

states. The author, however, leaves unanswered the question whether he believes that this practice should be expanded and, if so, how.

The author argues persuasively that the Court plays a significant role in the development of the institutional law of the United Nations. The Court's contribution to the institutional law of the United Nations tends to be underestimated by the international community, including by students of the United Nations. The focus has always been on the law-making functions of the Security Council and the General Assembly. However, the book's analysis of the cases in which the Court has addressed the relationship between the principal organs of the United Nations in the maintenance of international peace and security, including its own role in that area and its interaction with the Security Council, shows that the Court has become increasingly involved in law-making through its interpretation of the law of the United Nations, and that this trend is likely to continue.

Where this analysis is somewhat too concise is the section on the Court's role regarding its contribution to the development of the 'other purposes and principles' of the United Nations. For example, the author spends only a couple of pages each on the Court's contribution to such critical principles and purposes of the United Nations as the threat of the use of force, self-defence, and non-intervention. There are only scant references to cases that define and elaborate on these fundamental principles of international law, such as the *Nicaragua* case and the *Nuclear Weapons* opinion.

Among the most stimulating parts of the book are the author's conclusions and suggestions. Most interesting, of course, are the author's suggestions for enhancing the role of the Court. A number of these are hardly novel (for example, creating a universal compulsory jurisdiction or prohibiting reservations when accepting the Court's compulsory jurisdiction), but follow logically from the author's analysis. Others are rather original, such as those in the area of the enforcement of the

Court's judgments (section 2.4 of the final chapter).

Several critical remarks need to be made, however, on the conclusions and suggestions put forward in the book. One is a matter of structure and consistency. The conclusions and suggestions at the end of the book are somewhat divorced from the book's analysis and, notably, from the conclusions at the end of each chapter. The general conclusions on the enforcement of the Court's judgments, for example, are not preceded by any discussion that would have laid the basis for the concluding thoughts and suggestions. Indeed, the conclusions at the end of each chapter are reasonably upbeat, while the suggestions at the end of the book appear more sober and thus somewhat at variance with the earlier optimistic evaluations. For example, while the author persuasively discusses the significant impact of the Court's judgments, decisions, and opinions, it is not until the final chapter that he recognizes that the number of advisory opinions (24) rendered by the Court is not very high (at 377) and that the acceptance of the Court's compulsory jurisdiction in contentious cases has not been sufficiently broad.

Finally, what seems to be missing from the book is a more extended discussion of the Court's need for resources, budget, and internal reorganization — a need that inevitably arises out of the increased caseload of the Court in recent years. The short subsection on the Court's budget (one page) in the concluding chapter does little more than simply flag the issue.

These criticisms, however, should not detract from the fact that the author's conclusions and suggestions provide a fresh look at the possibilities for enhancing the Court's role as the principal judicial organ within the United Nations system.

*Sidley Austin Brown Stanimir A. Alexandrov & Wood LLP,
Washington, D.C.*

Jean-Paul Jean and Denis Salas (eds). *Barbie, Touvier, Papon. Des procès pour la mémoire*. Paris Éditions Autrement, 2002. Pp. 204. €19.95. ISBN: 2746702630.

Criminal proceedings that deal with the troubled pasts of nations make history and justice intertwine in an often problematic manner. Many of the problems encountered in trials that deal with past state crimes were already experienced in connection with the Nuremberg trials and the various national trials of war criminals after the Second World War. More recently, the increasing use of criminal trials in the process to 'end the culture of impunity' enjoyed by national leaders has really placed the issue of the entanglement of law and history in trials on the agenda. Criminal proceedings concerning crimes committed years, perhaps decades, earlier raise complex questions about the multidirectional relationship of law and history that should be of interest to international lawyers involved in such issues. A number of studies have been published in recent years about themes like the use of history in trials, cooperation between judges and historians in criminal procedures, and the role of justice in the construction of collective memories.¹

