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## HISTORICAL IMPRESCRIPTIBILITY

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### ABSTRACT

In recent decades, imprescriptibility – the waiving of time-bars on legal actions – has become a core principle of human rights thought: it is applied to fight impunity (by prosecuting perpetrators of serious crimes until their deaths) and to protect human dignity (by granting their victims and society at large a right to the truth). In this essay, I develop an argument to stretch imprescriptibility beyond the legal realm to situations of recent and remote historical injustice. I call this historical imprescriptibility and look for the merits and flaws of the concept. I first discuss the controversial problem of labeling and judging historical crimes which are comparable to contemporary genocide, crimes against humanity, and war crimes. Then, I examine the promises and dangers of historical imprescriptibility: I weigh arguments in four relationships: time and fair trial, time and humanity, time and social importance, and time and epistemology. I conclude with some general remarks on the relationship between time and justice. On balance, I defend the position that historical imprescriptibility is a category in its own right, located in the moral and historical, but not the legal realm. Knowledge of historical injustice has a major reparatory effect in itself.

### I. LEGAL AND HISTORICAL IMPRESCRIPTIBILITY

#### LEGAL IMPRESCRIPTIBILITY<sup>1</sup>

Since the approval of the Statute of the International Criminal Court in Rome in 1998, genocide, crimes against humanity, and war crimes have been constantly in the news. The application of these notions to crimes of the past is able to stir up strong emotions, as is clear from Turkey's bitter reproaches against anyone who calls the Armenian massacres of 1915 a genocide or as is clear from the attempts of Spanish judge, Baltasar Garzón, to try repression by the Franco regime as crimes against humanity. Can crimes of the past be prosecuted endlessly? How does this match the prescription principle? And how tense is the relationship between time and justice?

<sup>1</sup> Complete versions of most human rights instruments and legal cases mentioned in this essay are available at <<http://www.concernedhistorians.org>>. I thank Toby Mendel, Executive Director of the Centre for Law and Democracy in Halifax, Canada, and Jeanne Pia Mifsud Bonnici, Rosalind Franklin fellow at the Faculty of Law of the University of Groningen for their thoughtful comments. This text contains four parts: a first, and much shorter, version of parts I and II appeared in Dutch as "Onverjaarbare historische misdrijven", *Internationale Spectator*, 64, no. 5 (May 2010): 293-297; parts I and III were originally a contribution to the Panel 'History and Human Rights' at the 21st International Congress of Historical Sciences (Amsterdam, 23 August 2010); part II was originally a contribution to the Panel 'History and Universal Justice' at the 4th International Congress Historia a Debate (Santiago de Compostela, 19 December 2010).

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In 1966, long before the approval of the Statute of the International Criminal Court, the United Nations stipulated that persons could be prosecuted if they committed acts which, at the time when they were committed, were “criminal according to the general principles of law recognized by the community of nations”<sup>2</sup>. The crimes covered were only the gravest ones: genocide, crimes against humanity, and war crimes. Two years later, a supplementary United Nations convention determined that, irrespective of the date of their commission, these three categories of crime could be prosecuted and punished without any time limits, even if they did not constitute a violation of the domestic law of the country in which they were committed. This non-applicability of time limits was confirmed by the Statute of the International Criminal Court thirty years later, but only for those core crimes committed after the Statute came into force (in 2002). Impunity would not flourish: from 2002 on, perpetrators of the most serious crimes can be prosecuted until their deaths<sup>3</sup>.

Although the principle of legal imprescriptibility – the principle that crimes have to be investigated, prosecuted, and punished regardless of the passage of time, that is regardless of time bars or statutes of limitations – was first applied to *perpetrators* only, it also gradually acquired a direct application for their *victims* and for society at large. Indeed, during the past three decades, a new right emerged within the United Nations system: the right to the truth<sup>4</sup>. The official interpretation

<sup>2</sup> Article 15.2 United Nations (UN) *International Covenant on Civil and Political Rights (ICCPR)* (1966). The provision, taken from the *Statute* (1945) of the International Court of Justice (ICJ), Article 38(1)(c), was also part of a June 1948 draft of the *Universal Declaration of Human Rights (UDHR)*. Both in 1948 (when it was defeated) and in 1966 (when it was accepted), the provision was intended to retroactively support the legality of the judgments of the Nuremberg and Tokyo tribunals (1946-1948). The 1966 provision was gradually prepared by several resolutions of the UN General Assembly. See also J. Morsink, *The Universal Declaration of Human Rights: Origin, Drafting, and Intent* (Philadelphia: University of Pennsylvania Press, 1999), 52-58.

<sup>3</sup> Foundational texts are: Article 15.2 *ICCPR*; Article 1 *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity* (1968); Article 29 *International Criminal Court (ICC), Statute* (1998). See also UN (Sub-Commission on Prevention of Discrimination and Protection of Minorities), *Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide* (‘Whitaker Report’) (E/CN.4/Sub.2/1985/6; 2 July 1985), paragraphs 60-61; M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (Kehl am Rhein, Strasbourg, Arlington, VA: Engel, 1993), 281; *Commentary on the Rome Statute of the International Criminal Court*, ed. O. Triffterer (Baden-Baden: Nomos, 1999), 523-526; C. Van den Wyngaert and J. Dugard, “Non-Applicability of Statute of Limitations”, A. Cassese, P. Gaeta, and J. Jones, eds., *The Rome Statute of the International Criminal Court: A Commentary*, vol. 1 (Oxford: Oxford University Press, 2002), 873-888.

<sup>4</sup> Foundational texts are: UN Commission on Human Rights, *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity* (2005), principles 1-18, 23, 34; UN, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (2005), principles 22(b), 24; UN, *International Convention for the Protection of All Persons from Enforced Disappearance* (2006), preamble, Articles 8, 24(2); resolutions of the UN Human Rights Council (formerly Commission on Human Rights) about the right to the truth in 2005-2006 and 2008-2009; studies on the right to the truth from the Office of the UN High Commissioner for Human Rights (OHCHR) in 2006, 2007, 2009, 2010 and 2011. See also International Human Rights Law Institute,

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of this new right, ever more carefully delineated since 2005, maintains that victims of human rights violations and their families have the inalienable, non-derogable, and imprescriptible right to know the truth about the circumstances in which the violations have taken place and, in the event of death or disappearance, to know the victim's fate<sup>5</sup>. This right cannot be limited or denied even when perpetrators were not prosecuted or when they received an amnesty<sup>6</sup>. The new right has already culminated in several court judgments with far-reaching impact<sup>7</sup>. In this way, the imprescriptibility principle acquires a new, humanitarian, dimension. I will now discuss this notion of imprescriptibility and in particular if it is applicable to historical injustice. By 'historical injustice' I indicate past genocides, crimes against humanity, war crimes and historical crimes. By 'historical crimes' I mean crimes of the past similar to genocides, crimes against humanity, and war crimes.

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In the above state of affairs, in fact, several elements stretch the imprescriptibility principle from the legal to the historical plane to such an extent that they seem to give rise to a new notion, which I shall call historical imprescriptibility. Two elements stretch coverage of the notion backward. First, the United Nations convention of 1968 speaks of imprescriptibility of crimes *irrespective* of the date of their commission, a broad formulation which, in principle, covers crimes committed *before* 1968<sup>8</sup>. Second, attention for the fate of victims of crime has an impressive pedigree: religious and ethical systems preaching principles of humanity throughout history, seventeenth century conceptions of natural law assuming that basic principles of humanity take priority over positive law, the *Alien Torts Claim Act* of 1789<sup>9</sup>, the French *Declaration of*

et al., *The Chicago Principles on Post-Conflict Justice* (2007), principles 2, 5; for the history of the right to the truth, see A. De Baets, *Responsible History* (New York and Oxford: Berghahn, 2009), 154-165.

<sup>5</sup> The right can *never* be taken away (imprescriptible) from *anybody* (inalienable) under *any circumstances* (non-derogable).

<sup>6</sup> UN Commission on Human Rights, *Updated Set*, principles 4, 23, 34; OHCHR, *Study on the Right to the Truth* (2006), paragraphs 4, 60 (2007) paragraphs 2, 86. There are several differences between the right to free expression and the right to the truth: the former is individual, whereas the latter is individual and collective; the former is sometimes derogable whereas the latter never is; the former is prescriptible, the latter is imprescriptible; the former knows several limitations, whereas the latter seems to know only one: privacy; and the former does not necessarily come with an official duty to investigate whereas the latter does. See De Baets, *Responsible History*, 161-162.

