

## **Recognizing the Wrongs of the Past: The Influence of Auschwitz and Jasenovac on International Criminal Law**

The Auschwitz concentration camp has become the chief exemplification of Nazism and the Holocaust. The atrocities committed at Auschwitz and other Nazi extermination camps were so egregious and deplorable that it was foreseen that their existence would be deemed preposterous by the globe. In anticipation of denial, the Allied military liberators of these camps captured their findings and the conditions of these camps via photographs, and more importantly, live film. Footage of the various camps was amalgamated into an official documentary report, *Nazi Concentration Camps*. Although its judicial evidentiary value has been questioned, *Nazi*

*Concentration Camps* captured an unprecedented horror; a horror so morally outrageous that the international community struggled to find an equitable manner in which to seek justice for its victims.

The legal struggle to prosecute the crimes of the Holocaust commenced with the Nuremberg trial of Nazi war criminals in 1943-1946. America persuaded the Allied powers that a criminal trial would be the most effective manner to hold Germany accountable for its crimes. Great Britain, France, the Soviet Union, and the United States collaborated to form the International Military Tribunal of Nuremberg, which undertook to establish international substantive and procedural law that would govern the prosecution of unprecedented war crimes. These struggles culminated in the creation of the Charter of the International Tribunal of Nuremberg, which established the novel international offence of crimes against humanity. The Nuremberg trial prosecuted the collective of German crimes perpetrated during World War II; it did not focus on the Holocaust in particular. The trial was perceived as tedious due to its length, complexity, and reliance on Nazi documents as credible evidence. Whilst eyewitness testimony would have provided a human dimension to the suffering imposed by Nazi atrocities, it was feared that the credibility of survivor testimony would be more readily diminished. In all, 24 defendants were tried, 18 were convicted and 12 were sentenced to death.<sup>1</sup>

The next trial of international significance commenced on April 11, 1961. Adolf Eichmann was brought to Jerusalem to stand trial for his involvement in the Holocaust after evading capture in Argentina for nearly two decades. When presented with the choice of immediate execution versus a criminal trial, Eichmann chose to be tried. The Eichmann trial was held before the District Court of Jerusalem, and he was tried under Israeli law. Unlike the International Military Tribunal Trial at Nuremberg and the subsequent Nuremberg proceedings, which relied extensively on written documents, the Eichmann Trial relied heavily on the testamentary evidence of survivors. Although it heightened awareness of the Holocaust, it failed to render justice with respect to the collective responsibility of Germany for the industrialized extermination of the European Jews.

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<sup>1</sup> Wikipedia, *sub verbo* "Nuremberg trials", online: < [https://en.wikipedia.org/wiki/Nuremberg\\_trials](https://en.wikipedia.org/wiki/Nuremberg_trials)>.

The Frankfurt Auschwitz Trial of 1963 was a major turning point for Holocaust survivors, war criminals, the German population and the international legal community. The Auschwitz trial cultivated international awareness of the complicity of the German population in the undertaking of the Final Solution, particularly in regard to the industrialized extermination executed at Auschwitz. By means of humiliation and guilt, Germany was compelled to confront the atrocities of its past, which led to the development of a distinct sense of contriteness. The trial may not have rendered criminal justice in the conventional sense; however, domestic and international courts are not equipped to render justice for the collective accountability for genocide. Nevertheless, the Auschwitz Trial sowed the seeds of a collective guilt, which has mitigated the possibility of a reoccurrence of state perpetrated genocide. This becomes readily apparent when contrasted to Croatia's failure to confront its past regarding the Second World War.

While Auschwitz has gained international recognition, Jasenovac registers with only a few. Jasenovac was the largest Yugoslav extermination camp built during the Second World War, and commonly referred to as the "Auschwitz of the Balkans". On April 16, 1941, Ante Pavelić declared himself Poglavnik (the Croatian equivalent to Führer) of the new formed Independent State of Croatia (NDH). Pavelić founded the Ustaša party, which ruled Croatia as a puppet of the Nazi regime. The Ustaše shared similar racial ideologies as the Nazis, including a desire to create a racially pure state through the extermination of all Serbs, Jews and Roma living within their borders. Thus, the Ustaše founded Jasenovac based on the Nazi model, and it is alleged that Ustaša cruelty and torture surpassed that of the Nazis. However, the genocide committed by the Ustaše was never prosecuted with the same zealousness nor did it they attain equivalent recognition as the Holocaust. Public recognition of the atrocities committed at Jasenovac has been suppressed by subsequent governments for numerous reasons. As a result of the failure to confront the Ustaša past, the tensions between the Serbian and Croatian ethnic groups intensified, serving as a precursor to the 1990s Yugoslav conflicts. The legacy of Jasenovac prompted the international legal community to mitigate the effects of yet another past circumvented, and thus, the International Criminal Tribunal for the former Yugoslavia emerged.

This paper seeks to examine how Auschwitz and Jasenovac have influenced international criminal law. The Auschwitz trial generated a sense of collective state guilt and accountability to the international forum; whereas the failure to recognize the atrocities committed at Jasenovac influenced the creation of the International Criminal Tribunal for the former Yugoslavia to ensure the prosecution of war criminals. A comparison of both emphasizes the importance of international participation in prosecuting crimes against humanity and seeking justice.

