and History in the Trials of the Holocaust, 2001, 174-175. Here Jaspers was undoubtedly drawing upon his *Die Schuldfrage*, 1946.

4 In her *The Nazi War Against the Jews: 1933-1945*, 1975, Lucy Davidowicz stresses the extent to which the Holocaust was not an accidental offshoot but a deliberate choice of the Hitler regime.

5 This was certainly the perspective taken by the Prosecutor, Gideon Hausner, whom Arendt saw as simply "obeying his master", David Ben-Gurion, the Prime Minister; H. Arendt, *Eichmann in Jerusalem. A Report on the Banality of Evil*, rev. and enlarged edition, 1963, 5. For an excellent recent discussion of this aspect of the trial, cf. Douglas, see note 3, 97 et seq., 150-182.

6 Arendt, see above, 270-271.

The view of criminal justice — also the Milosevic trial — as an instrument of truth and memory has been stated precisely in response to criticisms about criminal law's apparently obsessive concentration on the accused. This aspect of it was highlighted during the early years of the Yugoslavia Tribunal as it proved impossible to bring those accused of war crimes to trial in The Hague. The Tribunal resorted to the procedure that allows the reading of the indictment in open court and the issuing of an international arrest warrant in the absence of the accused.[7] The reasoning behind a "tribunal de verbe" as the procedure was opened on 27 June 1996 against Karadzic and Mladic has been summarised as follows:

> "Incapable jusqu'ici de rendre la justice, contraint de laisser sans châtiment des crimes contre l'humanité et un génocide, le travail du TPI prenait subitement une réelle consistance: la vérité pouvait au moins être dite devant les juges et les victimes reconnues comme telles, face au monde."[8]

Recording "the truth" and declaring it to the world through the criminal process has been held important for reasons that have little to do with the punishment of the individual. Instead, it has been thought necessary so as to enable the commencement of the healing process in the victim: only when the injustice to which a person has been subjected has been publicly recognised, the conditions for recovering from trauma are present and the dignity of the victim may be restored. Facing the truth of its past is a necessary condition to enable a wounded community — a community of perpetrators and victims — to recreate the conditions of viable social life.[9] Nuremberg, Eichmann and the three French trials (as well as more recent processes focusing on torture in Algeria) have each been defended as necessary for didactic purposes,

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7 Rule 61 of the Rules of the Tribunal: "Procedure in case of failure to execute a warrant."

8 P. Hazan, *La justice face à la guerre. De Nuremberg à la Haye*, 2000, 134.

9 Cf e.g. J. Verhoeven, "Vers un ordre répressif universel?" *AFDI* 45 (1999), writing about criminal justice in terms of "une fonction qui l'on dirait 'consolatrice', d'ordre thérapeutique et pédagogique...la quiétude et la sérénité ," 55 et seq., (60). In regard to the Rwandan genocide of 1994, D.D. Ntanda Nserko, "Genocidal Conflict in Rwanda and the ICTR", *NILR* 48 (2001), 62 et seq.

for establishing an impartial account of the past and for teaching younger generations of the dangers involved in particular policies.[10]

It is hard to assess the psychological credibility of such justifications. In Germany, the didactic effects of Nuremberg have been obscure. At the time of the process itself 78 per cent of the German population regarded the trial as "just" while a similar poll four years later showed only 38 per cent to have this opinion. Many reasons must have contributed to such change of perception: allied policy in occupied Germany, attitudes towards de-Nazification and the sense of Nuremberg as victor's justice.[11] German legal literature of the immediate post-war period usually treated the International Military Tribunal as an occupation court (*Besatzungsgericht*) rather than as an international tribunal.[12] The trials held in the American occupation zone during 1946-1949, too, were intended "to reform and re-educate the German people."[13] However, they were compromised from the outset. Influential members of the US judiciary — including judges from the tribunals themselves — had serious doubts about the constitutionality and procedural fairness of the trials and congressional support for them was thin. Under such conditions, little sympathy could be expected for the trials from the German population.[14] In 1952, only 10 per cent of Ger-

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10 For a summary of such justifications, cf. A. Cassese, "On the Current Trend towards Criminal Prosecution and Punishment for Breaches of International Humanitarian Law," *EJIL* 9 (1998), 2 et seq., (9-10).

11 Frei, see note 2, 62-67.

12 S. Jung, *Die Rechtsprobleme der Nürnberger Prozesse*, 1992, 89-92, 109-111.

13 F. M. Buscher, *The U.S. War Crimes Trials Programme in Germany, 1946-1955*, 1989, 69.

14 During 1946-49, twelve US military tribunals sitting in Nuremberg heard cases of 185-199 defendants (numbers vary according to source) while a US Army European Command set up its own process, conducted at Dachau that tried 1672 individuals. The trials were vehemently criticised by various United States and German organisations. Though the processes ended in a large number of convictions, most of the sentences were later reduced and a large number of the convicted amnestied in 1951. The summary of the history of those trials is negative: "... the war crimes programme did little to change German attitudes. Cries of foul play and 'victor's justice' accompanied the proceedings ... The constant attacks against the Allies, especially the United States as the main instigator of those proceedings in the late 1940's by Germany's church leaders, politicians, veterans' and refugee organizations demonstrated that the war crimes programme had not re-educated and democratized the Germans," Buscher, see note 13, 22. For the

mans approved of them.[15] "To be tried by a Nuremberg Military Tribunal signified at least in the Federal Republic of Germany no dishonour."[16]

Over the years, the German government, communities and individuals have taken far-reaching steps to keep alive and come to terms with the memory of the crimes of the Hitler regime.[17] But criminal justice has not been at the forefront of *Vergangenheitsbewältigung*. The Auschwitz process that terminated in Frankfurt in 1965 had only slight popular response, despite widespread press and TV coverage. In that same year, the Ministries of Justice of the Länder commenced a systematic effort to prosecute Nazi criminals: though the annual number of new dossiers arose in peak years to over 2000, the highest number of annual convictions was 39, and declined by 1976 to fewer than ten a year.[18] Empirical confirmation about the positive effects of truth-telling is not much more available from other sources, either. The most significant effort in this regard, the South African Truth and Reconciliation Commission (TRC), was hugely controversial when it was set up, and much of that controversy persists. In a recent poll in South Africa, only 17 per cent of the interviewed persons felt that process had had a positive effect while altogether two-thirds expressed the opinion that race relations after the TRC had deteriorated.[19]

Undoubtedly, many kinds of truth may be sought through criminal trials. The "denial of the Holocaust", for instance, has been criminalized in a number of countries in part to honour the memory of the victims, in part to uphold the conventions of truthfulness and good faith that found the discursive basis of the state. The 1985 law in the Federal Republic of Germany that prohibits "lying about Auschwitz" not only seeks to preserve the memory of the Holocaust but also and perhaps

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domestic US critiques, cf. ibid., 29-47. For the uses of administrative reviews and amnesties, cf. ibid., 49-89.

15 Buscher, see note 13, 91.

16 Jung, see note 12, 5.

17 For a detailed review, cf. e.g. A. Grosser, *Le crime et la mémoire*, 1989, 87-132.

18 Cf. A. Rückerl, *NS-Verbrechen vor Gericht. Versuch einer Vergangenheitsbewältigung* 1984, 330; Grosser, see note 17, 112-113, 121.

19 E. Kiss, "Moral Ambition Within and Beyond Political Constraints. Reflections on Restorative Justice", in: R.J. Rotberg/ D. Thompson, *Truth v. Justice. The Morality of Truth Commissions*, 2000, 88 and Rotberg, "Truth Commissions and the Provision of Truth, Justice, and Reconciliation", ibid., 19.

above all the legitimacy of the new Germany by keeping open the gap between it and its Nazi predecessor.[20] The more distant the events, the more fragile their truth becomes and thus, it may seem, the more necessary to protect it by the law. And yet, as Lawrence Douglas points out, the agnostic formalism of the law that accepts all historical accounts as *prima facie* of equal value may, in an adversarial process, end up inadvertently legitimating "negationism" as a position on which reasonable men may disagree.[21]

In a similar way, the strategy chosen by Milosevic in The Hague reveals the danger of thinking about international criminal trials in historical or didactic terms. This was the gist of Arendt's controversial critique of the Eichmann trial. For her, the trial's problems arose from the introduction of historical, political, and educational objectives into it.

> "The purpose of the trial is to render justice, and nothing else; even the noblest ulterior purposes — 'the making of a record of the Hitler regime...' can only detract from the law's main business: to weigh the charges brought against the accused, to render judgment and to mete out due punishment."[22]

By contrast, Arendt wrote, the Eichmann trial had become a "show trial",[23] staged by the Prime Minister, David Ben-Gurion to support political motives which had nothing to do with criminal trials as Arendt understood them, as being about the guilt or innocence of individuals.