<sup>7</sup> See footnotes of the OHCHR studies for leading international jurisprudence.

<sup>8</sup> This partly explains why states parties ratify the 1968 convention so slowly. See Van den Wyngaert and Dugard, "Non-Applicability", 875, 879, 887. As of 9 July 2011, there were 54 states parties; about one third of the states parties made reservations, some detailing that the convention is only applicable for crimes committed *after* its entry into force for the state party. Useful reflections on imprescriptibility and retroactive justice in R. Teitel, *Transitional Justice* (Oxford: Oxford University Press, 2000), 15-16, 20-21, 33-34, 62-66, 138-141.

<sup>9</sup> The Alien Torts Claim Act (1789) reads: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed *in violation of the law of nations* or a treaty of the United States" (my emphasis).

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*the Rights of Man and of the Citizen* of 1789<sup>10</sup>, the *Geneva Conventions* starting with the one of 1864, and the *Martens Clause* of 1899, they are all creations which are still very influential today.

Three elements stretch coverage of the notion forward. First, victims surviving human rights violations can invoke the right to the truth until the end of their lives, which implies that it can last for decades. Take the extreme case of the kidnapping of babies during the military regime in Argentina (1976-1983). Born to dissident women during the latter's detention, these babies were taken away for adoption by families of military or security officials who were unable to have children of their own. Some of these kidnapped children later attempted to establish their real identity. They are entitled to invoke the right to the truth, even if they become a hundred years old. This extends imprescriptibility to one century. Second, the families of victims can also invoke the right to the truth. Even if we count only the children of direct victims as families<sup>11</sup> (a minimalist assumption given that many would include grandchildren also), it means that the right to the truth can be invoked several decades longer. In the extreme Argentinian case just described, the children of persons who were kidnapped as babies, have a right to the truth until they grow old. This may extend the right to almost two centuries. Third, the social importance of the truth about past time does not necessarily die with the death of the last perpetrators and victims. Given all of these arguments, historical imprescriptibility can be considered as a concept in its own right. But it is very different from legal imprescriptibility.

## THE DISTINCTION

The crucial difference is that legal imprescriptibility can be applied to *recent* historical injustice and historical imprescriptibility to *remote* historical injustice. Clearly, there is also a borderline area in which recent historical injustice, while not losing its legal character (as in the Argentinian example), is gradually changing into remote historical injustice. The table spells out the main distinctions:

<sup>10</sup> *Declaration of the Rights of Man and of the Citizen* (1789), Article 2: "Le but de toute association politique est la conservation des droits naturels et imprescriptibles de l'homme". (The aim of all political association is the preservation of the natural and imprescriptible rights of man). For early criticism of the imprescriptibility idea, see Jeremy Bentham: "Natural rights is simple nonsense: natural and imprescriptible rights, rhetorical nonsense, nonsense upon stilts" (written in 1795, published in French in 1816 and in English in 1824; quoted in L. Hunt, *Inventing Human Rights: A History* [London: Norton & Company, 2007], 125).

<sup>11</sup> UN, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (1985), principle 1: "'Victims' means persons who [...] suffered harm [...] through acts or omissions that are in violation of criminal laws [...]"; principle 2: "The term 'victim' also includes, where appropriate, the immediate family or dependants of the direct victim [...] ". See also UN, *Convention Enforced Disappearance* (2006), principle 24(1).

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<i>Basic definitions</i>		
<i>Imprescriptibility</i>	The waiving of time-bars on legal actions	
<i>Historical injustice</i>	Past genocides, crimes against humanity, war crimes and historical crimes	
<i>Historical crimes</i>	Crimes of the past <i>similar</i> to genocides, crimes against humanity, and war crimes	
<i>The difference between legal and historical imprescriptibility</i>		
<i>Imprescriptibility</i>	<i>legal</i>	<i>historical</i>
<i>Type of injustice</i>	Recent historical injustice	Remote historical injustice
<i>Definition</i>	Injustice of which at least some perpetrators or (direct and indirect) victims are still alive	Injustice of which all perpetrators and (direct and indirect) victims are dead
<i>Crimes</i>	Past genocides, crimes against humanity, war crimes	Historical crimes <sup>12</sup>
<i>Scope</i>	Criminal and civil law; human rights and humanitarian law	Ethics; history
<i>Action</i>	<i>For perpetrators:</i> prosecution <i>For victims:</i> reparation, including truth as result of legal proceedings	<i>For society at large:</i> - reparation as satisfaction (or symbolic reparation), including truth as result of historical writing - remembrance
<i>Agents</i>	Surviving victims in cooperation with courts, governments, NGOs	Heirs, society at large, historians

Historical imprescriptibility does not mean that historians replace judges in questions of remote historical injustice. Few historians still believe that they are judges before the tribunal of history charged with the vengeance of peoples, as René de Chateaubriand did in the early nineteenth century<sup>13</sup>. Nevertheless, they possess the power to study and reopen cases and challenge the amnesia and falsification of history desired by former perpetrators.

## II. CONCEPTUALIZING HISTORICAL CRIMES

Adoption of the principle of historical imprescriptibility has important

<sup>12</sup> For a list of sixty moral and legal wrongs to the dead, see De Baets, *Responsible History*, 134-137. J. Thompson, *Taking Responsibility for the Past: Reparation and Historical Injustice* (Cambridge: Polity Press, 2002), x, defines historical injustice very broadly as “a wrong done either to or by past people”. Some of the sixty wrongs to the dead that I identified are forms of historical injustice in the sense of this definition, others are not.

<sup>13</sup> F.-R. de Chateaubriand, *Mercur de France* (4 July 1807), also in his *Mémoires d’Outre-Tombe*, vol. 1 (originally 1848-50; Paris: Gallimard, 1997), 916.

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consequences. It suggests that crimes committed in the course of history which are comparable to genocide, crimes against humanity, or war crimes should carry those same names, whatever the label used at the time<sup>14</sup>. Let us therefore compare the problems to label historical crimes with historical and recent concepts respectively.

## HISTORICAL CONCEPTS FOR HISTORICAL CRIMES

‘Historical concepts’ are the words for practices used by those involved at the time that these practices took place. Scholars can defend the use of historical concepts with the argument that many practices deemed inadmissible today (such as in the case of slavery, human sacrifices, heritage destruction, racism, censorship...) were accepted as rather normal and sometimes even as morally and legally right in some periods of the past. Arguably, then, it would be unfaithful to the sources, misleading and even anachronistic to use the present accusatory labels to describe them. This would mean, for example, that one should *not* call the crimes committed during the Crusades crimes against humanity (although a present observer would have good reason to qualify some of these crimes as such), for such a concept was nonexistent at the time. A radical variant of the latter is the view that not only recent labels should be avoided but even any moral judgments of past crimes, which are inevitably doomed to fail.

This argument, however, can be countered with several objections. *First, diverging judgments*. It is well known that parties involved in violent conflicts label these conflicts differently. And different terms imply different moral judgments, as Isaiah Berlin showed long ago:

In describing what occurred I can say that so many million men were brutally done to death; or alternatively, that they perished; laid down their lives; were massacred; or simply, that the population [...] was reduced, or that its average age was lowered; or that many men lost their lives. None of these descriptions of what took place is wholly neutral: all carry moral implications [...] The use of neutral language (“Himmler caused many persons to be asphyxiated”) conveys its own ethical tone<sup>15</sup>.