## **1. AUSCHWITZ**

### **A. A Symbol of Genocide**

The word Auschwitz is versatile. Auschwitz is a site of genocide, a museum, a cemetery, a symbol of the Holocaust, an educational institution, a town in Poland, a tourist attraction, and a location where multifaceted negotiations of identity and morality take place.<sup>2</sup> Although Auschwitz does not capture the entirety of the Nazi enterprise, it has come to represent the Holocaust in its wholeness. It is estimated that 1.1 million of the 1.3 million people that were interned at Auschwitz lost their lives within its confines.<sup>3</sup>

It's historical significance in the twentieth century relates to the immense concentration/extermination camp established in 1940 by the Nazi party that bordered the town of Auschwitz, Poland.<sup>4</sup> Originally erected as a detention centre for Polish prisoners, it expanded into a mass-extermination complex, encompassing three primary and more than forty satellite camps. Heinrich Himmler, Reich Commissioner for the Consolidation of the German Nation, commanded the redevelopment of the complex; it evolved from a concentration camp into an agricultural scientific experiment, which secured its permanency.<sup>5</sup> Financing for the project was obtained via a mutual agreement with chemical manufacturer, IG Farben; IG Farben would bear the cost of the expansion of the camp, and the Auschwitz camp would provide the labour to erect Farben's synthetic rubber plant and a new satellite camp, Birkenau.<sup>6</sup> In anticipation of the

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<sup>2</sup> Joanne Pettitt, "Introduction: New Perspectives on Auschwitz" (2021) 27:1 Holocaust Studies 1.

<sup>3</sup> *Ibid.*

<sup>4</sup> Robert Jan van Pelt, "Auschwitz" in Dinah L Shelton, ed, *Encyclopedia of Genocide and Crimes Against Humanity*, vol 1 (Michigan: Gale, 2005).

<sup>5</sup> Raul Hilberg, "Auschwitz and the Final Solution" in Yisrael Gutman & Michael Berenbaum, eds, *Anatomy of the Auschwitz Death Camp* (Indianapolis: Indiana University Press, 1994) 81.

<sup>6</sup> *Ibid.*

mortality of slave labourers, a crematorium was initially installed in 1940 with the ability to incinerate 340 corpses per day, however, in 1941 a new crematorium with the capacity to extinguish 1,440 corpses per day was commissioned.<sup>7</sup> Auschwitz-Birkenau's uniqueness as both an extermination camp and a vast labour complex rendered it "the jewel in their [Nazi] concentration camp crown."<sup>8</sup>

By July 1941, Hitler ordered the final solution of the Jewish problem - the physical extermination of all Jews.<sup>9</sup> In 1941, Auschwitz became a facility of genocide. The men, women and children deported to Auschwitz were gassed, starved, worked to death or subjected to lethal medical experiments.<sup>10</sup> The initial victims of the gas chambers were Soviet Communist party members; nevertheless, in 1942, Himmler began to contemplate the Auschwitz project as part of the Final Solution of the Jewish problem.<sup>11</sup> In 1942, Höss converted two cottages into gas chambers, and their efficiency prompted the architecture of four new crematoria that included sophisticated cyanide gas chambers.<sup>12</sup> These gas chambers would ultimately become death factories; the vast majority of Auschwitz prisoners were gassed in the chambers in Auschwitz II-Birkenau camp.<sup>13</sup>

Rail transports from all German-occupied countries arrived at Auschwitz. People were rounded up and crammed into freight or cattle wagons without food, water, toilets or seats.<sup>14</sup> The conditions, including a lack of ventilation, frequently resulted in multiple deaths due to suffocation or exposure to the elements during the journey.<sup>15</sup> The average transport was completed within four days; however, the longest transport during WWII was recorded at eighteen days, and all passengers were dead upon arrival.<sup>16</sup> Upon arrival at Auschwitz, the

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<sup>7</sup> *Ibid.*

<sup>8</sup> Karen Bartlett, *Architects of Death: The Family Who Engineered the Death Camps*, (New York: St. Martin's Press, 2018) at 119.

<sup>9</sup> Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: Viking, 1963).

<sup>10</sup> "Auschwitz: How Death Camp Became Centre of Nazi Holocaust", *BBC* (23 January 2020), online: <<https://www.bbc.com/news/world-europe-50743973>>.

<sup>11</sup> Hilberg, *supra* note 5.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Supra* note 10.

<sup>14</sup> *Ibid.*

<sup>15</sup> Wikipedia, *sub verbo* "holocaust trains", online: <[https://en.wikipedia.org/wiki/Holocaust\\_trains](https://en.wikipedia.org/wiki/Holocaust_trains)>.

<sup>16</sup> *Ibid.*

passengers were sorted into groups; “tens of thousands of slaves laboured in appalling hardship to drive forward the Nazi war effort, while hundreds of thousands of others experienced the camp for only a few moments, a few hours, before they were led straight to their deaths in the gas chambers.”<sup>17</sup> One survivor estimated that a mere 10-15% survived each transport.<sup>18</sup> Those destined for extermination were deceived into entering gas chambers disguised as showers under the premise that they were required to shower for delousing purposes.<sup>19</sup> Once sealed inside the chamber, the SS poured canisters of Zyklon B into openings in the chamber’s roof.<sup>20</sup> Death ensued by suffocation within approximately twenty minutes.<sup>21</sup> The bodies were incinerated; the crematoria at Birkenau could facilitate the incinerated of 20,000 bodies per day.<sup>22</sup>

Auschwitz housed both Jews and Non-Jewish prisoners. In its existence, the complex imprisoned Jews of numerous European nationalities, Roma, political prisoners and criminals.<sup>23</sup> Of all the prisoners, the Jews were subjected to the most egregious circumstances as the Nazi goal was extermination by any means feasible. Jews were methodically worked to death, and deprivation and hunger triggered homicidal conduct to survive.<sup>24</sup> Late-term abortions were performed on pregnant Jewish women, or their children were slaughtered at birth.<sup>25</sup> Between the period of May 1943 and January 1945, Dr. Josef Mengele performed pseudo-scientific medical experiments at Auschwitz, particularly on juvenile twins.<sup>26</sup> The experiments were heinous: injections of chemicals into the eyes; unknown injections into the spine without anesthesia; organ removal, castration, and amputations without anesthesia; and chloroform or phenol injections into the heart.<sup>27</sup> One twin was deliberately infected with a fatal disease, and once they succumbed to the disease, the other twin would be killed in order to compare post-mortem

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<sup>17</sup> Bartlett, *supra* note 8 at 117.