But should Arendt have the final word? Many of the problems of applying criminal law in response to massive injustice have become evident in the reactions to her critiques. Surely, as many of those involved in the process that led to the signature of the Statute for the International Criminal Court in 1998 seem to have assumed, the value of the new court lies in its deterrent message, the way in which it serves to prevent future atrocities.[24] The force of this argument is, however,

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20 L. Douglas, "Régenter le passé: Le négationnisme et la loi", in: Brayard, see note 2, 218-223.

21 Douglas, see note 20, 227-238.

22 Arendt, see note 5, 251.

23 Arendt, see note 5, 4-5.

24 Thus one advocate: "...punishment of war criminals should be motivated primarily by its deterrent effect, by the impetus it gives to improved standards of international conduct," C.M. Bassiouni, *Crimes against Humanity in International Law*, 1992, 14. A particularly thoughtful argument is in P. Akhavan, "Beyond Impunity. Can International Criminal Justice Prevent Future Atrocities?", *AJIL* 95 (2001), 7 et seq.

doubtful. In the first place, if crimes against humanity really emerge from what Kant labelled "radical evil", an evil that exceeds the bounds of instrumental rationality, that seeks no objective beyond itself, then by definition, calculations about the likelihood of future punishment do not enter the picture. Indeed, there is no calculation in the first place. But even if one remained suspicious about the metaphysics of "radical evil" (as Arendt herself later became) the deterrence argument would still fail to convince inasmuch as the atrocities of the 20th century have not emerged from criminal intent but as offshoots from a desire to do good.[25] This is most evident in regard to the crimes of communism, the Gulag, the Ukraine famine, liquidation of the "Kulaks". But even the worst Nazi nightmares were connected to a project to create a better world. Commenting upon the speeches of Heinrich Himmler to the SS in 1942, Alain Besançon concluded that even the death camps were operated "au nom d'un bien, sous le couvert d'une morale."[26] But if the acts do not evidence criminal intent, and instead come about as aspects of ideological programmes that strive for the good life, however far in future, or to save the world from a present danger, then the deterrence argument seems beside the point.[27] In such case, criminal law itself will come to seem a part of the world which must be set aside, an aspect of the "evil" that the ideology seeks to eradicate.

As criminal lawyers know well, fitting crimes against humanity or other massive human rights violations into the deterrence frame requires some rather implausible psychological generalisations. Either the crimes are aspects of political normality — Arendt's "banality of evil" — in which case there is no *mens rea,* or they take place in exceptional situations of massive destruction and personal danger when there is little liberty of action.[28] This is not to say that in such cases, people act as automatons, losing capacity for independent judgement. Many studies have elucidated the way individuals react to pressure created by either normality or exceptionality, and are sometimes able to resist. But it is implausible to believe that criminal law is able to teach people to become heroes, not least because what "heroism" might mean in particu-

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25 Cf. especially T. Todorov, *Tentation du bien, mémoire du mal,* 2000.

26 A. Besançon, *Le malheur du siècle. Sur le communisme, le nazisme et l'unicité de la Shoah,* 1998, 45.

27 Cf. J. Klabbers, "Just Revenge? The deterrence Argument in International Criminal Law", forthcoming in *Finnish YBIL* 11 (2000).

28 For a recent analysis, cf. I. Tallgren, "The Sensibility and Sense of International Criminal law", forthcoming in *EJIL* 13 (2002).

lar situations is often at the heart of the confrontation between the political values underlying the criminal justice system (perhaps seen as victor's justice) and the system that is on trial.

And then there is of course the very politics behind the establishment and functioning of a tribunal in the aftermath of a great crisis that may not always support the grandiloquent rhetoric that accompanies, on the victors' side, the work of justice, so conveniently underwriting their views and post-conflict preferences. By the end of the 1940's, Allied preferences had shifted dramatically. There was no political support for the trials of German industrialists and proceedings against high-ranking professional soldiers were followed with some embarrassment. Fear of communism, Germanophilia, sometimes antisemitism , as well as administrative problems connected with further punishments, made the principal Allied powers wary of further purges in Germany and keen to establish normal relations with it.[29] At least some of this supported the widespread German opposition to the Allied war crimes trial programme of 1946-1949: "Germans saw themselves as victims and not as perpetrators."[30]

In the Yugoslavian situation, too, it may not be exclusively the result of manipulation by the local leaders that the populations often seem to have little faith in the truth propounded by the Tribunal. The fluctuation of Western support, the visible impunity enjoyed by a large number of important Balkan war criminals, and the failure to prosecute the NATO bombings of Serbia of 1999 have provided space for cynicism and denial. Four years after the horrors of Srebrenica, Serbs residing in the area persist in claiming that "[n]othing happened here ... It is all propaganda."[31]

For such reasons, studies on the transformations of authoritarian regimes into more or less liberal democracies in central and eastern Europe, South America and South Africa have suggested a much more complex understanding of the role of criminal trials as not merely about punishment or retribution, nor indeed about deterrence, but as an aspect of a larger "transitional justice" that, in the words of one commentator, sometimes "perform [...] a successful 'final judgement' in the religious sense, a performance that would ultimately enable the state it-

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29 Cf. D. Bloxham, *Genocide on Trial, War Crimes Trials and the Formation of Holocaust History and Memory*, 2001, 38-56.

30 Buscher, see note note 13, 110.

31 Hazan, see note 8, 245-247.

self to function as a moral agent."[32] Under this view, it is the symbolism of the criminal trial — and the eventual judgement — that enables the community ritually to affirm its guiding principles and thus to become a workable "moral community."

But no uniform jurisprudence has emerged on the use of criminal trials of former political leaders in transition situations. Perhaps the main generalisation that can be made is that such trials have been few, they have been targeted very selectively, the convictions have been moderate and amnesties have been widely used.[33] The legal principles have been vigorously contested, the main controversy focusing on to what extent such trials are only political instruments to target former adversaries on the basis of laws that were not in force at the time they were acting.

But whether the trials use superpositive law (such as the "Radbruch formula" in Germany) or retrospective interpretation of pre-transition law,[34] it seems clear that in order to attain the symbolic, community-creating effect it is supposed to have, criminal law need not be applied to everyone. It is sufficient that a few well-published trials are held at which the "truth" of the past is demonstrated, the victims' voices are heard and the moral principles of the (new) community are affirmed.[35]

This may sometimes become a logistic necessity, too. In 1946, for instance, over 100.000 suspected war criminals resided in the British and American occupation zones in Germany. And in 2001 the Rwandan prisons housed approximately 120.000 detainees. A full trial of each individual was in both cases an impossibility. In the Rwandan situation, an attempt is being made to use "Gacaca courts", popular tribunals akin to truth commissions to expedite the work of justice and the prospect of reconciliation.[36] Clearly, at least sometimes victims do not so much

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32 J. Borneman, *Settling Accounts. Violence, Justice and Accountability in Postsocialist Europe*, 1997, 23.

33 Cf. R. G. Teitel, *Transitional Justice*, 2000, especially 51-59.

34 For this controversy after German unification, especially in relation to the GDR border guard trials and the trials of Honecker and the former Politbüro members, cf. J. McAdams, *Judging the Past in Unified Germany*, 2001, 23-54.

35 Teitel, see note 33, 46-49, 66.

36 Cf. K.C. Moghadli, "No Peace without Justice. The Role of International Criminal and Humanitarian Law in Conflict Settlement and Reconciliation," paper given at a conference "From Impunity to a Culture of Accountability," Utrecht 26-28 November 2001.

expect punishment (though of course that is not insignificant) but rather a recognition of the fact that what they were made to suffer was "wrong", and that their moral grandeur is symbolically affirmed.[37] For such purposes, "show trials" are quite sufficient, especially if they are supplemented with other measures such as compensations, disqualifications, administrative measures, truth commissions, opening of archives etc. However, such supplementary measures are not available at the international level. And here is the problem with the analogy between international courts and transitional justice. The reasons that make "show trials" — that is to say, trials of only few political leaders — acceptable, even beneficial, at the national level, while others are granted amnesty, are not present when criminal justice is conducted at the international plane. When trials are conducted by a foreign prosecutor, and before foreign judges, no moral community is being affirmed beyond the elusive and self-congratulatory "international community." Every failure to prosecute is a scandal, every judgement too little to restore the dignity of the victims, and no symbolism persuasive enough to justify the drawing of the thick line between the past and the future.[38]

In other words, if the argument of deterrence is unpersuasive as a justification of international criminal justice, and if the symbolic, community-creative rationales can be invoked only with the greatest difficulty, the temptation is great to see the point of the Milosevic trial in its truth-telling function, against the critiques by Arendt and others. Perhaps, the argument might go, the trial is important neither because it may end up punishing Milosevic, because it makes potential dictators or their henchmen think twice, nor because it enables the recreation of Balkan societies as moral communities. Perhaps, we might think, the significance of this "trial of the century" lies in the way it will bring to general knowledge the truth of what really happened — however and by whom that "truth" is then used by anyone at the national or the international level.