In 2000, for example, the Council of Europe reported that the war of 1992-1995 in Bosnia-Herzegovina was called ‘aggression’ by Bosniac history textbooks, ‘civil

<sup>14</sup> I found first mentions of the term “crimes against humanity” in 1915 (if an earlier mention of 1854 in another context is excluded), of “war crimes” in 1934, and of “genocide” in 1943-1944. For “crimes against humanity” and “war crimes”, see Articles 6b–6c *Charter of International Military Tribunal (IMT) at Nuremberg (1945)*; for “genocide”, see Article 2 *Convention on the Prevention and Punishment of the Crime of Genocide (1948)*. For presently internationally accepted definitions, see ICC, *Statute*, Article 6 for genocide (definition identical to Article 2 *Genocide Convention*), Article 7 for crimes against humanity (definition complete redrafting of IMT text), and Article 8 for war crimes (definition based on 1949 *Geneva Conventions* and 1977 *Additional Protocols*). For the 1854 use of crime against humanity, see J. Yovel, “How Can a Crime Be Against Humanity? Philosophical Doubts Concerning a Useful Concept”, *UCLA Journal of International Law and Foreign Affairs*, 11 (2007): 56. The ‘Whitaker Report’ (paragraph 74) attributes coinage of the term “crimes against humanity” to Hersch Lauterpacht.

<sup>15</sup> I. Berlin, “Historical Inevitability”, in I. Berlin, *Four Essays on Liberty* (originally 1954; Oxford: Oxford University Press, 1969), xxix, also 95, 115.

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war' by Serb history textbooks, and 'war of liberation' by Croat history textbooks<sup>16</sup>.

*Second, euphemistic judgments.* Opinions of contemporaries about the crimes usually diverged. On the one hand, at least some of the groups of contemporaries perceived as normal historical acts that would be considered criminal today – and it would be interesting to study this so-called normality and its context as contrasted to the present-day situation. On the other hand, some groups of contemporaries condemned the acts called criminal today and invoked already principles of humanity in defense of the victims in the process, even if these principles were not as formalized as today. Almost certainly, a general, let alone unanimous, perception of acts called criminal today as 'normal' was rare. Nevertheless, serious crimes from the past often received names which were perceived as euphemistic even for many of those directly involved: 'uprising' for 'civil war' (the nationalists in their conflict with the republicans in Spain in 1936-1939), 'final solution' for 'extermination' (Nazi Germany toward the Jews), 'police actions leading to excesses' for 'war leading to war crimes' (the Netherlands fighting Indonesia's independence in 1945-1949), and 'order-keeping operation' for 'colonial war' (France in Algeria during the independence struggle of 1954-1962)<sup>17</sup>. If the euphemisms were taken at face value, they could have serious consequences: soft expressions (police actions, order-keeping operations) do not imply imprescriptibility, whereas strong ones (war crimes) do.

*Third, politically inspired judgments.* A variant of the argument in favor of the use of historical concepts is politically inspired. Political leaders and pressure groups may take the view that the past is unique and that therefore crimes from the past are incomparable to those in the present and that both deserve their own labels. This view is often inspired by a strong desire to avoid unfavorable historical parallels<sup>18</sup>. Clearly, postulating complete incomparability over time is often self-serving. It is also radical: whoever takes such a position makes historical scholarship impossible.

Such are the objections against the use of historical concepts to label historical crimes. Let us now examine the other side.

## RECENT CONCEPTS FOR HISTORICAL CRIMES

The use of recent concepts can be defended with two arguments. First, compared to the relative arbitrariness with which many of the historical terms are used, legal concepts such as genocide, crimes against humanity, and war crimes are

<sup>16</sup> Council of Europe (Parliamentary Assembly), *Education in Bosnia and Herzegovina: Report (Doc. 8663)* (Online; 14 March 2000), II, 4g.

<sup>17</sup> See also T. Mendel, *Study on International Standards Relating to Incitement to Genocide or Racial Hatred – For the UN Special Advisor on the Prevention of Genocide* ([Halifax]; April 2006), 8: "Direct' incitement [to commit genocide] is more problematical to define, in part because it goes to the heart of what constitutes incitement [...] and in part because of the ingenuity of human beings, including in the commission of heinous crimes, whereby euphemisms or implicit forms of speech may be employed to largely the same effect as clear calls to commit genocide".

<sup>18</sup> I thank Peter Gran for drawing my attention to this argument.

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very precisely defined. Second, many concepts are created long after the realities they describe. As Hans Reichenbach and Karl Popper, among others, have shown, the context of discovery is different from the context of justification. Popper spoke about theories, but it is no different for concepts: concepts that were created in one (legal) context can often be used in another (historical) context in a scientifically justifiable way. Malicious intentions, criminal premeditation, widespread or systematic attacks on civilian populations, massive killings, inhuman policies, and other essential ingredients of gross crimes are phenomena of all times. Therefore, there is no intrinsic reason why present labels could not serve for past crimes.

The 1948 *Genocide Convention* itself acknowledges that genocide was a crime that occurred throughout history. Its preamble reads: “*Recognizing* that at all periods of history genocide has inflicted great losses on humanity and [*b*]eing convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required [...]”<sup>19</sup>. Indeed, the Holocaust of 1939-1945 has officially been called a genocide since the adoption of the *Genocide Convention*<sup>20</sup>. Nobody can protest in earnest against this case of retroactive labeling because the *Genocide Convention* was drafted precisely with the Nazi atrocities in the minds of the drafters. From 1975, the Armenian massacres of 1915 were also increasingly called a genocide and not only because they seemed to fit the 1948 definition so well but also because the inventor of the genocide concept, the Polish-Jewish lawyer Raphael Lemkin, developed the idea behind it when in the 1920s he learnt about the Armenian massacres. How sensitive this is, may be inferred from the following incident. A United Nations photo exhibition on the 1994 Rwandan genocide, scheduled to be opened in April 2007, was dismantled because of Turkish objections to a reference which read: “During World War I, a million Armenians were murdered in Turkey”. The reference was intended to explain the connection between the Armenian massacres and Lemkin’s concept of “genocide”. Although after diplomatic consultations the words “in Turkey” were removed, the exhibition was postponed<sup>21</sup>.

Other massacres were also labeled as genocide in a 1985 United Nations document, the so-called ‘Whitaker Report’:

The Nazi aberration has unfortunately not been the only case of genocide in the twentieth century. Among other examples which can be cited as qualifying are the German massacre of Hereros in 1904, the Ottoman massacre of Armenians in 1915-1916, the Ukrainian pogrom of Jews in 1919, the Tutsi massacre of Hutu in Burundi in 1965 and 1972, the Paraguayan massacre of Ache Indians prior to 1974, the Khmer Rouge massacre in Kampuchea between 1975 and 1978, and the contemporary Iranian killings of Baha’is<sup>22</sup>.

<sup>19</sup> See also ‘Whitaker Report’, paragraphs 14-24.

<sup>20</sup> The IMT *Charter* did not yet contain the genocide category. The UN General Assembly first affirmed that genocide was a crime under international law in *Resolution 96 (I)* (“The Crime of Genocide”) (11 December 1946).

<sup>21</sup> W. Hoge, “UN Genocide Exhibit Dismantled after Turkey Complains”, *New York Times* (10 April 2007).

<sup>22</sup> ‘Whitaker Report’, paragraph 24.



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Several objections have been launched against the use of recent concepts. *First, the arbitrary or limited character of unofficial recent concepts and definitions.* If historical concepts can be arbitrary or limited, so can recent ones. Sometimes, scholars use concepts different from court-sanctioned labels. In 2001, for example, the International Criminal Tribunal for the Former Yugoslavia ruled that the mass murder of July 1995 in Srebrenica was a genocide. Despite the fact that the historians of the Netherlands Institute for War Documentation repeatedly used this judgment in their 2002 report about the Srebrenica events (but without mentioning even once that the tribunal had called them a genocide), they labeled it a ‘mass murder’ for reasons of neutrality. This was unconvincing because a mass murder, however terrible, is different from a genocide. After 2002, the tribunal kept calling the Srebrenica murders a genocide in many new rulings, which were confirmed by a judgment of the International Court of Justice in 2007<sup>23</sup>.

Obviously, such conceptual problems also penetrate definitions. Twenty years ago, Frank Chalk and Kurt Jonassohn coordinated a study of twenty genocides in history. As one of the first works of its kind, it became a strong study but it had one major flaw: the authors did not adopt the United Nations definition of genocide to identify the historical cases of genocide; instead they developed a broader definition of their own<sup>24</sup>. Even if it is true that the official definitions of genocide and similar concepts are controversial and partially the product of compromise, often obtained after long years of diplomacy, it is very difficult to defend the use of recent concepts for historical crimes if scholars apply their own working definitions. Historians can certainly deviate from official concepts and definitions but they should convincingly justify why their alternative is better. Even if their justification succeeds, they pay the price of lowering the comparability of their work.