<sup>18</sup> Jeremy Dronfield, *The Boy Who Followed His Father into Auschwitz* (New York: Harper, 2020).

<sup>19</sup> *Supra* note 10.

<sup>20</sup> Daniel Keren, Jamie McCarthy and Harry W Mazal, “The Ruins of the Gas Chambers: A Forensic Investigation of Crematoriums at Auschwitz I and Auschwitz-Birkenau” (2004) 18:1 *Holo & Genoc Stud* 68.

<sup>21</sup> *Supra* note 10.

<sup>22</sup> Holocaust Trains, *supra* note 16.

<sup>23</sup> Bartlett, *supra* note 8.

<sup>24</sup> Dronfield, *supra* note 18.

<sup>25</sup> Bartlett, *supra* note 8.

<sup>26</sup> Jennifer Rosenberg, “A History of Mengele’s Gruesome Experiments on Twins”, *ThoughtCo.* (1 January 2021), online: <<https://www.thoughtco.com/mengeles-children-twins-of-auschwitz-1779486>>.

<sup>27</sup> *Ibid.*

examinations.<sup>28</sup> Prisoners attested that Mengele performed horrifying experiments for no medical purpose:

They had been sewn together like Siamese twins. The hunchback child was tied to the second one on the back and wrists. Mengele had sewn their vein together. The wounds were filthy and they festered. There was a powerful stench of gangrene. The children screamed all night long. Somehow their mother managed to get hold of morphine and put an end to their suffering.<sup>29</sup>

Survival within the camp was dependent on the work assigned, and survival could pay no heed to morality nor sin. Prisoners assigned *Sonderkommando* duties were responsible for removing valuables from the dead in the gas chambers and disposing of the corpses. “The Nazis fully exploited concentration camp and death camp inmates, even in death. Practices went far beyond the plunder of prisoners’ personal property or their use as slave labourers. Jews who were killed on arrival at Auschwitz were treated as raw material, their hair, bones, and teeth made of precious metals sold to enrich the Third Reich.”<sup>30</sup> Prisoners assigned to the *Reinkommando* were tasked with cleaning human hair and packaging it for shipment to manufacturers that would produce felt, yarn, fabric, stockings and socks.<sup>31</sup> Still other prisoners were forced to collect the fat that dripped from the bodies burned in pits in order that it could be used as fuel for the fires that would incinerate other bodies.<sup>32</sup> Those that survived immediate death upon arrival were stripped of their humanity, dignity, and for many their will to survive, by the conditions and administration of their hellish environment.

In an attempt to obliterate evidence of the atrocities committed at the camp, Nazis destroyed documents and records that could have established the number of victims.<sup>33</sup> Rudolf Höss, the former camp commandant, testified on various occasions, including before the International Military Tribunal at Nuremberg, that 3 million perished at Auschwitz.<sup>34</sup> The number of victims has been reassessed over the years, and estimates have been calculated on the basis of the

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<sup>28</sup> *Ibid.*

<sup>29</sup> Helena Kubica, “The Crimes of Josef Mengele” in Yisrael Gutman & Michael Berenbaum, eds, *Anatomy of the Auschwitz Death Camp* (Indianapolis: Indiana University Press, 1994) 317 at 324.

<sup>30</sup> Andrzej Strzelecki, “The Plunder of Victims and Their Corpses” in Yisrael Gutman & Michael Berenbaum, eds, *Anatomy of the Auschwitz Death Camp* (Indianapolis: Indiana University Press, 1994) 246 at 258.

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*

<sup>33</sup> Franciszek Piper, “The Number of Victims” in Yisrael Gutman & Michael Berenbaum, eds, *Anatomy of the Auschwitz Death Camp* (Indianapolis: Indiana University Press, 1994) 61.

<sup>34</sup> *Ibid.*

number of people deported, survivor testimonies and the operating capacity of the crematoria.<sup>35</sup> Historians estimate that approximately 1.1 million people were exterminated at Auschwitz.<sup>36</sup> The ultimate genocide of the Jewish people transpired at Auschwitz. Jewish nationals of twelve neighbouring European countries were deported to the camp, and it is estimated that a million Jewish men, women and children met their fates within the camp.<sup>37</sup>

The international community deemed Auschwitz a place of unprecedented horror. It is well-known that the Nazi genocide of the Jews did not occur exclusively at Auschwitz, however, Auschwitz was unique.

In 1941-1942 nearly 4 million Jewish men, women and children, mainly from eastern Europe, were murdered in places other than Auschwitz. All the same, Auschwitz was the apogee of extermination by the million, a place where the SS was constantly looking for ways to simplify the murder method, speed up the murder, and perfect the technical methods for hiding the evidence.<sup>38</sup>

In 1978, Auschwitz was designated a UNESCO world heritage site; it is the sole German concentration that has been afforded this recognition and protection.<sup>39</sup> “The status of Auschwitz as the epicenter of the Holocaust is institutionally preserved through its designation as a World Heritage site as well as through the singularity of its position on the list.”<sup>40</sup>

Auschwitz Birkenau, monument to the deliberate genocide of the Jews by the German Nazi regime and to the deaths of countless others, bears irrefutable evidence to one of the greatest crimes ever perpetrated against humanity. It is also a monument to the strength of the human spirit which in appalling conditions of adversity resisted the efforts of the German Nazi regime to suppress freedom and free thought and to wipe out whole races. The site is a key place of memory for the whole of humankind for the Holocaust, racist policies and barbarism; it is a place of our collective memory of this dark chapter in the history of humanity, of transmission to younger generations and a sign of warning of the many threats and tragic consequences of extreme ideologies and denial of human dignity.<sup>41</sup>

Survivor, Elie Wiesel, commemorated the 50<sup>th</sup> anniversary of the liberation of the camp by stating “After Auschwitz, the human condition is no longer the same. After Auschwitz, nothing

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<sup>35</sup> *Ibid.*

<sup>36</sup> Bartlett, *supra* note 8.