II. Of Truth and Context

As criminal lawyers have always known, legal and historical truth are far from identical. The wider the context in which individual guilt has

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37 Cf. e.g. P. Bouretz, "Prescription: table ronde du 22 janvier 1999", *Droits* 31 (2000), 53.

38 For this criticism in regard to the ICTY, cf. Hazan, see note 8, 239-263.

to be understood, and the more such understanding defers to the contingencies of historical interpretation, the more evident the limits of criminal procedure for reaching the "truth."[39] One of the few uncontroversial merits of truth commissions *vis-à-vis* criminal justice has been stated to lie in the way the former are able to canvass much more widely and deeply the criminality under scrutiny and thus to offer more "opportunities for closure, healing and reconciliation."[40] This is not to say that there would be no intrinsic relationship between the two types of truth, historical and criminal. In the domestic society, and in the context of a domestic criminal trial, that relationship rarely becomes questioned. Even if a crime is exceptionally shocking — "serial killing" for example — there is normally little doubt about how to understand the relevant acts in their historical context. The only problem is "did the accused do it"? No further question about how to understand what he did, how to place his behaviour in relation to the overall behaviour of those around him, emerges. The truth of the broader context is one, or at least relatively uncontested. In transitional periods, however, the debate about past normality takes on a contested, political aspect. How to deal with the routine spying by citizens of one another, shooting at those wishing to escape, or systematic liquidation of political opponents? How to judge the actions of individuals living and working in a "criminal" normality"(*Unrechtsstaat*): how much "heroism" is needed? What about (mere) passivity? And last but not least — can those judge who have not lived under such conditions?[41]

Much of this applies in the international sphere, too, where problems of interpretation are even more difficult. For any major event of international politics — and situations where the criminal responsibility of political leaders is invoked are inevitably such — there are many truths and many stakeholders for them. In the Milosevic trial, for instance, the narrative of "Greater Serbia" collides head-on with the self-determination stories of the seceding populations, while political assessments of "socialism" and "nationalism" compete with long-term historical and even religious frames of explanation. Much of the West-

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39 Cf. M. Wildt, "Des vérités qui diffèrent. Historiens et procureurs face aux crimes de Nazis", in: Brayard, see note 2, 251-257. Cf. also D. Lochak, "Prescription, remarques dans une table ronde du 22 janvier 1999", *Droits* 31 (2000), 49-54.

40 Kiss, see note 19, 69.

41 For discussion of this difficulty in the German situation, cf. Bornemann, see note 32, 80-96, 99-100; McAdams, see note 34, 47-54.

ern view depends on a (liberal) understanding of the sombre effects of the allegedly atavistic irrationalism underlying the different Balkan identifications — a view that dramatically plays down the political aspects of the conflict and the role of interest-groups (including the liberal one) in fomenting ethnic hostility. How to understand the actions of the leaders of the Yugoslav communities — whether they were "criminal" or not — depends on which framework of interpretation one accepts.[42]

Political Realists such as Hans Morgenthau always highlighted the weaknesses of the legal process in coming to grips with large events of international politics. Already in 1929, Morgenthau concluded that the role of formal dispute settlement had to remain limited in the international context because it inevitably focused only on some in itself minor aspect of an overall situation. A legal "dispute" for him was always just a part — and sometimes a very marginal part — of what he called a political "tension."[43] The narrower the focus, the less the process would convey any in-depth understanding of the situation and the less reason to think that it will bring about a credible political result. Because the legal process inevitably distorted the political context, it was not only useless but counterproductive for the purpose of providing a basis for peace and reconciliation.

The effort to end the "culture of impunity" emerges from an interpretation of the past — the Cold War in particular — as an unacceptably political approach to international crises. Focusing on the individual abstracts the political context, that is to say, describes it in terms of the actions and intentions of particular, well-situated individuals. Indeed, this is precisely what the Prosecutor in the Milosevic trial, Carla del Ponte, said she was doing in The Hague in February 2002. The (Serb) nation was not on trial, only an individual was. But the truth is not necessarily served by an individual focus.[44] On the contrary, the meaning of historical events often exceeds the intentions or actions of particular individuals and can be grasped only by attention to structural causes,

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42 For the role of such interpretations in the Milosevic trial, cf. K. Čavoški, "Juger l'histoire" in: P. Marie Gallois/ J. Vergès, *L'apartheid judiciaire au TPI, arme de guerre*, 2002, 77-89.

43 H. Morgenthau, *Die internationale Rechtspflege, ihr Wesen und ihre Grenzen*, 1929, 62-72 and *passim*. For the general context and a discussion, cf. M. Koskenniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870-1960*, 2002, 440-445.

44 Wildt, see note 39, 251.

such as economic or functional necessities, or a broad institutional logic through which the actions by individuals create social effects. Typically, among historians, the "intentionist" explanations of the destruction of European Jewry are opposed by "functional" explanations that point to the material and structural causes that finally at the Wannsee conference of 1942 — but not until then — turned Nazi policy towards full-scale extermination. When Arendt and others were criticising the Eichmann trial, they pointed to the inability of an individual focus to provide an understanding of the way the Shoah did not come about as a series of actions by deviant individuals with a criminal mind but through *Schreibtisch* acts by obedient servants of a criminal state.

This is why individualisation is not neutral in its effects. Use of terms such as "Hitlerism" or "Stalinism" leaves intact the political, moral and organisational structures that are the necessary condition of the crime.[45] To focus on individual leaders may even serve as an alibi for the population at large to relieve itself from responsibility. Something of this took place in the trials of Nazi criminals in Germany after World War II. The failure of the Allied powers to agree on a "trial of industrialists" may have reflected emerging concern in the West about the appearance of a new enemy — the Soviet Union — and the need to enlist a democratic Germany on their side. But it dramatically downplayed the degree of participation by German economy and society in the Nazi crimes.[46] As the prosecutions moved to German courts, Allied legislation, particularly Control Council Law No. 10, was set aside as contrary to the principle of non-retroactivity. Recourse was made to the German Penal Law whose relevant provisions had to do with murder and manslaughter. These described the relevant criminality in purely individual terms. Murder, under the interpretation of the *Bundesgerichtshof,* had to take place with a "murderous intent" (*Mordlust*) or "in a malicious and brutal manner" in a way that completely failed to grasp the kind of writing desk action of which most Nazi criminality consisted and in which individuals could (rightly) believe themselves as fully replaceable if they did not carry out their tasks in accordance with the rules that themselves were criminal.[47] By the time of the Auschwitz trials in Frankfurt in 1963-65, the crime of manslaughter had already

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45 As pointed out in Grosser, see note 17, 76-77.

46 Cf. Bloxham, see note 29, 28-32.

47 For an account of the procedural difficulties in prosecuting former Nazis in Germany under the common criminal law, cf. Rückerl, see note 18, 261-288.

been subject to the statute of limitations so that the defendants could only be tried for murder, and because of a definition of murder that referred to individual intent failed to apply to any but the most brutal operators of the extermination system, most of the Nazis not only escaped judgement but were integrated as loyal citizens of the Bonn republic.[48]

The point here is not to try to settle the epistemological controversy about whether the individual or the contextual (functional, structural) focus provides the better truth but, rather, that neither can *a priori* override the other and that in some situations it is proper to focus individuals while in other cases — such as Nazi criminality, and perhaps in taking stock of *Stasi* collaboration in the GDR — the context provides the better frame of interpretation. But if that is so, then there is no guarantee that a criminal process *a priori* oriented towards individual guilt such as the Milosevic trial necessarily enacts a lesson of historical truth. On the contrary, it may rather obstruct this process by exonerating from responsibility those larger (political, economic, even legal) structures within which the conditions for individual criminality have been created — within which the social normality of a criminal society emerges.

As the German historian Martin Broszat has pointed out, the "one-sided personalisation" and rigid conceptualisation of criminal categories may lead not only to a different kind of truth but also a different way of distributing accountability from that produced by a contextually oriented historical study in a situation such as Germany under the Hitler regime.[49] If one is participating in a collective venture with a sense of historical mission and a moral purpose ("happiness of mankind") such as "communism", for instance, then little is gained by a retrospective interpretation of the effects of that effort — between 85 to 100 million innocent killed — in terms of the evil acts of some number of individuals. The logic of "tentation du bien, mémoire de mal" at work in communism can only be reached through trying to grasp the collective process that combines utopianism and scientism with a revolutionary spirit.[50]

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48 Cf. D. O. Pendas, "'Auschwitz, je ne savais pas ce que c'était'. Le procès d'Auschwitz à Francfort et l'opinion public allemande", in: Brayard, see note 2, 85-93. Cf also Douglas, see note 3, 188-190.