*Second, difficult categorization.* Official definitions of genocide, crimes against humanity, and war crimes are precise, but also detailed. This complicates the task to prove the facts for each of the elements of the definition beyond reasonable doubt. If a crime transforms from a mass murder into, for example, a genocide, the burden of proof becomes more severe. This is the reason why almost without exception all genocides, also historical ones, provoke acrimonious debates about crucial aspects of the crime such as victim group types, chains of command, and perpetrator intent and motives as inferred from the planning and scale of the crime. An example is the *Holodomor* (‘death from hunger’), the famine of 1932-1933 which was called a genocide by the Ukrainian government of Victor Yushchenko in 2008. That same year, however, the European Parliament labeled it a crime

<sup>23</sup> See my discussion in “Na de genocide: Waarheidsstrategieën van rechters en historici” [“After the Genocide: Truth Strategies of Judges and Historians”], *Tijdschrift voor geschiedenis*, 116, no. 2 (May 2003), 224-229.

<sup>24</sup> F. Chalk and K. Jonassohn, *The History and Sociology of Genocide: Analyses and Case Studies* (New Haven and London: Yale University Press, 1990). For evidence that genocide is not a new phenomenon, see P. Singer, *One World: The Ethics of Globalization* (New Haven, CT: Yale University Press, 2002), 106-110.

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against humanity, not a genocide. In 2010, the succeeding President Viktor Yanukovych declared in the Parliamentary Assembly of the Council of Europe that the *Holodomor* had affected many nationalities and ethnic groups, and that therefore it was not fair to label it a genocide. The president was promptly sued in defamation<sup>25</sup>.

Similar problems arise when we label practices as ‘crimes against humanity’ and ‘war crimes’ (both concepts having entered into international criminal law in 1945). In a rare study from 1997 about the impunity of perpetrators of violations of economic, social, and cultural rights, the United Nations Commission on Human Rights explored four, what it called, ‘historical precedents’ of such violations: apartheid, slavery, the looting of cultural heritage, and colonization. The rapporteur of the study even called these precedents ‘crimes against humanity’<sup>26</sup>. It is interesting to find out from which moment these four precedents have been labeled as crime categories. The United Nations called apartheid a subcategory of ‘crimes against humanity’ in 1966. As to the second precedent, in 1998, the International Criminal Court Statute determined that enslavement (a summary name for slavery and slave trade) was a subcategory of ‘crimes against humanity’<sup>27</sup>. As to the third precedent, one extreme variant of the looting of cultural heritage, the destruction of historic monuments, if carried out without overriding military necessity, was called a war crime in the two 1977 *Protocols Additional to the Geneva Conventions*. In 1998 the International Criminal Court saw this destruction also as a form of persecution, which is a subcategory of ‘crimes against humanity’<sup>28</sup>. The first judgment in this regard (by the International Criminal Tribunal for the Former Yugoslavia) was pronounced in 2006<sup>29</sup>. As to the last precedent, many forms of colonization were accompanied by acts that would doubtlessly be called crimes

<sup>25</sup> European Parliament, “Resolution on the Commemoration of the Holodomor, the Ukraine Artificial Famine (1932-1933)” (23 October 2008); *Kyiv Post* (30 March 2009); “Ukrainian Sues Yanukovych Over Famine Statement” (RFE/RL; 15 June 2010).

<sup>26</sup> UN Commission on Human Rights, *Final Report on the Question of the Impunity of Perpetrators of Human Rights Violations (Economic, Social and Cultural Rights)* (1997), paragraphs 28–52, especially paragraph 32. The plea of its author, El Hadji Guissé, to expand the 1985 UN definition of victim (at paragraph 137: “The status of victim and the rights attaching thereto are transmissible to the successors. This concept of successor should be understood in a wide sense...”) was not taken up. See also UN Sub-Commission on the Promotion and Protection of Human Rights, *Recognition of Responsibility and Reparation for Massive and Flagrant Violations of Human Rights Which Constitute Crimes against Humanity and Which Took Place During the Period of Slavery, of Colonialism and Wars of Conquest: Resolution 2002/5* (2002). This resolution was preceded by *Decision 2000/114* and *Resolution 2001/1*.

<sup>27</sup> *Apartheid*: UN General Assembly, *Resolution 2202 (XXI)* (1966), and UN, *International Convention on the Suppression and Punishment of the Crime of Apartheid* (1973); *enslavement*: ICC, *Statute* (1998), Articles 7.1(c), 7.2(c); *slavery/slave trade*: World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, *Declaration* (2001), Article 13.

<sup>28</sup> *Geneva Conventions Protocol I* (1977), Articles 53(a), 85.4(d), and *II* (1977), Article 16; ICC, *Statute*, Articles 8.2(b)ix, 8.2(e)iv.

<sup>29</sup> International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Momčilo Krajišnik; Case no. IT-00-39-T: Judgement*, <<http://www.un.org/icty>> (2006), paragraphs 780-783, 836-840.

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against humanity today. King Leopold II's Congo Free State (1885-1908) is an example. In some cases, colonization even led to war crimes (during ruthless campaigns for expansion) or genocide (as with the massacre of the Herero in German South West Africa, present-day Namibia, in 1904)<sup>30</sup>. Thus, it is indeed defensible to categorize some types of these four 'historical precedents' as crimes against humanity. In addition, some types may fall under two or three labels: 'destroying historic monuments' can also be a war crime and 'colonial punitive expeditions' (if they meet strict conditions) a war crime or genocide.

*Third, shifting categorization.* Labels can shift. In 1992, the United Nations General Assembly called 'ethnic cleansing' a form of genocide, but in 2007, the International Court of Justice declared that ethnic cleansing was not a crime, but a policy that *could* include genocide<sup>31</sup>. Such examples are rare at the international level but rather common when they become the object of national party politics (as the Ukrainian example showed).

*Fourth, complex case law.* Like categorizing, judging concrete cases can be quite complex. In 2008, for example, the Grand Chamber of the European Court of Human Rights ruled (11 against 6) that the 1994 conviction of a retired military officer for crimes against humanity for quelling a riot during the Hungarian Revolution of October 1956 was unjustified. On the one hand, it was not shown that the act of this officer formed part of a widespread attack on the civilian population, on the other it was proven that at least one of the victims was a combatant. Therefore, the officer could not have foreseen that his orders and shots constituted a crime against humanity<sup>32</sup>. Also in 2008, a chamber of the European Court of Human Rights controversially ruled (4 to 3) that a punitive military operation by Soviet partisans in Mazie Bati, Latvia, in May 1944 could not be called a war crime. The case was referred to the Court's Grand Chamber, which in May 2010 reversed the ruling by judging (14 to 3) that it had indeed been a war crime and that the rule 'no punishment without law' had not been violated<sup>33</sup>.

*Fifth, challenges to categorization.* In October 2008, Judge Baltasar Garzón attempted to initiate a case against Franco and his generals for crimes against

<sup>30</sup> More examples in *Le Livre noir du colonialisme: XVIe-XXIe siècle, de l'extermination à la repentance*, ed. M. Ferro (Paris: Robert Laffont, 2003).

<sup>31</sup> UN General Assembly, *Resolution 121* (The Situation in Bosnia and Herzegovina) (1992); ICJ, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro): Judgment* (2007), paragraph 190.

<sup>32</sup> European Court of Human Rights (ECHR), *Case of Korbély v. Hungary (Application no. 9174/02): Judgment* (Strasbourg, 19 September 2008). The case was discussed under Article 7 European Convention on Human Rights (the legality principle: no one can be held guilty for acts that were not criminal at the time they were committed). The canonical formulation of this *nullum crimen sine lege* principle is Article 11 *UDHR* (1948): "No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed".

<sup>33</sup> ECHR, *Case of Kononov v. Latvia (Application no. 36376/04): Judgment* (Strasbourg, 24 July 2008); ECHR (Grand Chamber), *Case of Kononov v. Latvia (Application no. 36376/04): Judgment* (Strasbourg, 17 May 2010).