<sup>37</sup> Hilberg, *supra* note 5.

<sup>38</sup> Bartlett, *supra* note 8 at 142.

<sup>39</sup> Pettitt, *supra* note 2.

<sup>40</sup> *Ibid* at 2.

<sup>41</sup> *Ibid* at 2.



will ever be the same."<sup>42</sup> The central role of Auschwitz in the Jewish genocide will never be forgotten.

## **B. A Concerted Extermination Effort**

Throughout WWII, the Nazis operated in excess of 300 concentration camps across Europe.<sup>43</sup> Nazi atrocity was a State-Committed crime. "Genocide, murder, or any crime becomes anonymous when it is committed by the State. Nobody bears responsibility. Everybody shares it – those who by their presence maintain and support the administration, those who conceived the crime and those who ordained it, as well as he who issued the order."<sup>44</sup> Christopher Simpson asserts that genocide and mass torture are institutional or institutionalized crimes. They require the participation of a broad range of perpetrators, collaborators and bystanders: from concentration camp guards, police, university scholars, legal professionals, the judiciary, church and religious organizations, cultural leaders, public servants and the media.<sup>45</sup> Indisputably, there are more non-violent collaborators than murders.

There was a capitalist nature to the entire endeavour of Auschwitz.<sup>46</sup> As stated above, Big Business, including IG Farben played a crucial role in the construction and maintenance of Auschwitz; the camp provided a supply of workers to meet the demands of affiliated businesses. IG Farben directors were co-perpetrators to the offences committed at the camp; their business decisions were contingent on a supply of slaves, and they possessed awareness of the inhumane conditions of the camp. IG Farben was not the only commercial entity that proffered from Auschwitz. Topf and Sons were commissioned to construct the crematoria at Auschwitz, and all other SS extermination camps.<sup>47</sup> Bartlett argues that Topf and Sons was not the only business to

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<sup>42</sup> *Supra* note 10.

<sup>43</sup> Bartlett, *supra* note 8.

<sup>44</sup> Lawrence Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (London: Yale University Press, 2001) at 91.

<sup>45</sup> Christopher Simpson, "Jasenovac, the Ratlines, and the Early Cold War" in Barry M Lituchy, ed, *Jasenovac and the Holocaust in Yugoslavia: Analyses and Survivor Testimonies Presented at the First International Conference and Exhibition on the Jasenovac Concentration Camp* (New York: Jasenovac Research Institute, 2006) 98.

<sup>46</sup> Rebecca Wittman, *Beyond Justice: The Auschwitz Trial* (London: Harvard University Press, 2005).

<sup>47</sup> Bartlett, *supra* note 8.

service the Third Reich; “in that, they were like thousands of other technocrats, scientists, engineers, town planners, economists, doctors, and businessmen.”<sup>48</sup>

The plunder of victims and their corpses substantiates the cruelty of the Nazi regime, and supports the notion of greater awareness of Nazi crimes. Clothes, money, food, medicine, gold teeth, even hair were plundered from the dead, and salvaged for German use.<sup>49</sup> Warehouses were erected within Auschwitz to store the property seized from prisoners in order that it could be delivered to Germany.<sup>50</sup> “German men were shaving with Jewish razors, while good German mothers pushed Jewish prams and grandparents put on Jewish glasses to read newspapers about the war effort. In July 1944, 2,500 wristwatches were sent to the residents of Berlin who had suffered damage from Allied raid attacks.”<sup>51</sup>

The industrialized extermination that occurred in Auschwitz was explicitly committed by the SS, sustained by the affiliated commercial entities and implicitly condoned by various bystanders. The Auschwitz trials would provide an international forum to question their wilful blindness.

### **C. The Judgement of Auschwitz**

#### **i. Judgement Preceding the Auschwitz Trial**

Since the liberation of Auschwitz, only a small proportion of Nazi criminals have been tried for their involvement in the atrocities committed, and an even smaller proportion have been sentenced and/or served their respective sentences. Aleksandar Lasik estimates that a minimum of 6,500 SS men and women, prosecutable for war crimes and crimes against humanity, staffed Auschwitz between the years of 1940 and 1945.<sup>52</sup> Notably, this figure does not include the high-ranking SS officers responsible for the implementation of the Final Solution from afar.

The 1945 trial at Nuremberg marked a new era in human history. The four Allied powers, France, Russia, Britain and the America, collaborated to administer justice in the wake of WWII.

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<sup>48</sup> *Ibid* at 278.

<sup>49</sup> Strzelecki, *supra* note 30.

<sup>50</sup> Bartlett, *supra* note 8.

<sup>51</sup> *Ibid* at 128.

<sup>52</sup> Aleksandar Lasik, “Historical-Sociological Profile of the Auschwitz SS” in Yisrael Gutman & Michael Berenbaum, eds, *Anatomy of the Auschwitz Death Camp* (Indianapolis: Indiana University Press, 1994) 271.