49 H. Graml/ K.D. Henke, *Nach Hitler. Der schwierige Umgang mit unserer Geschichte. Beiträge von Martin Broszat*, 1987, 47-49.

50 Todorov, see note 25, 36-41; Besançon, see note 26, 59-64.

But in the end, individualisation is also impossible. After all, the defences available to the accused refer precisely to the context in which his acts were undertaken. Was there an acceptable motive or an alternative course of action? Did the victim contribute to the action?[51] What about the acts of the Croatian Militia in Krajina or Eastern Slavonia at the beginning of the war, or the UCK in Kosovo? What was the chain of command that led to the Omarska camp or the Srebrenica massacre? As a journalist commenting on the Racak inquiry during the Milosevic trials observed: "Even among experts who loathe Mr. Milosevic, there are worries over whether the proceedings may look like victors' justice and whether the prosecutor, Carla Del Ponte, can deliver the evidence that draws a direct line between Mr. Milosevic and bodies like those uncovered here."[52] To create that chain will, in the absence of written orders, have to involve broad interpretations and assumptions about the political and administrative culture in the territory, including personal links and expectations between the various protagonists. In this way, even focus on individuals presumes a larger context in which particular individuals rise to key positions and in which their choices and preferences are formulated and come to seem either as "normal" or "deviant". The acts of former Nazis or the Communist Party *Politbüro* — or perhaps more mundanely, *Stasi* agents or members of *apartheid* hit-squads — were not anti-social in the way of regular criminality but part of the political "normality" of criminal societies. This is precisely why Milosevic is able to reveal the hypocrisy in the Prosecutor's position: the trial is a trial of the Serbian nation inasmuch as his acts were part of (and not a deviation from) the social normality of Serbia's recent past.

It is at this point that the strategy chosen by Milosevic receives its full significance, and tends to demonstrate the limits of the criminal trial as an instrument of material truth and political reconciliation. When a trial concerns large political events, it will necessarily involve an interpretation of the context which is precisely what is disputed in the individual actions that are the object of the trial.[53] To accept the terms in

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51 Even the individualisation of guilt is a policy – namely a policy of collective impunity. "We have to individualize the guilt," said Ivan Djordjevic, a former dissident lawyer and an official in Serbia's Ministry of Internal Affairs. "Otherwise we have this feeling of collective guilt, that this whole nation had the goal of eliminating other people and killing. Not all of us supported this," New York Times 11 February 2002.

52 New York Times, 11 February 2002.

53 As Charles Leben has observed, in large political crimes, the ordinary relationship between fact and context breaks down. Judges may no longer

which the trial is conducted — what deeds are singled out, who is being accused — is to already accept one interpretation of the context among those between which the political struggle has been waged. This is what Jean-François Lyotard has famously called a *Différend* — a situation in which to accept a method or criterion of settlement is already to have accepted the position of one's adversary:

> "A case of differend between two parties takes place when the 'regulation' of the conflict that opposes them is done in the idiom of one of the parties while the wrong suffered by the other is not signified in that idiom."[54]

In case of differend, everything is at stake and the context is always a part of the dispute itself. To understand the German bombing of Coventry and Birmingham in November 1940, with their over 1200 victims as a war crime, but not to see one in the carpet bombing of Germany that resulted in perhaps 600.000 civilian deaths is possible only if one already accepts the truth of the Allied view. Not to condemn Germany, and only Germany, would have put to question the justice of the Allied cause itself. The Nuremberg idiom presumed that the war had been launched as Axis aggression and that every atrocity came about as a consequence of it.

If individual criminality always presumes some context, and it is the context which is at dispute, then it is necessary for an accused such as Milosevic to attack the context that his adversaries offer to him. This is where a trial becomes inevitably a history lesson, and the dispute at the heart of it a political debate about the plausibility of the historical "interpretations." Blaming the destruction of Yugoslavia, and the atrocities committed in what had been its territory, on Western policy, as done by Milosevic, plays upon complex structural causalities and long-term interpretations which are hard to consider within a formal trial. But it is imperative to notice that as long as the chain of causality to individual atrocities has not been established (and so far this has not been the case) to put the blame on Milosevic plays upon equally complex assumptions and interpretations. The fact that Milosevic is on trial, and not Western leaders, presumes the correctness of the Western view of the political and historical context. And because the context is part of the political

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confine themselves within the former, historians within the latter: in judging the facts, judges also judge the context, "Remarques dans un débat de table ronde le 22 janvier 2000", *Droits* 31 (2000), 64.

54 J.F. Lyotard, *The Differend. Phrases in Dispute*, translated by G. Van Den Abbeele, 1988, 9.

dispute, the trial of Milosevic can only, from the latter's perspective, be a show trial participation which will mean the admission of Western victory.

There is no doubt that the The Hague trials are an effect of Western policy. The Tribunal would not have come to existence without pressure from the Clinton administration and quarters in the French government.[55] But the West should not be allowed to remain confident that its version of the recent history of the Yugoslavian populations will be automatically vindicated. A trial that "automatically" vindicates the position of the Prosecutor is a show trial in the precise Stalinist sense of that expression. This, after all, was the source of the embarrassment of the Western judges at Nuremberg when their Soviet colleague at the beginning of the trial toasted to the prospect that "they will all hang."[56] To avoid looking like Vyshinsky, the judges not only must allow Milosevic to speak, but take what he says seriously. They will have to accept being directed by Milosevic into the context within which he will construct his defence in terms of patriotic anti-imperialism. As the political and historical "truth" of the Balkans becomes one aspect of the trial, then the West must accept that some — perhaps quite a bit — of responsibility will be assigned to its weak and contradictory policy. The bombing of Serbia in the spring of 1999 that caused around 500 civilian casualties will become one of the relevant factors.[57] The Tribunal cannot ignore the question of whether that was a reasonable price to pay for flying at high altitudes so as to avert danger to NATO pilots.[58] But who can tell how far in the past the chain of political causality leads, and what will turn up as Milosevic will reveal his interpretation of why the West rejected him as an acceptable interlocutor?

In the course of the trial Milosevic has conducted his defence less in order to save himself than in order to get his version of truth across to

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55 For the diplomatic history, cf. Hazan, see note 8, 55-77.

56 Vyshinsky, as reported in T. Taylor, *The Anatomy of the Nuremberg Trials. A Personal Memoir*, 1992, 211.

57 For the view of the Prosecutor that although "some mistakes" were made, no violations of humanitarian law were involved, cf. the Annual Report of the ICTY, Doc. A/55/273, 30-31, para. 192. The legality of the bombing has, however, been severely contested within humanitarian organisations, among them the ICRC. For the contents of a confidential memorandum by the ICRC, cf. Hazan, see note 8, 219-223.

58 Cf. Comparution de M. Slobodan Milosevic, Les incohérences du Tribunal pénal international, Le Monde Diplomatique (20 juillet 2001) par Catherine Samary, http://www.monde-diplomatique.fr/cahier/kosovo/samary0701.

the public in Serbia, as well as to "history" by and large. He portrays himself not unlike the Armenian Tehlirian who in Berlin in 1921 shot to death Talaat Bey, one of those responsible for the Armenian genocide of 1915, and gave himself up to the police so as to be tried and in the trial to have the occasion to give publicity to the cause of the Armenian people. We may agree that the punishment of one man is incommensurable with the atrocities committed in the Former Yugoslavia. But we are not entitled to forget that this man, too, may share the sense of his own insignificance, and choose to play not for acquittal, but for truth and history.

Having finally moved away from the Scylla of impunity — however incoherently and in response to external pressure — the West is now heading either towards a lesson in history and politics in which its own guilt will have to be assessed, or to the Charybdis of show trials.[59] Whether or not Milosevic was finally indicted only because the West had decided that it no longer needed him, and to provide support for its bombing campaign, once the trial had commenced, it had lost full control of where it might lead. The West may have erred in believing that the international "truth" is one in the same way as domestic truth. Now that the trial will be about the context, the West can no longer remain confident that its version will be automatically vindicated — unless, of course, it would prefer to have a show trial.

III. A Brief History of History Lessons

The idea of the trial as a didactic process, a process of learning the truth about the events on trial has frequently been voiced. The French Prosecutor François de Menthon, for example, addressed the Nuremberg Tribunal with the following words:

> "The work of justice is equally indispensable for the future of the German people. These people have been for many years intoxicated by Nazism ... Their re-education is indispensable ... The initial condemnation of Nazi Germany by your High Tribunal will be a first lesson to these people and will constitute the best starting point

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59 For aspects of that guilt, cf. M. Koskenniemi, "'The Lady Doth Protest too Much" Kosovo, and the Turn to Ethics in International Law," *The Modern Law Review* 65 (2002), 159 et seq.