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humanity during the civil war and the first years of the ensuing dictatorship (1936-1952). A month later, however, judges from the national high court forced Garzón to drop the case with the arguments that the alleged perpetrators were dead and that, among other things, the crimes were covered by an amnesty passed in 1977. In 2009, a Supreme Court investigating magistrate ruled that by intentionally bypassing the amnesty law, Garzón had committed abuse of power. Garzón's decision not to apply this amnesty law, however, was supported by international treaty and customary law, which impose on states a duty to investigate the worst international crimes, including crimes against humanity. In 2008, for example, the United Nations Human Rights Committee had called on Spain to repeal the law and to ensure that domestic courts did not apply limitation periods to crimes against humanity. In May 2010, Garzón was suspended from his duties<sup>34</sup>.

*Sixth, politically inspired categorization.* As genocide is the strongest possible condemnation of a crime, victim groups and their spokespersons are eager to use it as a trump card. Recently, a judge called the massacre of about 300 students at Tlatelolco Square in Mexico City in October 1968 a genocide, but it is difficult to see how students fall under one of the four groups (national, ethnic, racial, religious) mentioned in the 1948 genocide definition. This judgment was overruled<sup>35</sup>. To give another example, some define slavery inaccurately as a genocide or a 'Black Holocaust', but the slave traders' intent was not to destroy the slaves but to exploit them as cheap labor<sup>36</sup>. In a French legal case from 2005, crimes against humanity and genocide were confused. The Collectif DOM des Antillais-Guyanais-Réunionnais sued historian Olivier Pétré-Grenouillau in Paris because he allegedly denied in an interview that the slave trade was a crime against humanity – whereas the 2001 Taubira law had given it this status. In the interview, however, Pétré-Grenouillau had denied that the slave trade was a genocide, not that it was a crime against humanity. Observers thought that the real motive behind the accusation was Pétré-Grenouillau's 2004 book *Les Traités négrières: Essai d'histoire globale* [The Black-Slave Trade: Essay in Global History], which viewed the slave trade as a phenomenon of thirteen centuries on five continents, of

<sup>34</sup> Amnesty International (AI), *Report 2010* (London: AI, 2010), 298, 300; *Report 2009* (London: AI, 2009), 301, 303; *Guardian* (17 October 2008); *New York Times* (17 October 2008, 19 November 2008); *The Times* (19 November 2008). For another case, see D. Oldroyd, "Anachronism and the 'History Wars' in Australia", *Scientia Poetica*, 10 (2006): 337-365 (discussing whether the resistance of indigenous Tasmanians against the white settlers between 1824 and the mid-1830s can be called guerrilla warfare and whether their eventual disappearance was a case of ethnic cleansing and genocide). For a case in which it was attempted to solve ancient wrongs by law, the Waitangi Tribunal in New Zealand (established in 1975), see R. Higgins, "Time and the Law: International Perspectives on an Old Problem", *International and Comparative Law Quarterly*, 46 (July 1997): 510-511.

<sup>35</sup> AI, *Report 2006* (London: AI, 2006), 182; AI, *Report 2007* (London: AI, 2007), 25, 184; AI, *Report 2008* (London: AI, 2008), 16, 205; AI, *Report 2009* (London: AI, 2009), 226; Human Rights Watch (HRW), *World Report 2006* (Washington: HRW, 2006), 203; HRW, *World Report 2007* (Washington: HRW, 2007), 218; HRW, *World Report 2008* (Washington: HRW, 2008), 220-221.

<sup>36</sup> G. Oostindie, "Slavernij, canon en trauma: debatten en dilemma's" [Slavery, Canon and Trauma: Debates and Dilemmas], *Tijdschrift voor geschiedenis*, 121, no. 1 (2008): 8-9, 18.

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which the European slave trade (1500-1900) was but one part. The charges were dropped in 2006<sup>37</sup>.

*Seventh, penalization for deviant categorization.* Not only in France (as in the case of the Taubira law) but also elsewhere – in countries as diverse as Russia and Rwanda – so-called ‘memory laws’ are regularly adopted, laws that seek to define the collective memory on a controversial historical subject by prescribing how people ought to think about certain historical episodes and by criminalizing the denial of imprescriptible crimes (such as the Armenian genocide, the Holocaust, or the Rwandan genocide). ARTICLE 19, an NGO defending free expression, aptly formulated why such laws ought to be rejected:

Memory laws too often end up elevating history to dogma [...] Such laws are both unnecessary – since generic hate speech laws already prohibit incitement to hatred – and open to abuse to stifle legitimate historical debate and research [...] [B]ecause they are open to abuse, the risk of disproportionate harm to freedom of expression is significant [...] It is very clear that international law protects merely offensive, as opposed to harmful, speech<sup>38</sup>.

States should prohibit the public condoning, denying, or grossly trivializing of genocide, crimes against humanity and war crimes *only* when they are forms of hate speech (that is, according to the United Nations, any advocacy of national, racial or religious hatred that *at the same time* constitutes incitement to discrimination,

<sup>37</sup> In December 2005, nineteen historians, including Pierre Nora (Pétre-Grenouillau’s publisher with Gallimard), signed a petition in support of Pétre-Grenouillau and in protest against the increasing judicialization of history in France, and founded an association, *Liberté pour l’histoire*, with the aim of abolishing all French laws that regarded specific historical questions and restricted the historians’ freedom. The petition was eventually signed by more than 550 historians. For the affair, see, among others, *Libération* (30 November 2005; 8 June 2006; 10 August 2006) and R. Rémond, *Quand l’État se mêle de l’Histoire* (Paris: Stock, 2006), 8, 38-40, 94-95. For the context of the problem of memory laws (lois mémorielles), see W. Schulze, “Erinnerung per Gesetz oder ‘Freiheit für die Geschichte?’”, *Geschichte in Wissenschaft und Unterricht*, 59, nos. 7-8 (2008): 364-381 (with the Pétre-Grenouillau case on 373).

<sup>38</sup> ARTICLE 19, “France: No More ‘Memory Laws’” (press release; 26 November 2008). The *Draft General Comment No. 34 (Upon completion of the first reading by the Human Rights Committee) – Article 19* (Geneva, 22 October 2010) by the Human Rights Committee is very clear in its paragraph 51: “Laws that penalise the promulgation of specific views about past events, so called ‘memory-laws’, must be reviewed to ensure they violate neither freedom of opinion nor expression. The Covenant [the International Covenant on Civil and Political Rights, *adb*] does not permit general prohibitions on expression of historical views, nor does it prohibit a person’s entitlement to be wrong or to incorrectly interpret past events” and its in its paragraph 55: “The Committee [the Human Rights Committee, *adb*] is concerned with the many forms of ‘hate speech’ that, although a matter of concern, do not meet the level of seriousness set out in article 20”. For a consistent approach, see ARTICLE 19, *The Camden Principles on Freedom of Expression and Equality* (London: ARTICLE 19, 2009), principles 12.1-12.3: “(12.1) All States should adopt legislation prohibiting any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence (hate speech)... (12.2) States should prohibit the condoning or denying of crimes of genocide, crimes against humanity and war crimes, but only where such statements constitute hate speech as defined by Principle 12.1. (12.3) States should not prohibit criticism directed at, or debate about, particular ideas, beliefs or ideologies, or religions or religious institutions, unless such expression constitutes hate speech as defined by Principle 12.1”.

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hostility or violence)<sup>39</sup>. In practice, most public condoning, denying, or grossly trivializing of these grave crimes does not meet the incitement standard<sup>40</sup>.

The debate about the use of recent concepts for historical crimes implies that historians should develop a position vis-à-vis others who label crimes: politicians, legislators, and judges. Politicians should not prescribe how history is written and therefore historians can neglect political views in principle (though often not in practice)<sup>41</sup>. When laws are adopted, historians should obey them, but this does not exclude the possibility to protest national ‘memory laws’ that again want to command a ‘correct’ reading of history. In hate speech matters, historians should defend the narrow universal standard laid down in Article 20.2 of the *International Covenant on Civil and Political Rights*. When judges are independent (and most international and many national judges are), their decisions have to be reckoned with. Deviation from the concepts used by these judges can only be justified through a better alternative.