The book edited by Jean-Paul Jean and Denis Salas, based on colloquiums held between French and German historians, legal scholars and magistrates, makes an interesting contribution to this ongoing discussion. This collection contains short essays in which the authors examine the relationship between law, history and memory, mostly through analysis of the trials held for crimes against humanity in France in the 1980s and 1990s against Klaus Barbie, Paul Touvier and Maurice Papon. German efforts to judge Nazi criminals are also briefly analysed in the book, and the possibility of addressing crimes such as those committed by the French army in

Algeria are touched upon. By concentrating on domestic trials, this book offers a welcome perspective to the issue of crimes against humanity. Despite the recent urge to bring crimes against humanity to international fora, by far the greatest number of such trials in fact have been held within national contexts in which states have engaged in retrospective assessments of their past. The substantive law has been derived from international law and has therefore been international in character, but punishment and procedure have remained national matters.² Accordingly, Michel Massé points out in his essay that while originally the notion of crimes against humanity was internationally inspired, a multidirectional movement has existed between national and international law, with legal practice having a decisive role. The French cases of Barbie, Touvier, and Papon, for example, have influenced the statutes of the ad hoc tribunals for the former Yugoslavia and Rwanda as well as the statute of the International Criminal Court. Despite certain doctrinal inconsistencies, French legal practice on crimes against humanity has certainly contributed to the international attempt to build a legal culture in which government leaders are held accountable for their actions.³

While domestic trials have an impact on the framing of international criminal justice, there is no doubt that international criminal tribunals are also called upon to pronounce on weighty domestic issues. The interpretation of history before an international tribunal may prove to be a politically delicate matter. Even crimes that are international in character, like crimes against humanity, will have taken place in a certain national context. Establishing this political context requires

¹ To mention some, see for instance Austin Sarat and Thomas R. Kearns, *History, Memory, and the Law* (2002), Lawrence Douglas, *The Memory of Judgement: Making Law and History in the Trials of Holocaust* (2001), Nancy Wood, *Vectors of Memory: Legacies of Trauma in Postwar Europe* (1999), Mark Osiel, *Mass Atrocity, Collective Memory, and the Law* (1997).

² Leila Sadat Wexler, 'The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again', *Col.J.Transnational L.* 32 (1994) p. 364.

³ Leila Nadya Sadat, *The Legal Legacy of Maurice Papon* in Golsan, R.J. (ed): *The Papon Affair: Memory and Justice on Trial* (2000) p. 147.

interpretation of national history, and an authoritative statement on contested national events by an international tribunal is unlikely to be accepted without objections. Criminal trials, in turn, naturally shape the ways in which national histories are written and how collective memories are constructed in different societies. Also, many of the social functions of trials about crimes against humanity, such as truth finding, memory transmitting, and community strengthening, that have come to complement traditional objectives of retribution and prevention, actually respond to national, rather than international needs.

History has allegedly often proved the incapacity of national justice to deal with crimes against humanity. According to the accounts of both German contributors to this volume, Ingo Müller and Hans Böttcher, East and West Germany have more or less failed in their prosecuting of Nazi criminals. Yet, what the authors do not mention is that circumstances in Germany after the war were very different from those in France, for instance. With de Gaulle in power, France could perceive itself as united in resistance. This enabled a marginalization of guilt followed by indictment of a few individuals. Germans, on the other hand, saw themselves as united in collective guilt. The fact that a handful of Nazis responsible for the most egregious crimes were condemned by the victors at Nuremberg did not alter the matter much. Yet, some time later Germany too had trials during which the Holocaust was re-examined and discussed in depth. The 1964 prosecution of the Auschwitz guards, for instance, prompted the 1964 French enactment to remove the statute of limitations for crimes against humanity, and prosecution of Majdanek officials between 1975 and 1981 for crimes against humanity captured the attention of millions of Germans.⁴ Germany has also assessed its past through other channels than the juridical one, namely through public debates on

history and historiography. Two very good examples of this approach are the *Historikerstreit* of the mid-1980s as well as the more recent public debate aroused by Daniel Goldhagen's *Hitler's Willing Executioner*.⁵ Collective trauma has been so deep in Germany that juridical arguments that require individualization of guilt might not have been the most adequate means to come to terms with the past.