> for the work of revision of values and of re-education which must be its great concern during the coming years...."[60]

But the truth to which the Germans were to be educated at Nuremberg followed from controversial choices about how to focus the Allied case. In his four-hour indictment, de Menthon himself referred to the destruction of the Jews in only one sentence and not once to the Vichy régime, thus helping to build the Gaullist myth of the French nation united by *résistance.*[61] Above all, however, the energetic pursuit of United States' priorities by Justice Jackson in preparing the trial led to the principal charge becoming that of the Nazis having prepared and carried out an aggressive war. As a consequence, the atrocities against the civilians — "crimes against humanity" — were divested of an independent role and became relevant only to the extent they had been carried out after 1939 and "in execution of any crime within the jurisdiction of the tribunal." As Jackson himself put it in June 1945:

> "Our case against the major defendants is concerned with the Nazi master plan, not with individual barbarities or perversions which occurred independently of any central plan."[62]

Such an emphasis — until the end disputed by the French Judge Donnedieu de Vabres — downplayed the significance of the attacks on civilian populations and especially the racially motivated persecutions, carried out alongside and to a large extent independently of the war effort. Since the controversial charge of "common plan or conspiracy" under which members of Nazi organizations were to be tried was finally and perhaps somewhat absent-mindedly linked only to the aggressive war charge (thus undermining the original idea of covering also the pre-1939 persecutions),[63] the result was an interpretation of the Nazi regime as predominantly one of aggressive militarists that put its racist and genocidal character in a secondary and at times almost invisible role.[64] For instance, Belzec, Sobibor and Treblinka at which 1.7 mil-

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60 Quoted in M. Marrus, *The Nuremberg War Crimes Trial 1945-46. A Documentary History*, 1997, 90.

61 Marrus, see above, 88; Bloxham, see note 29, 101-102. But de Menthon's alternate Edgar Faure went to great detail in researching and describing the persecution of the Jews and other crimes against humanity in the West. Cf. A. Wieviorka, "La France et le procès de Nuremberg," in: A. Wieviorka (ed.), *Les procès de Nuremberg et de Tokio*, 1996, 62-77.

62 Jackson, '6 June 1945' as cited in Marrus, see note 60, 42.

63 Cf. Taylor, see note 56, 75-76.

64 For a critique, cf. Douglas, see note 3, 48-56.

lion Jews were destroyed shared between them only one fleeting reference during the trial.[65] The industrial mechanism of mass killings was completely overshadowed by the Prosecution's concentration on the "common plan" and "aggression" charges. As the historian Michael Marrus has observed: "Distortion and exaggeration were indeed the results — creating an unreal picture for subsequent historians."[66]

The historical truth of Nuremberg came about through a complex play of national priorities, available evidence and interpretation. Among the trial's more embarrassing moments was a partial accommodation of the Russians' wish to avoid references to the Ribbentrop Pact that had divided the spheres of interest between Germany and the Soviet Union in August 1939 and whose existence was only indirectly affirmed through the examinations of Ribbentrop himself and Ambassador Ernst von Weizsäcker.[67] The British, too, had their skeleton in a closet, and it was only due to the defence counsels' persistence that it transpired in Admiral Erich Raeder's examination, that the reason for Germany's attack on Norway in 1940 was to forestall a planned attack by Britain. "On these matters", Telford Taylor later observed, "the tribunal was engaging in half-truths, if indeed there are such things."[68]

Nuremberg demonstrates the limits of criminal trial as an instrument of "truth" above all in its treatment of the destruction of European Jewry. As Lawrence Douglas has recently shown, when the documentary *Nazi Concentration Camps* which was made directly after the liberation of the camps and which includes the famous images of mountains of naked bodies bulldozed into mass graves, was screened in Nuremberg for the first time, the voice behind the images spoke of excesses in war and political brutality, thus highlighting war crimes instead of crimes against humanity.[69] It is not necessary to interpret this

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65 Bloxham, see note 29, 108-110.

66 Marrus, see note 60, 127. For a sustained description and criticism of the emphasis in the IMT and the successor trials, cf. Bloxham, see note 29, especially, 57-128.

67 Marrus, see note 60, 134-139.

68 Taylor, see note 56, 555. Cf. also M. Messerschmidt, "La quête de la responsabilité...", in: Wieviorka, see note 61, 91-92. Other famous "oversights" include the Allied terror bombing of German cities and of course Hiroshima and (especially) Nagasaki. For the embarrassing treatment of the Katyn massacre, cf. A. Viatteau, "Comment a été traité la question de Katyn à Nuremberg", in: ibid., 145-155 and A. Tusa/ J. Tusa, *The Nuremberg Trial*, 1983, 410-412.

69 Douglas, see note 3, 57-63.

as manipulation of the evidence. It took years until the full extent of the Jewish catastrophe was revealed to the victors. But it does highlight the problem that as a trial writes history in the immediate aftermath of the events, its interpretation will necessary be based on fragmentary evidence and influenced by interpretations by contemporaries with a concrete stake in the result.[70]

The *Eichmann* trial attempted to correct what was felt in Israel as insufficient weight given at Nuremberg to the Nazi policy against the Jews. This time, *Nazi Concentration Camps* was screened as evidence of the atrocities against Jews. But this was not its only purpose and many observers have criticised the way the trial was used to bolster the self-confidence of the newly created Israeli state by focusing away from the image of Jews as helpless victims driven like lambs to slaughter and to bring to light stories of Jewish resistance and heroism.

In this regard, the story of the French use of the concept of "crimes against humanity" in the controversial trial of Paul Touvier is perhaps even more illustrative. In 1964, when the prospect of former Nazi criminals escaping trial due to passing of the 20-years' prescription period appeared on the horizon, the French National Assembly enacted a law on the non-prescription of crimes against humanity.[71] What were to be held as such was later defined by the *Cour de Cassation* in 1985 as:

> "all inhuman acts and persecutions which, in the name of a state practising a policy of ideological hegemony, have been committed systematically, not only against persons because of their membership in a racial or religious group, but also against the opponents of this policy, whatever the form of their opposition."[72]

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70 The increasing criticism and decreasing use by historians of Nuremberg documentation is pointed out e.g. in B.F. Smith, *Reaching Judgment at Nuremberg*, 1977, xv-xvi. One aspect of the cold war interpretation lay in the legend about the *Wehrmacht's* innocence in the crimes of the SS, necessary so as to prepare military cooperation with the West. Cf. Bloxham, see note 29, 129-133.

71 Law No. 64-1326 of 26 December 1964. For a discussion of the debates surrounding the adoption of this law, cf. A. Laquièze, "Le débat de 1964 sur l'imprescriptibilité des crimes contre l'humanité", *Droits* 31 (2000), 19-40.

72 Cour de Cassation, Judgment of 20 December 1985. For an extensive analysis of the drafting of this language, cf. L. Sadat Wexler, "The Interpretation of the Nuremberg principles by the French Court of Cassation: From Touvier to Barbie and Back Again", *Col. J. Transnat'l L.* 32 (1994),

Now Touvier was a Frenchman who had been at the service of the Vichy *Milice* and in this capacity participated in the shooting of seven hostages at Rillieux-la-Pape, close to Lyon, on 29 June 1944. His trial brought for the first time to justice the nature of Vichy complicity in the atrocities during the German occupation. As Leila Wexler points out in her detailed study of the case, there was a sense in which it was to be "the trial of the whole French society and not just one man."[73] Was French society ready to stand trial?

Touvier had been condemned to death in absentia in 1946 and 1947. After these sentences had prescribed in 1969, however, he surfaced in France and was, two years later, granted pardon from the remaining convictions by President Pompidou. He was brought to trial anew in 1973 on the basis of the 1964 law and, after several turns, his case came to the Paris Court of Appeals, which in a decision of 13 April 1992, applied the above quoted definition by the *Cour de Cassation* so as to conclude that there was no cause to prosecute him as the Vichy regime had not conducted an "policy of ideological hegemony." The decision caused a tremendous uproar, not least among French historians who were "scandalised over the way the judges permitted themselves to write history and to characterise the ideological nature of the French State".[74] The judgement was partially reversed by the Criminal Chamber of the *Cour de Cassation* on 27 November 1992. However, in applying the definition the Court did not attribute Touvier's acts to Vichy France but to Germany, by pointing out that although Touvier was a member of the French Militia he was acting at the instigation of Gestapo, and "in the interests of the European Axis countries" as defined in article 6 of the Nuremberg Charter. Thus, finally, the Court managed to uphold an interpretation of the nature and role of the Pétain regime during the occupation period that did not conflict with the Fifth Republic consensus about an unbridgeable gap between France and the Hitler regime.[75]

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287 et seq., (338). Cf also G. Binder, "Representing Nazism: Advocacy and Identity in the Trial of Klaus Barbie", *Yale L. J.* 14 (1989), 1321 et seq., (1337-1338).