## HISTORICAL OR RECENT CONCEPTS?

Given all of the above arguments and positions, balancing historical against recent concepts is not easy, although some tentative guidelines can be given. To begin with, historians should always mention the historical concepts, that is how certain crimes were named by different parties at the time of their occurrence, and discuss the meaning of such names. Readers can then judge for themselves if and why the author prefers to deviate from the historical vocabulary. Furthermore, it was clearly shown that the use of recent concepts is not necessarily anachronistic and often plainly better. (Below I will clarify the distinction between illegitimate anachronism and legitimate retrospection). In addition, if one rejects historical concepts and uses recent concepts instead, it is permissible, though often confusing, to develop own definitions for concepts that have already been defined under international law (as many scholars have done for the genocide concept). To be sure, scholars and others retain the right *not* to adopt labels defined under international law for historical practices. They should, however, explain why their

<sup>39</sup> Hate speech as defined in Article 20.2 *ICCPR*.

<sup>40</sup> That is the reason why historians have protested against the (European Union) *Council Framework Decision 2008/913/JHA of 28 November 2008 on Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law* (2008). See L. Cajani, “Historians under Criminal Law: EU Legislation Casts a Shadow on Historical Research”, *Perspectives on History* (<http://www.historians.org/perspectives>; October 2009).

<sup>41</sup> On 19 January 2007, journalist Hrant Dink was assassinated for his views on the Armenian genocide of 1915. On 14 September 2010, the ECHR unanimously ruled in *Dink vs. Turkey* that Turkey violated his right to life (by failing to prevent the murder although the police and gendarmerie had been informed of the likelihood of an assassination attempt and of the identity of the suspected instigators; and by not conducting an effective investigation into the failures which occurred in protecting Dink’s life); and his right to free expression (a guilty verdict for “insulting and weakening Turkish identity through the media” had been handed down in the absence of a pressing social need, which made Dink a target for extreme nationalist groups). The ECHR concluded that Dink was indirectly punished for criticizing the official denial of the view that the 1915 events amounted to genocide.

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alternative label or definition is superior. In cases of recent historical injustice, it is not recommended to define the nature of a given crime differently from international courts with their elevated standards of evidence and huge research departments. In cases of remote historical injustice, the use of either historical or recent concepts has to be painstakingly justified<sup>42</sup>.

## III. TIME AND JUSTICE

The above analysis demonstrates that, even if historical imprescriptibility is a category in its own right, it is a difficult one. Indeed, a defense of historical imprescriptibility tends to encourage the use of historical over recent concepts. However, our analysis just showed that using historical concepts is often not the best choice; recent concepts are often preferable.

The key dilemma in legal and historical imprescriptibility concerns the relationship between time and justice<sup>43</sup>, which I break down into a discussion of four relationships, the first two referring to recent historical injustice and the last two to remote historical injustice: ‘time and fair trial’ relates to the perpetrators, ‘time and humanity’ to the victims, ‘time and social importance’ to society at large, and ‘time and epistemology’ to the historians (and related professions).

## PERPETRATORS: TIME AND FAIR TRIAL

A first set of arguments of those pleading against legal and historical imprescriptibility revolve around the chances for a fair trial for alleged perpetrators which seem to decline because over time the quality of the evidence becomes jeopardized. The problems posed by loss of material evidence and by unreliable memories of witnesses long after the facts are important indeed. In 1993, the Israeli Supreme Court overturned the 1988 death sentence of John Demjanjuk (73 years old in 1993) for war crimes because of mistaken identity: despite all evidence, it was not proven beyond reasonable doubt that he had been ‘Iwan the Terrible’ who tortured Jews on their way to the gas chambers in Treblinka (although there was compelling evidence that he had been a guard at other camps). Archives from the former Soviet Union contained sworn testimony by former Treblinka guards and laborers indicating that the real name of ‘Iwan the Terrible’ was Ivan Marchenko<sup>44</sup>. If evidential unreliability is the case for relatively recent historical injustice such as

<sup>42</sup> In another context, I tried to solve the problem whether the demarcation between the use and abuse of history is a traditional one that has always existed or a modern one. See De Baets, *Responsible History*, 45-46.

<sup>43</sup> For a formulation of the dilemma, inspired by the 1998 Papon trial, see Y. Thomas, “La Vérité, le temps, le juge et l’historien”, *Le Débat*, no. 102 (November-December 1998): 26-27. For others touching upon it, see J.-N. Jeanneney, *Le Passé dans le prétoire: l’historien, le juge et le journaliste* (Paris: Seuil, 1998), 69-78; E. Barkan, *The Guilt of Nations: Restitution and Negotiating Historical Injustices* (New York and London: The Johns Hopkins University Press, 2000), xxx-xxxiv.

<sup>44</sup> C. Hedges, “Israel Recommends That Demjanjuk Be Released”, *New York Times* (12 August

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this, jeopardizing the right to fair trial, it is all the more so for remote historical injustice.

A further objection is that courts sometimes tend to write history which imperils the core principle of presumption of innocence. The trials of Adolf Eichmann in Israel (in 1961-1962, when Eichmann was 56 years old) and of Maurice Papon in France (in 1998, when Papon was 88 years old) demonstrated that when some perpetrators survive a period of crime longer than others, their trial tends to become symbolic, ensuing the risk that the judgment does not only sentence the perpetrators, as it should be, but through them the entire criminal regime of which they were a part and for which they were supposed to stand – as it should not be. Law should avoid ‘memory trials’ altogether and focus on the accused individual, not on entire regimes<sup>45</sup>.

In reply to the objection from quality of evidence, those in favor of imprescriptibility argue that regime change and the passage of time may not only lead to the disappearance of testimony, but also to new and fearless confessions, and not only to archival cleansing, but also to greater accessibility, even discovery, of new evidence. Moreover, evidential unreliability constitutes a permanent problem, which is neither specific for imprescriptibility issues nor unusual for judges and historians. In addition, imprescriptibility considerably extends the role of scholars, for example as witnesses invited at trials to inform judges about historical structures and contexts relevant for cases of which the events took place long ago<sup>46</sup>. Serious crimes typically occur on a large scale and presuppose some plan to destroy and/or to repress entire population groups carried out by a multitude of perpetrator groups<sup>47</sup>. These aspects press prosecutors and scholars to a broad analysis of patterns including social groups and structures over time. In addition, outside the court, scholars in democracies enjoy the freedom to reopen and study cases of repression at any time and publish about it.

In reply to the objection from presumption of innocence, they further argue that, while certainly defensible in principle, in practice prescription is often arbitrary. Given the massive scale on which most grave crimes are committed, it is often impossible to collect quickly reliable evidence against perpetrators and their commanders. Where prescription is not the issue, elements reminiscent of it are sometimes at play as when, for example, legal procedure forbids proof of the truth for events that happened before a fixed time limit. This may amputate relevant

1993). In May 2009, a new trial against Demjanjuk started in Germany, on charges of complicity in 27,900 murders (war crimes) as a guardian in the Sobibor extermination camp. On 12 May 2011, Demjanjuk was sentenced to 5 years’ imprisonment.

<sup>45</sup> Thomas, “La Vérité”, 26; R. Wilson, “Judging History: The Historical Record of the International Criminal Tribunal for the Former Yugoslavia”, *Human Rights Quarterly*, 27, no. 3 (August 2005): 909-912; M. Osiel, *Mass Atrocity, Collective Memory, and the Law* (New Brunswick and London: Transaction Publishers, 1997), 65-72. Historians also, especially if they belong to the school of microhistory, tend to fall into this fallacy of synecdoche or *pars pro toto*.

<sup>46</sup> De Baets, “Na de genocide”, 212-214. The practice of historians as legal witnesses is not unproblematic, as some of them have pointed out.

<sup>47</sup> Wilson, “Judging History”, 908, 913-914, 940-942.



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backgrounds, contexts, time spans, and, range of suspects, and so seriously distort the account<sup>48</sup>. Historical imprescriptibility prevents this. However, the risk of ‘pedagogical trials’ should be avoided.

## VICTIMS: TIME AND HUMANITY

A second group of arguments opposing legal and historical imprescriptibility concentrates on the human treatment of alleged perpetrators. A first argument maintains that physical fitness is a condition to stand trial, as the Pinochet extradition affair in the United Kingdom in 1998-2000 was supposed to demonstrate. In addition, like all persons, alleged perpetrators change over time and when tried after decades they are not the same persons anymore as they were at the moment they committed the crime. When the perpetrators show repentance, this in particular should count as a mitigating circumstance.