An International Military Tribunal was struck to prosecute prominent members of the political, military, judicial, and economic administration of the Nazi party. Encumbered with substantive and procedural complexities, the court presided over eleven months in an attempt to prosecute unprecedented war crimes, including crimes against humanity and engaging in a common plan or conspiracy. The trial was perceived as tedious and unexciting.<sup>53</sup> Given the perceived illegitimacy of the WWI Leipzig Trials due to a lack of credible evidence, American Chief Prosecutor, Robert Jackson, insisted on the reliance of documentary evidence.<sup>54</sup> Jackson's concerns were well-founded on the premise that the unparalleled horror of Nazi activities would be dismissed as propaganda, particularly as the Nazis themselves trusted the allegations would be rejected as preposterous.<sup>55</sup> Auschwitz survivor, Primo Levi recounted the patronising taunt of the camp staff: "And even if some proof should remain and some of you survive, people will say that the events you describe are too monstrous to be believed; they will say that they are the exaggerations of Allied propaganda and will believe us, who will deny everything, and not you."<sup>56</sup> Hannah Arendt commented that the arrogance of the Nazis in Nuremberg was due to the inability of the international community to deal with "guilt that is beyond crime."<sup>57</sup> The screening of *Nazi Concentration Camps* was introduced to refute denial, and to provide insight to the magnitude of Nazi atrocities. However, the film did not distinguish between atrocities committed against Jewish people or other prisoners of war, nor did it substantiate the Final Solution. Most importantly, it did not discern the collective responsibility of Germany. Individuals were prosecuted for what was arguably state policy.<sup>58</sup> The Nuremberg trial prosecuted high-level officials for unprecedented war crimes and established international legal capability, yet it failed to depict Nazi atrocities in manner capable of involving collective accountability.

The Eichmann trial of 1961 revived interest in Nazi criminals and the Holocaust. Eichmann was prosecuted in the District Court of Jerusalem under Israeli law. Douglas reasons that it was the first and only international trial to focus exclusively on the crimes of the Holocaust.<sup>59</sup> "Whereas

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<sup>53</sup> Douglas, *supra* note 44.

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid* at 17.

<sup>57</sup> *Ibid* at 39.

<sup>58</sup> Christopher Burchard, "The Nuremberg Trial and its Impact on Germany" (2006) 4 J Int'l Crim Just 800.

<sup>59</sup> Douglas, *supra* note 44.

the witness at Nuremberg played a largely supplementary role to the evidence supplied by document, the opposite was the case in Jerusalem: documents were used to establish a tight criminal case against the accused, but it was the words of the survivors that provided the dramatic focus of the trial and that built a bridge from the accused to the 'world of ashes'."<sup>60</sup> The trial privileged survivor testimony, and thus, liberated survivors to share their truths. Testimonies were readily accepted for their substance; the defence did not reject the history of the Holocaust, it diverted attention from the crimes perpetrated to Eichmann's role in their commission.<sup>61</sup> Hannah Arendt contended that broadening the intent of a criminal trial to include historical and pedagogical purposes undermines its main purpose to render justice.<sup>62</sup> A trial of a single perpetrator in strict accordance with the governing legislation was incapable of rendering justice for the victims of the Holocaust, thus, it appears a futile argument. Deborah Lipstadt contends that the Eichmann trial raised Holocaust awareness in Israel, fortified the word "Holocaust" into global vocabulary, enhanced Holocaust studies, accelerated the German prosecution of Nazi criminals, and fortified universal jurisdiction over genocide.<sup>63</sup> If valid, Lipstadt's assertions furthered justice as they enhanced the sanctity of human life on an international platform. Additionally, it set the stage for a trial that focused solely on the Holocaust.

## ii. The German Attitude

In the aftermath of the war, German society was embodied with despair given defeat. The majority of Germans considered themselves victims, and negated responsibility for the crimes perpetrated against the Jews and others.<sup>64</sup> This defensive attitude led Western Germany to object to the legitimacy of the Nuremberg trial. It criticized the trial on the basis that it was no more than a victor's justice enforced by the Allies, and the individual culpability for the crimes established by the IMT was a violation of the principle of *nullum crimen sine lege*.<sup>65</sup> The IMT did not include judges from neutral states or Germany, biased judges were appointed solely by

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<sup>60</sup> *Ibid* at 104-5.

<sup>61</sup> *Ibid*.

<sup>62</sup> Arendt, *supra* note 9.

<sup>63</sup> Sheldon Kirshner, "The Eichmann Trial in Retrospect", *Canadian Jewish News* (18 August 2011).

<sup>64</sup> Reinhold Boschki, Bettina Reichmann & Wilhelm Schwendemann, "Education After and About Auschwitz in Germany: Towards a Theory of Remembrance in the European Context" (2010) 40 *Prospects* 133.

<sup>65</sup> Burchard, *supra* note 58.

the victor states. Furthermore, West Germany was resentful that the IMT did not consider *crimes of the Nazis against the German people*.<sup>66</sup> Many legal scholars argued the judgement of the IMT was objectionable as criminal law was applied retroactively, predominantly in regard to the crime of aggression.<sup>67</sup> Moreover, the destruction that the air raids effected on the German people left the Germans angered with the Allies, and uninterested in the prosecution of Nazis as their primary concern was to secure social security for their families.<sup>68</sup>

At the beginning of the 1950s there was a rising exhaustion of denazification, and an aspiration to draw a line under the past and focus on the future. In 1965, a German criminal lawyer wrote:

For years, most German citizens made all possible efforts to forget what happened in twelve ill-fated years. They made their gaps in memory systematic, and developed the handling of these generous gaps to perfection. That foreign countries neither could nor would forget as easily had to be taken note of from time to time, yet did little to disturb the inner-German silence. Already the term reconciliation with the past was becoming frowned on. Of collective responsibility, a responsibility of the German people (not collective guilt), nobody wanted to know.<sup>69</sup>