73 Wexler, see above 72, 346.

74 Wieviorka, see note 61, 83.

75 Touvier was finally condemned to life imprisonment by the Versailles appeals court on 19 April 1994. For the relevant part of the act of accusation, cf. S. Chalandon/ P. Nivelle (eds), *Crimes contre l'humanité. Barbie, Touvier, Bousquet, Papon*, 1998, 160-163. For a description and critique of the

This consensus was, however, fragile. Work by historians of Vichy contemporaneous to the trial brought out increasing evidence of the enthusiasm with which French administrators collaborated with the Nazis, initiating legislative action that disqualified Jews from public service and required their registration in a way that greatly facilitated rounding them up for transport to the death camps. The deportation of 75.000 Jews from France was largely organised by the French themselves, sometimes without pressure from Germany. Particularly notorious in this regard was the Vel d'Hiv roundup in July 1942 when 7000 internees were held in a sports stadium in the 15th arrondissement in atrocious conditions for four days before being sent to the Drancy internment centre and then to the death camps.[76]

The policy of Vichy France itself was brought to trial in 1997-98 when Maurice Papon, the Secretary-General of the Gironde prefecture in Bordeaux in 1942 was indicted for his role in the deportation of almost 1600 Jews from the Bordeaux region. Papon, a Frenchman and, unlike Touvier, a white-collar administrator at the service of "*L'État français*" had organised the roundups, kept lists of Jews and provided transport and police protection to the convoys.[77] He had also enjoyed a successful career in post-war France, having been Prefect of Paris in 1958, member of the National Assembly in 1968 and even Minister of Finance in the French Government in 1978. There had been higher Vichy officials who had participated in the persecutions, such as René Bousquet and Jean Leguay, but both had died in the course of the proceedings against them in the 1980's. It was thus clear to most Frenchmen that to bring Papon to trial was to aim at Vichy France itself.[78] The

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1992 judgments, cf. Wexler, see note 72, 344-353 and 361-367. Cf. also Annex II of the article which contains the reasoning of the Paris Court ending up in the conclusion that Vichy France was not exercising "a policy of ideological hegemony," ibid. 376-379.

76 Cf. especially M. Marrus/ R.O. Paxton, *Vichy France and the Jews*, 1983, 250-252.

77 L. Sadat, "The Legal Legacy of Maurice Papon," in: R.J. Golsan (ed.), *The Papon Affair. Memory and Justice on Trial*, 2000, 141-142.

78 This theme is treated in most of the essays in Golsan, see above. But cf. especially R.O. Paxton, "Vichy on Trial", 169-170; A. Lévy-Willard/ B. Vallaeys, "Those who Organised the Trains Knew There Would be Deaths," Interview with R.O. Paxton in: Libération 3 October 1997, ibid. 181 and N. Weill/ R. Solé, "Today, Everything Converges on the Haunting Memory of Vichy," Interview with P. Nora in: Le Monde 1 October 1997, ibid. 176-177. That to judge Papon was to judge Vichy France was even an as-

fact that he was sentenced, on 2 April 1998, to only ten years' imprisonment, and that French authorities did anything but hurry with the execution of the sentence, throws only a slight shadow on the clarity of that message.

Eichmann, Touvier and *Papon* were each about avoiding impunity. But they were also about historical truth and memory. As such, they entered the terrain where national identities are constructed out of interpretations of the nation's past — in these cases those of Israel and Fifth Republic France. But there is no agreement on such identities. What "Israel" or "modern France" stand for are issues of fundamental political controversy among nationals and non-nationals. The engagement of a court with "truth" and "memory" is thus always an engagement with political antagonism, and nowhere more so than in dealing with events of wide-ranging international and moral significance. Historians disagree on the interpretation of such events. So it is no surprise that judges may find it difficult to deal with them. But no matter how much judges may seek to proceed in good faith towards their judgements, the context of the trial cannot — unlike the history seminar — be presumed to manifest good faith on everybody's part. This is not a disinterested enquiry by a group of external observers but part of the history it seeks to interpret. Much is at stake for the protagonists — that is the nature of the trial — and no truth can remain sacred within it.

IV. The Politics of Truth

In order to attain "truth", and to avoid a show trial, the accused must be allowed to speak. But this creates the risk of the trial turning into a propaganda show. This was the great concern at Nuremberg and remains a predominant worry as the United States will bring to trial the prisoners from its terrorism war in Afghanistan, presently detained in Guantanamo. One of the reasons for setting up a Military Court instead of an ordinary civil procedure is precisely to avoid such embarrassment.[79] In this regard, Nuremberg was only partly successful. As

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pect of Papon's defence. Cf. his final statement to the Bordeaux Appeals Court on 1 April 1998, cf. P. Nivelle, "Le procès papon", in: Chalandon/Nivelle, see note 75, 510-513, 515.

79 Cf. Jackson's Report to the President, 6 June 1945 quoted by Marrus, see note 60, 41.

Jackson's cross-examination of Göring got out of hands, the latter later gloated with satisfaction: "I had the best legal brains of England, America, Russia and France arrayed against me in their whole legal machinery — and there I was, alone".[80]

There is no reason to think that historical truth in a trial such as that of former President Slobodan Milosevic would come about through obedient co-operation of the accused. A criminal trial is defined by adversity and the construction of the historical context is part of the antagonism between the prosecutor and the defence. In the Milosevic trial, the battle on the historical-didactic terrain clearly outweighs in importance the issue of whether or not the accused is found guilty. So far, his behaviour has well reflected this. Here is a reporter's summary:

> "Il fait le spectacle, tantôt boudeur, tantôt blagueur, toujours agressif et défiant face à des juges impassibles et des procureurs appliqués. Il bouscule chaque témoin produit par l'accusation. Il use et abuse des contre-interrogatoires au grand dam de l'accusation ... Parallèlement, l'accusé ne rate pas une occasion de s'emparer de cette tribune pour diffuser sa parole politique à son opinion publique."[81]

When the list of names that formed the group of Milosevic' legal advisers was published, it was clear that much of the trial would be conducted on this terrain. That list included the name of the controversial French advocate Jacques Vergès, known not only as the counsel for Klaus Barbie, "the Butcher of Lyon", the high-profile terrorist "Carlos" and a supporter of Palestinian activists, but also as the theorist of the "trial of rupture" in which the defence is conducted entirely as an attack on the system represented by the prosecution case.[82] In contrast to the trial of "connivance" in which the accused seeks merely to put the facts in question, a strategy of rupture starts from the existence of what I earlier referred to as a *différend* — two incompatible frameworks of interpretation, and directly attacks the opponent's framework:

> "La rupture bouleverse toute la structure du procès. Les faits passent au deuxième plan ainsi que les circonstances de l'action; au premier plan apparaît soudain la contestation brutale de l'ordre public."[83]

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80 Quoted in Marrus, see note 60, 118.

81 C. Châtelot, "Le procès Milosevic s'enfonce dans la routine," Le Monde 25 Mai 2002, 15.

82 Cf. J. Vergès, *De la stratégie judiciaire*, 1968.

83 Ibid., 86-87.

The trials of Socrates, of Louis XVI, and of the Communist, Dimitrov, accused by the Nazis of the *Reichstag* fire of 1934, each involve aspects of this strategy — as indeed does the posture of Prometheus, declining to defend himself under Divine law, or Zola's attack on the prosecutors of Dreyfus: *J'accuse*. Dimitrov's strategy was published in the *Pravda* on 4 March 1934 in terms of taking initiative, making the prosecutor, as well as the high representatives of the state called to the witness stand, seem ridiculous. The sole objective in the trial, as described by Vergès, was to advance the cause of the proletariat. Everything else, including Dimitrov's own fate — he refused to rely on an alibi of being away from Berlin on the night of the fire — was secondary.[84]

The trial of Klaus Barbie in Lyon in 1987 is an exemplary case of the use of such a strategy. For most observers, the prime significance of that trial, too, had to do with truth and memory, educating a new generation of Frenchmen in the facts of Nazi policy under the occupation. "The trial was necessary" wrote André Frossard, member of *l'Académie française*, former member of the resistance and prisoner of war to the Germans, saved only by the fact of his ascendancy having been qualified as no more than "three quarters" Jewish, in the immediate aftermath of the trial:

> "la jeune génération d'aujourd'hui ne savait presque rien du passé où l'histoire devenue folle était sortie du monde connu pour séjourner quelque temps en enfer. Le procès Barbie l'a instruite."[85]

For giving this lesson, Barbie was an excellent candidate. He had been the head of the Information Section of the Gestapo in Lyon in 1942-1944, managed to escape trial after the war by participating in US counter-intelligence in Germany and fled then to Bolivia "where he spent the next three decades managing business and unapologetically touting Nazi and other militaristic causes".[86] He was finally abducted by the French Secret Police from Bolivia in 1982 and the trial against him commenced a couple of years thereafter. Among the charges two were particularly important. In April 1944 Barbie had organised the delivery to Auschwitz of 44 Jewish schoolchildren who had been staying at a religious *Foyer des enfants* in the village of Izieu, 75 km from Lyon,

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84 Ibid., 104-112.