In reply, those in favor of imprescriptibility do not deny the rights of suspects, but they prefer to concentrate on the plight of the victims. Powerful political and military groups systematically committing grave atrocities and covering-up or erasing the evidence are successful if they can escape unpunished. As a result, others are seduced to risk the same game. This goes against widespread conceptions of humanity. The Estonian jurist Fjodor Martens formulated a classic humanity clause, the so-called Martens Clause, in the preambles of the *Hague Conventions* (1899, 1907):

Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the *principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience*<sup>49</sup>.

<sup>48</sup> P. Ricœur, *La Mémoire, l'histoire, l'oubli* (Paris: Seuil, 2000), 610-612; A. Finkelkraut, *La Mémoire vaine: du crime contre l'humanité* (Paris: Gallimard, 1989), 96; Wilson, “Judging History”, 913-915. ICJ judge Rosalyn Higgins writes that “[P]articular past periods of time (which often reflect sensitive events) can [...] be excluded from the jurisdictional reach of the Court. Some twenty such declarations [i.e., reservations made by states when accepting ICJ jurisdiction] have been made under the International Court, referring to periods of hostilities, military occupation, or to the Second World War”. Higgins, “Time and the Law”, 502. The countries were Australia, El Salvador (2x), Honduras, India (3x), Israel, Kenya, Malawi, Malta (2x), Mauritius, South Africa, Sudan, and the United Kingdom (5x).

<sup>49</sup> My emphasis. *Convention (II) with Respect to the Laws and Customs of War on Land* (The Hague, 29 July 1899), preamble (ninth recital). See also Theodor Meron, “The Martens Clause, Principles of Humanity, and Dictates of Public Conscience”, *American Journal of International Law*, 94, no. 1 (January 2000): 78-89. The language of the Martens Clause echoes through many texts, for example: *The Turku Declaration of Minimum Humanitarian Standards* (E/CN.4/Sub.2/1991/55; 2 December 1990): “Recognizing that in cases not covered by human rights and humanitarian instruments, all persons and groups remain under the protection of the principles of international law derived from established custom, from the principles of humanity and the dictates of public conscience”. For criticism of the concept of ‘conscience of mankind’ (namely the remark that it can be invoked abusively), see Singer, *One World*, 121-122.

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The clause was extended from wartime to peacetime and reformulated in the 1945 *Statute* of the International Court of Justice, in the 1948 *Universal Declaration of Human Rights*, in the 1949 *Geneva Conventions* and their 1977 *Additional Protocols*, in the 1966 *International Covenant on Civil and Political Rights*, and in the 1998 *Statute* of the International Criminal Court, which all have received worldwide recognition. The second recital of the *Universal Declaration* preamble, for example, reads: “Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind”<sup>50</sup>. This recital expresses the conviction that considerations of humanity enrich the legality principle because such considerations preexisted as part of international customary law long before 1899 (serious crimes being so repugnant that the international community does not want to let them go unpunished) and as part of international treaty law thereafter<sup>51</sup>.

## SOCIETY AT LARGE: TIME AND SOCIAL IMPORTANCE

Some say that the social importance of bringing criminals to justice and perhaps of writing histories about them declines over time. Parties involved in injustice die, which makes prosecution and most reparation gradually impossible; they are succeeded by generations usually less aware of the injustice; it is impossible and undesirable to reevaluate all of the past all of the time; the past cannot be altered, and so on. As time passes, circumstances change and supersede historical injustice so that claims of victims and their descendants to do justice gradually fade over time. In addition, imprescriptibility hampers reconciliation. Societies want to close conflicts and go on<sup>52</sup>.

Those in favor of imprescriptibility invoke three defenses to this powerful argument: continuity of obligations, public interest in the truth, and remembrance. In 1988, the Inter-American Court of Human Rights delivered a pioneering judgment in a disappearance case concerning the duty to investigate past crimes and, implicitly, on its inextricable complement, the emerging right to the truth. The court emphasized that changes of government did not affect the duties of states to prevent, investigate, punish, and compensate human rights violations. It declared:

<sup>50</sup> Discussing the phrase “the conscience of mankind” in the *UDHR*, Morsink (*Universal Declaration*, 299-301), calls it a instance of “moral intuitionism”: the generalizing assumption that every normal human being would be outraged when confronted with concrete gross human rights violations presupposes that people everywhere have an immediate knowledge of the wrongness of these violations. For intuitionism, see also H. Sidgwick, *The Methods of Ethics* (originally 1874; seventh edition 1907; Indianapolis/Cambridge: Hackett, reprint 1981), 96-98, 199-216. The phrase ‘the conscience of mankind’ was already used in UN General Assembly, *Resolution 96 (I)* of 1946.

<sup>51</sup> Higgins, “Time and the Law”, 508-509; Meron, “Martens Clause”, 79. In Nuremberg, the Martens clause was invoked in response to assertions that the IMT *Charter* constituted retroactive legislation. Meron, “Martens Clause”, 80. In addition, Article 6 IMT *Charter* stated that crimes against humanity were crimes “whether or not in violation of the domestic law of the country where perpetrated”. See also Singer, *One World*, 113.

<sup>52</sup> *Interest rei publicae ut finis litium sit* (It is in the public interest that lawsuits should have an end).

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According to the principle of the continuity of the State in international law, responsibility exists both independently of changes of government over a period of time and continuously from the time of the act that creates responsibility to the time when the act is declared illegal<sup>53</sup>.

The principle of obligatory investigation of past abuses *even after a change of regime* gradually became accepted<sup>54</sup>. Hence, continuous obligations help assure that the unwillingness of dictatorial regimes and the possible incapacity of post-conflict societies to try the perpetrators of gross crimes are bridged until the moment of investigation has come.

As to the public interest, it should be recalled that the United Nations declared that the right to the truth is not only a right of victims, but also of society at large. This indicates that third parties have a legitimate interest in knowledge of the facts. This social importance is not purely legal, it is also eminently historical in the sense that many contemporaries yearn to learn more about the conflict that generated the human rights violations and its history. There is no good reason why this interest would extinguish, or even decrease, once those directly involved are dead. The scale on which most gross human rights abuses occur, implies a system of repression whose operation is able to captivate the public interest for long after the facts. We know that the collective awareness of historical injustice may stretch back to centuries-old events of shame like military defeat and violent subjugation.

Finally, there is also the argument from remembrance. Historical imprescriptibility creates better conditions for the exercise of the right to remember the past. It reinforces the argument from humanity (as embodied in the Martens clause), as the rights to mourn and to remember are essential for the symbolic reparation of historical injustice, and as such, for restoring the dignity of deceased victims and for dealing appropriately with the past. Dignified commemoration is also a confirmation of humanitarian norms and in doing so it helps prevent the repetition of repression in the future.

## HISTORIANS: TIME AND EPISTEMOLOGY

Thus far, the replies to the objections against imprescriptibility lead this author to believe that these objections can be solved, met with prudence, or avoided all together. This may not be the case with a last objection, the objection from anachronism. Anachronism is a risk for historians and related professions whether they use the language of imprescriptibility or not. Even when they avoid purposeful anachronism, they are inevitably subjected to a number of present

<sup>53</sup> Inter-American Court of Human Rights (IACHR), *Velásquez Rodríguez Case: Judgment of July 29, 1988* (1988), paragraph 184.

<sup>54</sup> IACHR, *Velásquez Rodríguez*, paragraphs 166-181, 184, 194; UN Human Rights Committee (HRC), *General Comment 26 [Continuity of Obligations]* (1997), paragraph 4, and HRC, *General Comment 31 [General Legal Obligation]* (2004), paragraph 15. Article 17 UN *Declaration on the Protection of All Persons from Enforced Disappearance* (1992) perceived enforced disappearances not as crimes of the past, but as *ongoing* crimes (as kidnappings without an end) as long as the perpetrators continued to conceal the fate of the disappeared. For the definition of a “continuing violation”, see Higgins, “Time and the Law”, 504-507.