These observations were mirrored by public polls of the German population executed by the US Office of Military Government. For example, at the end of the trial only 9% of those polled believed the verdicts of the IMT were too harsh, yet by the early 1950s, the figure rose to 40%.<sup>70</sup> Generally, the West German public displayed a lack of remorse. Furthermore, Burchard argues that the German sense of self-victimization stemmed from feelings of betrayal by their political leaders who had led to them to defeat. “There was a feeling that they deserved punishment, not because they had persecuted minorities but because they had failed the majority.”<sup>71</sup> Others credit the Cold War for the repression of a confrontation with the Nazi past.<sup>72</sup> As the denazification of Germany ensued, many academics, longing to forget the past, returned to their previous roles,

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<sup>66</sup> *Ibid.*

<sup>67</sup> Burchard, *supra* note 58.

<sup>68</sup> Wittman, *supra* note 46.

<sup>69</sup> Burchard, *supra* note 58 at 812.

<sup>70</sup> Burchard, *supra* note 58 - During the trial, 87% of the German interviewees knew that the trial was taking place; 80% considered the proceedings fair; a majority deemed the defendants guilty and 70% thought that there were other German criminals who should be held accountable before a court of law. At the end of the trial, only 6% expressed negative or critical assessments, and only 9% regarded the verdicts as too harsh. These results were to change dramatically by the early 1950s, with two prominent trends. First, 30% now believed that the proceedings had been unfair and 40% that the verdicts had been too harsh. Second, only 10% said that they were satisfied with how the Allies dealt with the problem of war criminals, while 59% disapproved.

<sup>71</sup> Burchard, *supra* note 58 at 824.

<sup>72</sup> Boschki, *supra* note 64.

thus, the early 1960s provided no foundation for a productive confrontation of the Nazi past or issues surrounding the Holocaust, whether in educational institutions or at home.<sup>73</sup>

The Eichmann trial was officially opened on April 12, 1961, and it was the most important media event in Israel to date.<sup>74</sup> The unprecedented focus of the trial was on victim testimonies and the suffering of the Jewish people.<sup>75</sup> “The prosecution used the platform of the trial to tell the missing story of the Jewish Holocaust. For this purpose, it brought 112 witnesses who testified about the events of the Holocaust and Eichmann's involvement in coordinating and carrying out the Final Solution.”<sup>76</sup> The trial was a global event; the proceedings in the courtroom were filmed and broadcast internationally. The Eichmann trial created a sense of unease within the West German government; the government worried that Eichmann's testimony could incriminate prominent Nazis serving as West German politicians or government agents.<sup>77</sup> “The German government's behavior in the Eichmann affair reveals a mentality which goes a long way toward explaining why Nazi war crimes were not pursued energetically in the early years of the Federal Republic. Damage control, particularly in the case of Eichmann, was seen as much more important.”<sup>78</sup> German scholars, Werner Bergman and Rainer Erb, reported that a survey concluded that 95% of Germans were aware of the trial, and 67% were in favour of a severe sentence.<sup>79</sup> Toby Axelrod asserts that up until the Eichmann trial, many Germans had dismissed the limited written accounts of the Holocaust as biased, however, the broadcasts of the trial confronted the public ignorance, and young Germans questioned the wartime generation.<sup>80</sup> Following the Eichmann trial, it was reported by Sydney Gruson of the New York Times that the sense of shame amongst the German population was widespread, nevertheless, only a few

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<sup>73</sup> *Ibid.*

<sup>74</sup> Douglas, *supra* note 44.

<sup>75</sup> Leora Bilsky, “The Eichmann Trial” in Dinnah Shelton, ed, *Encyclopedia of Genocide and Crimes Against Humanity* (Michigan: Gale, 2005), online: <<https://go-gale.com.ezproxy.library.ubc.ca/ps/i.do?p=GVRL&u=ubcolumbia&id=GALE%7CCX3434600110&v=2.1&it=r&sid=suomon>>.

<sup>76</sup> Burchard, *supra* note 58 at 812.

<sup>77</sup> German Watch, “The Eichmann Trial – German Image Management” (10 September 2011), *German Watch* (blog), online: <<https://germanywatch.blogspot.com/2011/09/eichmann-trial-german-image-management.html>>.

<sup>78</sup> *Ibid.*

<sup>79</sup> Toby Axelrod, “How Eichmann Trial and TV Changed Perceptions of Holocaust”, *Jewish Standard* (22 April 2011), online: <<https://jewishstandard.timesofisrael.com/how-eichmann-trial-and-tv-changed-perceptions-of-holocaust/>>.

<sup>80</sup> *Ibid.*

Germans experienced personal guilt for the crimes of the Nazis.<sup>81</sup> The Eichmann trial put Germany one step closer to confrontation, however, the shifting German attitude reflected that it was an issue that could no longer be ignored, and the Auschwitz trial was arranged in the hope of providing a means to an end.

### iii. The Frankfurt Auschwitz Trial

Attorney General Fritz Bauer envisioned that the Auschwitz trial would be an event of great significance; “the trial was to put the entire ‘Auschwitz complex’ before the court, both the ‘small men’ who had carried out the ‘Final Solution’ and those who had created the measures, policies, and laws that had given the Holocaust an air of legality.”<sup>82</sup> It was intended to compel Germany’s confrontation with the Nazi past.