85 A. Frossard, *Le crime contre l'humanité*, 1997, 40. On the reception of the Barbie trial in France, cf. also the very useful account in H. Rousso, *The Vichy Syndrome. History and memory in France since 1944*, translated by A. Goldhammer, 1991, 191-216. Interesting is also Binder, see note 72.

86 Douglas, see note 3, 187-188.

together with their five teachers. None of the children and only one teacher returned. And he was known as the Gestapo officer having captured and tortured — sometimes to death — members of the resistance, among them the resistance hero Jean Moulin.

Two aspects of the Barbie trial bring strikingly to surface the politics of a trial conducted for historical or didactic purposes. There was, on the one hand, the question of whether the French statute of limitations was applicable to Barbie's activities against the members of *la résistance.* That statute limited the prosecution for the most serious crimes of the common law (such as murder) to 20 years. An exception was, however, created by the 1964 law, referred to above, which integrated "crimes against humanity" into French penal law and made them imprescriptible. In 1985, the Lyon court (*Chambre d'accusation*) interpreted the notion so as to allow only prosecution for the deportation of "innocent Jews" — the children of Izieu together with four other counts for action against Jewish civilians — but not for the torture and killing of Jean Moulin, the latter being a "war crime", and thus not covered by "crimes against humanity."[87]

Under pressure from organisations of former resistance members, especially those close to Jean Moulin, the indictment was appealed to the Criminal Chamber of the *Cour de Cassation* that chose a less restrictive interpretation of "crimes against humanity." As we have seen, the High Court defined the concept so as to include in the notion also crimes against the "opponents" of a "state practising a policy of ideological hegemony whatever the form of their opposition."[88] This definition enabled the Court to focus not only on the Jewish victims but also the action taken by the Gestapo against the resistance members, a determined preference for many politicians in the Fifth Republic. France was to be remembered not only as a land of victims and collaborators but also as a country of heroes and fighters, as argued by many of the civil parties in the Lyon hearings.[89] Through this means, however, as

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87 Decision of 4 October 1985. For extracts from the act of accusation of the Lyon Court, cf. Chalandon/ Nivelle, see note 75, 17-28.

88 Judgment of 20 December 1985. Cf. also the quote at page 22 and references in note 72.

89 Cf e.g. the account of the statement of the counsel for the *Ligue des droits de l'homme*, Henri Noguères, experiencing "shock of witnessing a discrimination between the Jews and the non-Jews that had been thrown into the last train from Lyon to Auschwitz on 11 August 1944,"in: S. Chalandon, "Le procès de Klaus Barbie," in: Chalandon/ Nivelle, see note 75, 125.

Frossard points out, the notion of "crimes against humanity" was diluted so that almost any Frenchman could have invoked it against any German under the occupation.[90] Unlike the judgement of the Lyon Court, the broader view of the *Cour de Cassation* was open to criticism on account of its equating the two historical facts that formed the background of the trial — the destruction of the Jews and the work of the resistance. By so doing, it seemed to erase the special horror of the Jewish genocide, captured in an understanding of "crimes against humanity" as taking place only if, to quote Frossard once more, someone is killed "under the pretext of having been born."[91]

In effect, this confusion goes some way to supporting revisionist interpretations on Nazi policy that sometimes seek to explain the action against the Jews as directed against some kind of opposition or a "danger" to Hitler's regime. When a German historian of international law, for instance, fails to say a word about the Shoah in an account of the conduct of the belligerent powers in the World War II, instead pointing to actions against civilians by "both sides", highlighting the "sad role" that mass executions played in the activities against "partisans", he is engaged in a particularly distasteful act of historical revisionism that could be by-passed as yet another negationist apology, did it not come from the discipline of international law from which the notion of "crimes against humanity" once emerged.[92]

The second aspect of the politics of history in the Barbie trial is even more immediately relevant for the Milosevic case. The declared tactics of Barbie's counsel, Jacques Vergès, was to use the trial for the purpose of attacking the hypocrisy of the French State in accusing Barbie of acts that had been routine parts of its own colonial warfare and particularly

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90 Frossard, see note 85, 17.

91 Frossard, see note 85, 70. In her thorough commentary of the case, L. Sadat takes the position that Frossard's definition, which coincided with the Lyon Court's restricted view, was both "illogical" and possibly "insensitive", see note 77, 137. Cassese, too, supports the wider definition – but oddly defends this on the basis that the targeted persons were chosen "only because they belong to the enemy" (instead of being belligerents), A. Cassese, *Law and Violence in the Modern Age*, 1986, 112. But surely the Jews were not targeted because they were the enemy. And surely that is precisely where the speciality of the Nazi genocide resides, as Frossard argues, and what is lost from the wider definition.

92 Cf. W. Grewe, *The Epochs of International Law*, translated by M. Byers, 2000, 626 and my book review in *ICLQ* 51 (2002), 746 et seq., as well as *Kritische Justiz* 35 (2002), 277 et seq.

of French policy in the Algerian war (1954-62). Himself of Vietnamese origin, Vergès was an *ancien combattant* in the decolonialist cause who had married an Algerian woman once savagely tortured and condemned to death by the French military. In his pre-trial statements, Vergès had stated that the real battle lay not in attaining the release of his client but in achieving control of the historical and didactic aspects of the trial — far more important questions than the fate of an old Nazi.[93] In fact, he declared, the original indictment had been formulated so as to cover only acts against Jewish civilians so as to avoid the obvious parallel between Nazi action against resistance members and the French suppression of Algerian opposition as well as to keep hidden the names of the resistance members — assumed to occupy high positions in contemporary France — that had delivered Moulin to the Gestapo on 21 June 1943.[94]

To conduct his "trial of rupture", Vergès invited two African lawyers to accompany him on the defence bench, the Algerian Nabil Bouaïta and the Congolese Jean-Martin Mbemba, as if to suggest that whatever happened to the Jews in Europe was about intra-European guilt, "a drop of European blood in the ocean of human suffering which, therefore, only concerned the white man."[95] The Barbie team did not attempt to exculpate Barbie for what he had done, look for mitigating circumstances or point to his marginal role in the Gestapo. Its main concern was to develop the *tu quoque* to maximal public effect, to demonstrate that in essence, there was hardly any difference between what Barbie had done in Lyon and French racism during the years of its colonial wars. Why weep over the dead in the white colonialist's internecine struggles, arrogantly labelled a "World War"? Did not the Barbie trial demonstrate that white man's pity extended only to another white man, his compassion turned into narcissism, exhausting his emotional energy and perpetuating his racism towards everything not-European?[96] "Racism", Vergès argued in his closing statement to the Lyon Court, "we know what it is. We bow our heads also in front of

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93 For Vergès career and pre-trial statements, cf. Binder, see note 72, 1356-1359 and Cassese, see note 91, 113-115.

94 Rousso, see note 85, 208-209.

95 A. Finkelkraut, *La mémoire vaine. Du crime contre l'humanité*, 1998, 51-52.

96 Finkelkraut, see above, 61-63.

the martyrdom of the children of Izieu because we remember the suffering of the children of Algeria."[97]

In the end, Barbie's counsel did not go into systematic detail in producing evidence of the tortures committed as part of the official policy of France in the Algerian war or reveal much that was unknown regarding Moulin's arrest. Yet, he restated his main argument over and over again. Acts of colonial brutality in Africa and Indo-China were brought in as aspects of the historical context within which Barbie's actions were to be interpreted: on the day of allied victory, on 8 May 1945, French troops massacred 15.000 Algerian demonstrators in the town of Sétif who joined the celebration of victory with a call for national self-determination.[98] There was no reason — apart from racist reasons — to single out Nazi policy from the historical patterns of continuing violence exercised by Europe on everyone. There was no reason to deny the Holocaust, only to put it in the correct historical frame — in which its significance became automatically relative.

The defence tactic in the Barbie trial was to accept it as being about historical truth. By then choosing an appropriate interpretative context — European colonialism — the actions of the accused would necessarily appear as a relatively "normal" episode in the flow of racist persecutions and massive suffering of which European history has consisted. This has been the choice of Milosevic in the Hague as well. By turning his accusing finger against the Tribunal and the forces that lay behind its creation and his own downfall, Milosevic, too, seeks to write the history of the most recent Balkan wars as a continuation of the Great Power policy that had over and over again torn the peninsula into pieces, throwing its peoples against each other as part of a ruthless game of European domination.