The choice of legal channels to deal with past state crimes creates problems that the various contributors to the book under review address. Several authors touch on the points of convergence between historical truth and legal truth. Historical reasoning aims at the understanding of causes and effects by establishing political and social contexts in which historical events took place. Juridical truth, by contrast, implies the construction of judicially qualified facts that assess the personal responsibility of the accused. Historians and history are allegedly needed in the trials in order to establish 'what actually happened'. Paradoxically enough, historiography long ago abandoned this Rankean notion and has moved towards the acceptance of different narratives and the idea of complexity of truth.

Among the contributors to this volume, the historian Henry Rousso is perhaps the most critical towards the use (or abuse) of history and historians in trials. According to Rousso, the launch of proceedings for crimes against humanity is a manifestation of the fact that the past has become a field for public action in a number of European states. At worst, the involvement of historians at such trials leads to a juridical instrumentalization of historiographical expertise. The risk is that the formal rules of juridical proceedings, and the orientation of trials towards finality will not do justice to the complexity of a historical interpretation that should remain open for revision. Historiographical interpretation in courts is determined by juridical considerations and by a trial's ultimate goal of reach-

⁴ Mark Osiel, *Mass Atrocity, Collective Memory, and the Law* (1997), at 192–193.

⁵ For a discussion on the issue see for instance Nancy Wood, *Vectors of Memory: Legacies of Trauma in Postwar Europe* (1999).

ing a verdict on the innocence or guilt of the accused. This is, for example, what led to a distortion of historical truth at the trial of Paul Touvier. In order to meet the criteria of the French notion of crimes against humanity, the Court of Cassation declared that Touvier had acted on behalf of the Nazis in the massacre of seven Jewish hostages at Rillieux, whereas many historians agree that Touvier in fact acted as an official of the Vichy regime. Rousso goes so far as to claim that historians are in fact not needed in order to establish the truth of the historical context but to justify and legitimize these belated, exceptional 'historical' trials. In this way, historians may be enlisted as apologists of present-day policies.

Writing from the bench, Denis Salas sees the encounter between judge and historian in trials on crimes against humanity in more optimistic terms. Although opposed in their methods and objectives, the judge and the historian both contribute to reconstructing a political community's relationship to its past. Trials on crimes against humanity offer a public forum for groups that have been moved to the margins of the official collective memory and who now seek the world's attention through law. Trials have thus become commemorative events among many other forms of public remembrance. According to Salas, there was a change in this direction in the 1980s and 1990s, already present in the trials of Barbie, Touvier and Papon. The trials at Nuremberg, in contrast, were focused on the Nazi leaders' crime of war of aggression and in the French trials immediately following the war the accused were judged on grounds of collaboration and intelligence with the enemy. In these early trials, little attention was paid to victims' suffering, but in our era emphasis has increasingly shifted to victims. In fact, if the Nuremberg trials have often been criticized as being victors' justice, one could say of the more recent proceedings for crimes against humanity that they represent victims' justice.

The question of anachronism, more familiar to the historian than to the judge, is another problem raised by trials of crimes against humanity that take place long after

the event. Trials that deal with crimes committed perhaps decades before may reflect a will to make up for what today are regarded as failings and gaps in history. Scholarly history, not trials, can offer explanation as to why certain crimes were not prosecuted at the time. Societal values may have changed, even dramatically, during the period from when the crime was committed and the time of the trial. Criticizing present-day relativism, Jean-Noël Jeanneney rejects the idea that the evolution of moral and philosophical principles would lead to anachronism, because in his opinion, absolute goodness and justice do exist, notwithstanding our difficulties in attaining them. More complicated for the historian or the judge, perhaps, is the act of projecting him or herself back to the time that the criminal act was committed and to determine the limits of the freedom of action of the accused. The judge should try to reach his or her verdict as if the end of the story were unknown and, conversely, the role of the historian is not really to judge history. Yet, trials at which crimes against humanity are prosecuted long after the event may become events in which one generation judges the previous one, as Jean-Paul Jean points out. While one generation wants to forget, another may insist on remembering.