The Auschwitz trial took place in Frankfurt am Main opening in December 1963. The defendants were tried under the German Penal Code, often referred to as the StGB. German criminal law differs from Anglo-American law on three primary facets: it is an inquisitorial system; the court is predominantly responsible for assembling the evidence and deciding the course of the trial; lastly, hearsay is permissible evidence.<sup>83</sup> The German penal code was codified in 1871, and it remained the basis of criminal law throughout the reign of the Third Reich.<sup>84</sup> Appreciably, it was amended in March 1954 to codify the criminality of genocide; however, due to the principle of *nullum crimen sine lege*, codified in the German Constitution, it was inapplicable to the prosecution of Nazi perpetrators.<sup>85</sup> Thus, the sole accessible punishable offences were murder and manslaughter as per the StGB. In regard to the characterization of an offence, the StGB necessitates the existence of an offence, the unlawfulness of the offence, and the guilt of the offender.<sup>86</sup> Analogous to Anglo-American law, a criminal offence is comprised of two essential components, the *actus reus* and *mens rea*; however, the StGB requires subjective intent and motive, which cannot be substituted by negligence in any context. The General Part of

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<sup>81</sup> Sydney Gruson, “Eichmann: Impact on Germany”, *New York Times* (16 April 1961) E4.

<sup>82</sup> Wittman, *supra* note 46 at 2.

<sup>83</sup> Wittman, *supra* note 46.

<sup>84</sup> *Ibid.*

<sup>85</sup> Wittman, *supra* note 46.

<sup>86</sup> *Ibid.*

the StGB qualifies parties to an offence, formulating a distinction between principal perpetrators and co-perpetrators/accomplices.<sup>87</sup>

In relation to murder, paragraph 211 of the German penal code reads as follows:

- 1) The murderer shall be punished by imprisonment for life
- 2) A murderer is anyone who kills a human being: from a lust for killing, to satisfy his sexual drives, from covetousness or other base motives, treacherously, cruelly, or by means endangering the community or in order to facilitate or conceal another crime.<sup>88</sup>

As stated, specific motive is an essential component for murder. “The attempt to define motive, however, as a subjective inner disposition such as sadism or sexual desire, is unique to the German criminal code and considerably narrows the spectrum of criminal behaviour that the prosecution can validly try as murder.”<sup>89</sup> With respect to the Auschwitz trial, the court interpreted “base motives” as race hatred, anti-Semitism, or a sense of entitlement to take others’ lives into one’s hands.<sup>90</sup> This particular requisite precluded findings of murder as it was challenging for the prosecution to prove. For example, an Auschwitz guard claiming to have merely acted upon orders would not possess the necessary base motives for murder, as it was practically unfeasible to prove the guard’s anti-Semitism. Moreover, the court held that treacherous behaviour denoted killing a victim that was both defenseless and harmless, yet defenselessness did not apply to prisoners of war.<sup>91</sup> Cruelty was applicable to “excess perpetrators”, nonetheless, “the mere mass-liquidation of victims was not considered cruel treatment by the courts.”<sup>92</sup> The level of participation in murder was determined by an individual’s initiative in committing the act. A perpetrator is someone who possesses an individual will to commit an offence, whereas an accomplice merely commits an offence.<sup>93</sup> The notion of a causal nexus between motive (will) and conduct impeded findings of guilt as guilt was dependent on an individual’s subjective disposition in Auschwitz.<sup>94</sup> The “individual

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<sup>87</sup> *Ibid.*

<sup>88</sup> *Ibid* at 62.

<sup>89</sup> *Ibid* at 44.

<sup>90</sup> *Ibid.*

<sup>91</sup> *Ibid.*

<sup>92</sup> *Ibid* at 46.

<sup>93</sup> *Ibid.*

<sup>94</sup> Devin O Pendas, *The Frankfurt Auschwitz Trial, 1963-1965: Genocide, History, and the Limits of the Law* (New York: Cambridge University Press, 2006).



initiation” clause was employed very liberally throughout the proceedings; those who acted on orders were rarely found to have the requisite intention to kill as a perpetrator.<sup>95</sup> Yet, in typical criminal proceedings, the German court was not as liberal with the application of the clause.<sup>96</sup>

German procedural law posed further hurdles. Pursuant to Paragraph 67 of the Penal Code, the statute of limitations for offences punishable by a life sentence was twenty years, and for offences subject to imprisonment for ten or more years it was ten years.<sup>97</sup> Application of this provision barred the prosecution for manslaughter related to crimes perpetrated during the operation of Auschwitz after 1960. Furthermore, the prosecution for murder would be barred in 1965. In the late 1950s and early 1960s German Parliament initiated debate concerning the inherent issues of prosecuting Nazi crimes.<sup>98</sup> On March 25, 1965, an act was passed that declared the period from May 1945 to December 1949 to be immune from statutory limitation; however, the new legislation could not be applied retroactively, and thus the ability to prosecute manslaughter expired.<sup>99</sup> Only in 1979 did Nazi offences become exceptions to German statutory limitations.<sup>100</sup>

The presiding judge was Hans Hofmeyer.<sup>101</sup> During the Third Reich, he served as a military judge; however, there was no evidence to suggest that he participated in any overtly abhorrent interests during the war.<sup>102</sup> Given that only experienced judges were permitted to preside over serious matters, including Nazi trials, the majority of the judiciary had entered their professional careers during the Nazi era.<sup>103</sup> In turn, numerous judges presiding over Nazi criminal trials had been active legal professionals during the Third Reich.<sup>104</sup>

The inherent limitations of the StGB allowed for the conviction of only seven of the twenty defendants for the perpetration of murder.<sup>105</sup> On August 19, 1965, the court convicted six

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<sup>95</sup> Wittman, *supra* note 46.

<sup>96</sup> *Ibid.*

<sup>97</sup> *Ibid.*

<sup>98</sup> *Ibid.*

<sup>99</sup> *Ibid.*

<sup>100</sup> *Ibid.*

<sup>101</sup> Pendas, *supra* note 94.