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concerns when they frame their questions, coin their concepts, select their evidence, phrase their stories, give their explanations, and reflect on their judgments. Between the past and ourselves, there is always the mediation of evidence and interpretation. Hence, judgments made long after the facts risk to be anachronistic<sup>55</sup>. Historical figures of long ago had no idea of our conceptions; their worldview and moral judgments were very different from today's. In addition, even if some events were considered crimes at the time of their occurrence, and even if it were justified to use recent terms to label them, it would not be fair to judge perpetrators of past crimes with present standards. The objection from anachronism strikes the imprescriptibility principle at the heart, since it seems to distort inescapably the truth sought after. But three appeals counterbalance this objection.

In the first place, the *appeal to the principle of retrospection*. Ever since historians became professional scholars, they attempted to avoid anachronism in the sense of 'present-mindedness', that is, the depiction of past phenomena in terms of present values, assumptions, or interpretive categories<sup>56</sup>. As philosophers of history have convincingly shown, however, understanding the past exclusively on its own terms is impossible and undesirable. It is impossible because interpretations of the thoughts and acts of historical agents *must* use concepts (like 'reliable evidence', 'secondary source' or 'anachronism') and methods (like historical criticism) that were unavailable during most of history to distinguish the past's 'own terms' from present terms. It is undesirable because larger processes and deeper causes of historical change that generate upheaval were often not noticed (like demographic changes) or conceptualized (like revolutions) by the people who made and witnessed them: if we would use only the concepts and judgments of historical agents, we would often have but a poor understanding of the past<sup>57</sup>. Let us suppose, nevertheless, that it would be possible and desirable to judge crimes exclusively with the criteria of the past, further questions would arise about selection (which criteria of which historical agents), knowledge (how to

<sup>55</sup> The objection from anachronism probably finds support in the nonretroactivity principle (as the legality principle is also sometimes called). Bearing in mind the different time spans in both professions, retroactivity is for legal scholars what anachronism is for historians.

<sup>56</sup> H. Ritter, "Anachronism", *A Global Encyclopedia of Historical Writing*, ed. D. Woolf (New York: Garland, 1998), 30-31; D. H. Fischer, *Historians' Fallacies: Toward a Logic of Historical Thought* (New York, etc.: Harper Torchbooks, 1970), 132-142; P. Burke, "Triumphs and Poverties of Anachronism", *Scientia Poetica*, 10 (2006): 291-292, 298. The term 'anachronism' came into use around 1650.

<sup>57</sup> A. Tucker, "Temporal Provincialism: Anachronism, Retrospection and Evidence", *Scientia Poetica*, 10 (2006): 299-303, 310-317; S. Ducheyne, "Ascribing Contemporary Scientific Concepts to Past Thinkers: Towards a Frame-work for Handling Matters More Precisely", *Scientia Poetica*, 10 (2006): 274-290; P. Blaas, "Some General Remarks after Thirty Years", *Scientia Poetica*, 10 (2006): 332-336; P. Newall, "Logical Fallacies of Historians", *A Companion to the Philosophy of History and Historiography*, ed. A. Tucker (Oxford: Wiley-Blackwell, 2009), 268-269; C. Spoerhase and C. King, "Historical Fallacies of Historians", *Companion*, 279-280; N. Jardine, "Philosophy of History of Science", *Companion*, 292-293. See also K. Popper, *The Poverty of Historicism* (originally 1944-1945; London: Routledge, 1957), 135.

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know the thoughts of crime victims who never left sources), and logic (what to do in cases where criteria were not widely shared or were contradictory). Historians have frequently depicted better the mental universe of historical agents and described the set of choices and constraints they had before them when they committed crimes than these agents did themselves. As long as the evidence is respected, competing explanations weighed, and historical criticism practiced, this is legitimate retrospection rather than illegitimate anachronism.

In the second place, *the appeal to the principle of comparability*. The risk of anachronism of contemporary moral judgments about past crimes is highest where historical events were generally not perceived as crimes but as ‘normal’ practices. This class of events is situated at the greatest distance from today’s conceptions. But the potential comparative relevance of such ‘strange’ cases for current discussions should not be excluded beforehand. The contrast can throw light on our understanding.

In the third place, *the appeal to the principle of consequentialism*. Anachronism is a strange objection in the realm of moral judgments. The search for the causes of crimes almost inevitably leads to statements about perpetrator responsibility. Both are closely knit, as John Toews reminded us: “[B]ecause the construction of causal relations is closely tied to the attribution of responsibility for particular acts, it integrates cognitive schemes with systems of ethics”<sup>58</sup>. A narrative that asks for the causes of a crime almost automatically leads to the question who was guilty for it and thus to moral judgments – which does not imply that causes and responsibilities are necessarily identical<sup>59</sup>.

Furthermore, it is not possible to identify crucial elements such as the criminal intent and perhaps the motives for crimes without the benefit of hindsight. Moreover, a major strategy to pass moral judgments on perpetrators is to look at the consequences of their criminal acts and omissions. These consequences can be placed on a scale according to whether the acts and omissions were carried out purposely, knowingly, or recklessly. Knowledge of whether the consequences were intended and foreseeable on the part of the perpetrator or the result of willful blindness is necessary to get a complete picture of the criminal conduct and to make a moral judgment about it. In short, professional historians can replace unacceptable anachronism with acceptable retrospection.

## IV. CONCLUSION

At the level of facts, the problems posed by research into historical injustice are no different from those posed by any other historical subject. At the level of opinions, we should distinguish, however hard this is, plausible interpretations of a given historical injustice from moral judgments which could then follow from such

<sup>58</sup> J. Toews, “Salvaging Truth and Ethical Obligation from the Historicist Tide: Thomas Haskell’s Moderate Historicism”, *History and Theory*, 38, no. 3 (October 1999): 353.

<sup>59</sup> See Fischer, *Historians’ Fallacies*, 182-183 (the fallacy of responsibility as cause).

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interpretations. The construction of plausible interpretations itself is essentially the same as for any other historical topic. The passing of moral judgments is a different matter. Two options are possible. The first is not to pass moral judgments on crimes of the past. Scholars indeed have a right to silence that is absolute for opinions such as retroactive moral evaluations. If scholars waive their right to silence – as they often do for a variety of reasons – they should find a way to pass moral judgments that solves the tension between historical imprescriptibility and anachronism. This second solution is only possible on condition that any retrospective moral judgments have sufficient factual basis, are prudent and fair, and are a contribution to the public debate about history. In such judgments, scholars should, at all times and to the best of their ability, distinguish the values of contemporaries of the epoch studied, those of themselves, and those embodied in universal human rights standards. Thus, although scholars are not obliged to make statements about responsibility and guilt of historical actors or to draw moral lessons from the past, in cases of imprescriptible crimes (such as genocide, crimes against humanity, and war crimes) and their close historical counterparts, they should try, to the best of their ability, to indicate the *range* of well-founded evaluations<sup>60</sup>.

Scientifically reliable knowledge of the formerly censored or forgotten facts of historical injustice, public acknowledgment of these facts and prudent moral judgments about them have a reparatory effect on the victims and on society at large *in itself*<sup>61</sup>. Conversely, failing to deal properly with historical injustice is an injustice *in itself*. The former strengthens, the latter undermines democratic societies<sup>62</sup>.

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<sup>60</sup> De Baets, *Responsible History*, 194.

<sup>61</sup> OHCHR, *Study on the Right to the Truth* (2006), paragraph 36, and OHCHR, *Right to the Truth* (2007), paragraphs 10, 33, 78. A similar idea in Ch. Maier, “Overcoming the Past? Narrative and Negotiation, Remembering, and Reparation: Issues at the Interface of History and the Law”, *Politics and the Past: On Repairing Historical Injustices*, ed. J. Torpey (Lanham, MD, etc.: Rowman & Littlefield, 2003), 298-303. The IACHR has repeatedly held that a judgment declaring the existence of a violation, is in and of itself a form of reparation. See, e. g., IACHR, *Case of Kimel v. Argentina: Judgment of May 2, 2008 (Merits, Reparations and Costs)*, paragraphs 117, 140.5.

<sup>62</sup> See my manuscript “The Relationship Between Democracy and Historical Writing” delivered as a lecture at the panel about “Democracy and Censorship” of the Second International Conference on Democracy as Idea and Practice in Oslo in January 2011, organized by the Beacon for Freedom of Expression, <<http://www.beaconforfreedom.org>>.