Imprescriptible crimes against humanity resist the restrictions normally placed on the functioning of law by time and space. As one reads through the various essays in this volume, one gets the impression that the prosecution of these crimes often leaves the judges floating in history, so coloured are both the notion of crimes against humanity and application of the law by the passage of time. Yet, despite the complexities of trials on crimes against humanity, and despite the historical significance of many of these trials, general prosecutor Marc Robert contends that a judge must think of these trials as ordinary cases of law application.

Abundant in information and perspectives, slightly lacking in coherence and depth of analysis, the book under review leaves the reader to reflect on many complex questions. Can legal proceedings for crimes against

humanity simultaneously serve the needs of justice and those of memory or history? What are the ultimate objectives of trials that deal with crimes against humanity: memory, forgetting, punishing the guilty, setting the historical record straight? One wonders about the ability of criminal trials to achieve all of these.

University of Helsinki *Stiina Löytömäki*

Maria Clelia Ciciriello. *L'aggressione in diritto internazionale. Da 'crimine' di Stato a crimine dell'individuo*. Napoli Editoriale Scientifica, 2002. Pp. 156. €12. ISBN: 8888321187.

In recent years, the flourishing — and controversial — jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) have captured jurists' attention by bringing the crime of genocide, war crimes and crimes against humanity to the forefront. Aggression as a motif of individual criminal responsibility, however, appeared to have been all but forgotten since the case law of the Nuremberg and Tokyo tribunals.

The future exercise of the International Criminal Court's (ICC) jurisdiction over the crime of aggression provided for by Article 5 of the Rome Statute accounts for the renewed interest in this crime. In this context, the focus on individual criminal responsibility is a departure from the many years during which this question was overshadowed by other related issues, such as Resolution 3314 (XXIX) on the definition of aggression in inter-state relations and the concept of state crime.

The time seems right, therefore, to study anew what some still refer to as the 'crime of crimes' and the volume by Maria Clelia Ciciriello constitutes a timely contribution to the current debate.

Contrary to what the reader might expect from its title, the crime of aggression is not analysed systematically in this book, either as

a wrongful act committed by the state or as an individual crime. In *L'aggressione in diritto internazionale — Da 'crimine' di Stato a crimine dell'individuo* the author limits herself to selecting certain questions related to the definition of the individual crime of aggression and to outlining them in nine brief chapters.

The common denominator running through all of these, however, is that of generality. Although references are made to the Nuremberg and Tokyo trials, the constituent elements (both objective and subjective) of aggression are not thoroughly studied. Even the recent work of the Preparatory Commission for the ICC (PrepCom) is only very summarily analysed, which is disappointing since some of the proposals presented by various delegations deserve careful attention.

The author does attempt to address the status of the individual crime of aggression in the light of customary international law, but her treatment of that question seems to be flawed. Ciciriello's conclusion is that the practice (or, to be more exact, lack of practice) following the Nuremberg and Tokyo trials does not allow for the existence of a consolidated customary rule on this matter. In this connection, the arguments put forward by the author are twofold: first, in the exceptional cases in which the Security Council has labelled an action undertaken by a state as aggression (for instance, in Resolution 387, 31 March 1976 regarding South Africa's aggression against Angola) it has failed to determine the international criminal responsibility of the individuals involved therein. Second, in those cases in which the Council has condemned states — although not labelling them as aggressors — it has shown the same passivity with regard to the responsibility of individuals.

It seems to this reviewer that the author resolves this issue too expeditiously, thus neglecting to take into account abundant practice — which does not consist exclusively in Security Council resolutions — which points in the opposite direction. In particular, General Assembly Resolution 95(I) affirms the Nuremberg Principles and the important Resolutions 2625 (XXV) and 3314 (XXIX) specifi-