When the debate is moved at that level, then of course it becomes much harder to receive closure by the trial. The opposing evaluations and assessments about how to think about Balkan history will not cease to exist when the judgement is read. The judgement will not provide the only prism through which the events succeeding the dissolution of the former Yugoslavia will be read. On the contrary — and this gives the accused his idiom — the judgement will become part of the complexities of Balkan history. If Milosevic succeeds in becoming a representative of one, perhaps disputed but still respectable view of that history, then he will have attained two victories.

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97 Vergès 1 July 1987, as reported in Chalandon/ Nivelle, see note 75, 138.

98 Ibid. 139-140.

First, he will have escaped the full force of the legal judgement. The judgement will seem to manifest only one among several interpretations of the past and to receive its validity above all from the power of the forces that were behind it. It would be no more than "victors' justice." The condemnation of the accused would then not seem to carry universal moral significance. It would seem that he was found guilty, as Göring put it in Nuremberg, "because he was on the side that lost the war."

In the second place, by articulating and giving concrete appearance to the particular historical vision that he claimed was on trial, he will have strengthened that vision, providing it with the aura of an iconoclasm that seemed critical enough to have been subjected to the extraordinary measure of a formal trial. The martyrdom that will be the condemned man's private image will reflect on the historical truth that he represents as its secret critical force, its revolutionary power.

V. "Show Trial"?

It is precisely because Realist theorists such as Morgenthau or E.H. Carr had been right about the need always to look for the broad context that pure "individualisation" cannot be carried out. A legal system that did not hold the killing of the innocent a crime would be unacceptable. But equally, and more importantly, not every killing of the innocent is a crime. As the ICJ observed in its *Legality of the Threat or Use of Nuclear Weapons* opinion in 1996, article 6 of the Covenant on Civil and Political Rights prohibits only the "arbitrary" taking of lives and it cannot be determined whether the death of innocent civilians in some situation is an atrocious crime or an inevitable by-product of action that was necessary to protect some more fundamental interest.[99]

But as soon as the law tries to make an assessment about that larger interest, and evaluate the relevant contextual data, it will move onto an area of indeterminacy and political conflict. Are the Balkan wars to be interpreted by reference to ethnic animosities or the interests and alliances of the Great Powers in the region? It has been observed that a

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[99] Legality of the Threat or Use of Nuclear Weapons, ICJ Reports 1996, 226 et seq., (239-240, paras 24-25). Cf further M. Koskenniemi, "The Silence of Law/ The Voice of Justice", in: L. Boisson de Chazournes/ P. Sands, *International Law, the International Court of Justice and Nuclear Weapons*, 1999, 488 et seq., (490-498).

number of the total of 271 historical facts of which the Tribunal took judicial notice in the 1998 Galic case involved contentious assumptions that were disputed among historians.[100] A Court cannot avoid taking judicial notice of a certain number of background facts. But the moment it does this, it will seem to be conducting a political trial to the extent that what those facts are, and how they should be understood, is part of the conflict that is being adjudged.

Yet, success is not necessarily guaranteed by the opposite technique of refusing to take any of the disputed facts as granted, either. Trials against "Holocaust deniers" have brought to surface the dangerous weakness in the adversarial process: did the witness *really* see who gave orders to the massacre while he or she was hiding behind the barn? And if nobody saw it, did the massacre take place at all? Nobody may have *actually seen* Jews gassed at Auschwitz and lived to tell about it: so did gas chambers really exist? Even Raoul Hilberg's extensive minutiae on the extermination process and Christopher Browning's detailed accounts of the participation of "ordinary men" in the *Einsatzgruppen* are only "hearsay" and thus perhaps inadmissible as evidence in a criminal trial.[101] The more you try to prove such facts in court, the more fragile they become. Witnesses contradict themselves and each other, memories change, or remain inscribed in the words that have been used to give shape to them, lose their immediacy and turn into myth. A vigorous cross-examination leads even the most reliable witness to a state of confusion. In the end, memory may not have been served but undermined — not to say anything of the dignity of the victims who, like the young woman who survived the Racak massacre in January 1999, testified about it in the Hague in May 2002, and whose evidence was reduced to a series of panicky "I don't know" statements by a bullying Milosevic.[102] The tribunal — any tribunal — is here between the difficult choice of accepting some facts as commonly known (and integrat-

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100 Čavoški, see note 42, 77-89.

101 Cf. the account of the trial of Ernst Zundel, over his pamphlet "Did Six Million really Die?", in Toronto, Canada, in 1988, in: Douglas, see note 3, 226-254. Through the aggressive cross-examination by Zundel's advocate, D. Christie, "memory was ridiculed, the survivor transformed into an amnesiac at best, and outright liar at worst," 240. For the enormous risks involved in trying to prove "sacred facts" through the banality of the legal process, cf. also D.D. Guttenplan, *The Holocaust on Trial. History, Justice and David Irving Libel Case*, 2001, 307-308.

102 Cross-examination of Ms Drita Emini on 28 and 30 May 2002, Transcript of the Milosevic trial, 5747-5764.

ing the controversies concerning the adequacy of what is "commonly known") and constructing facts out of what the procedural techniques — including cross-examination — happen to bring forward. Here the line between justice, history, and manipulation tends to become all but invisible.

The objective of "educating" people of "historical truths" through law emerges from our contemporary wish to accommodate the Realist insight about the need to take account of the context but also from our rejection of the Realists' conclusion — namely that law cannot be of use here. To speak of a duty of memory is fine, but "memory" may not be something that can be authoritatively fixed by a legal process. To document and to testify is necessary. But documents and testimony are not memory as such. The organisation of archives and the interpretation of testimonies so as to construct coherent narratives involves selection and emphasis that are aspects of the historical craft. "L'historien écrit et cette écriture n'est ni neutre ni transparente," writes the historian Pierre Vidal-Naquet in his polemic against Holocaust revisionism,[103] thus making also explicit the difficulty of conceiving courts as instruments of history and memory. A court rules — and must rule — over individual guilt and innocence and in so doing must strive for neutrality and transparency. Whether it succeeds can only be assessed from the outside, perhaps like in Nuremberg, only after decades of assessment and criticism. One type of memory involves precisely that assessment and criticism, an active interaction with the past from the perspective of one's personal recollection and experience, a memory that looks into the past but opens into the future, poised for transgression, possibly reconciliation. This contrasts with another kind of memory, labelled by the philosopher Alain Finkelkraut "vain memory", in which we outsiders admire our own moral sensibilities and capacity for quick compassion, a memory serving our personal and social projects, far removed from the events on trial[104] — perhaps the construction of an "international community" out of the tragedies of others.[105]

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103 P. Vidal-Naquet, *Les assassins de la mémoire*, 1987, 148.

104 Cf. Finkelkraut, see note 95.

105 It often seems that the memory for which the trial in the Hague is staged is not the memory of Balkan populations but that of an "international community" recounting its past as a progress narrative from "Nuremberg to the Hague," impunity to the Rule of Law. This "community" would construct itself in the image of a "public time" (in analogy with "public space") in which it would contemplate its past and give a moral meaning to disas-

So far, the dry and bureaucratic procedures at the ICTY have made little impression on the communities in the territory of the former Yugoslavia. There is not much evidence of a developed sense of culpability among the populations. The spectacle of the Milosevic trial has been followed with varying interest in the press and on the terrain. After five months, other concerns seem to have set in. This is in the nature of the criminal trial, the famous tedium of Nuremberg so frustrating for a journalist but indispensable in a complex legal proceeding. Yet, one cannot fail to wonder to what extent a process conducted in front of foreign judges in the Hague is able to attain the didactic purposes hoped for; to what degree Balkan memory may be constructed or directed by an international process. Already antagonised by the absence of the death penalty, and the celebration as a hero of a condemned war criminal on his return to Zagreb after serving his two and half years' sentence,[106] the victims will have to accept being taught by a hypocritical West that has made sure its own guilt would not be formally adjudicated in the process. On the perpetrator side, the articulation of the Milosevic story gives it a measure of respectability that it might otherwise never have received. All this follows as a matter of course in criminal trial that looks for punishment. Anything more — "truth", "lesson", "catharsis", "reconciliation" — depends on how the tribunal will be able to deal with a constitutive paradox at the heart of its job.

This is the paradox: to convey an unambiguous historical "truth" to its audience, the trial will have to silence the accused. But in such case, it ends up as a *show trial*. In order for the trial to be legitimate, the accused must be entitled to speak. But in that case, he will be able to challenge the version of truth represented by the prosecutor and relativise the guilt that is thrust upon him by the powers on whose strength the Tribunal stands. His will be the truth of the revolution and he himself a martyr for the revolutionary cause.

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ters such as Rwanda or Srebrenica as implying a promise of radiant future. On the idea of "public time", cf. S. Villavicencio, "Sans même un procès. L'impunité et les identités collectives," in: J. Poulain, *Qu'est-ce que la justice? Devant l'autel de l'histoire*, 1996, 216-217.

106 Cf. Hazan, see note 8, 243-247.