<sup>102</sup> *Ibid.*

<sup>103</sup> *Ibid.*

<sup>104</sup> *Ibid.*

<sup>105</sup> Wittman, *supra* note 46.

defendants of murder, one of “collective” murder as per the juvenile code, ten of aiding and abetting murder, and three defendants were acquitted.<sup>106</sup> Yet, of the ten defendants convicted of aiding and abetting, four were immediately released and one was subsequently acquitted.<sup>107</sup> This is dismal considering that of the 6,500 SS members employed at Auschwitz, only 29 were ultimately sentenced between various trials.<sup>108</sup>

#### **iv. The German Awakening: The Past Cannot Lie Any Longer**

When the Frankfurt Auschwitz trial began in December 1963, it marked the beginning of a new era. Under the leadership of Konrad Adenauer, the first postwar chancellor of West Germany, Germans abided by the motto “Let the past lie”.<sup>109</sup> For the eighteen years of Adenauer’s reign it was distasteful to mention Nazi atrocities, particularly in the realm of the justice system.<sup>110</sup> Hannah Arendt contended that the German attitude towards its past was laissez-faire and Germans were heedless to the presence of murderers amongst them as they did not intend to commit murder of their own will.<sup>111</sup> Germans did not self-identify with Nazi perpetrators.

For Attorney General Fritz Bauer, the objective of the trial was pedagogical in nature.<sup>112</sup> During the proceedings, he asserted:

One of the most important tasks of this trial is not only to present the horrendous facts [of the Final Solution], but also actually to teach ourselves something, that we here in Germany have completely forgotten in the course of the last one hundred years.... You must worship God more than human beings.... That’s why it is the be all and the end all of this trial, to say: “You should have said no.” I think that in Germany we must all recognize that there are limits that everyone sees and feels. Watch out for your fellow men, such things cannot happen again, you must not go along with it!... And if something is to be learned from this trial, then it is the meaning of the fight for equality, which must be taken seriously, the meaning of tolerance, care and recognition, and the understanding that hate...leads to such things as Auschwitz.<sup>113</sup>

During the proceedings, the prosecution presented evidence that challenged the deep-rooted beliefs of the German population. Contrary to the assumption that the totalitarian terror of the

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<sup>106</sup> *Ibid.*

<sup>107</sup> *Ibid.*

<sup>108</sup> Volker Wagener, “Auschwitz Trial Ensured That Germany Would Never Forget”, *DW* (18 August 2015), online: <<https://www.dw.com/en/auschwitz-trial-ensured-that-germany-would-never-forget/a-18654790>>.

<sup>109</sup> Boschki, *supra* note 64.

<sup>110</sup> *Ibid.*

<sup>111</sup> Wittman, *supra* note 46.

<sup>112</sup> Pendas, *supra* note 94.

<sup>113</sup> Wittman, *supra* note 46 at 65.

Third Reich extended to SS personnel, evidence presented undermined the claim that the refusal to murder as per higher orders was subjectable to internal SS punishment.<sup>114</sup> “In more than the ten years of research focused particularly on the history of the SS and related police organizations, this expert witness has not found one case that resulted in ‘damage to life and limb’ when an SS officer refused to carry out an ‘annihilation order.’ On the contrary, the results of my research show that when refusal to obey an order became known, neither was there an investigation by SS police courts nor was any other serious form of punishment considered.”<sup>115</sup> There was more autonomy than previously believed.

The trial reconstructed an image of Auschwitz for the German people that had yet to exist. The trial participants visited the camp in December 1964.<sup>116</sup> I would argue that the official examination of Auschwitz repudiated the air of reality reservation that plagued Germans and others globally due to the unprecedented nature of industrialized extermination. It furthered the objective of the *Nazi Concentration Camp* documentary. However, in this instance the validation and corroboration of evidence was derived by the German judiciary and legal professionals rather than the controversial Allied powers. The German people were confronted with the truths they longed to disregard.<sup>117</sup> It forced Germany to acknowledge that Nazi trials, albeit imperfect were legitimate; they were not a source of victor’s justice, as presumed at Nuremberg, or a mere platform for a show trial of narratives that survivors could not clearly express, as presumed at the Eichmann proceedings.

Although, the trials of Nazi criminals focused on individual responsibility rather than collective responsibility, the evidence presented at the Auschwitz Trial confirmed the collaboration of the greater German public. As discussed above, the operation and sustainability of Auschwitz was dependent on a concerted effort, which encompassed the SS, German corporations, family-run businesses, and many facets of government and public agencies. The source of goods distributed to the German population had been exposed; Germans had the remnants of the Auschwitz victims in their homes. Ralph Giordano coined this period, the "second guilt": the acknowledgment of the failure of the German justice system to deal with the complexity of the

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<sup>114</sup> *Ibid.*

<sup>115</sup> *Ibid* at 81.

<sup>116</sup> Pendas, *supra* note 94.

<sup>117</sup> Wagener, *supra* note 108.

nation's crimes.<sup>118</sup> “Although it is certainly necessary to differentiate between degrees of criminality, the Germans who were complicit in the Nazi regime must not be confused with those who suffered under it. It is a simple and brutal reality that it was Germany, not the Nazi party, who started the war and industrialized genocide. To forget or suppress this fact denies a historical truth. Yet, exactly this view was, to some extent, fostered by the individualization of criminal guilt in Nuremberg. The major war criminals were made to shoulder the responsibility of the German people as a whole; they were objects for the transfer of guilt.”<sup>119</sup> The concerted effort of Auschwitz was revealed to the globe.

The Frankfurt Auschwitz trial consumed the media between 1963 and 1965.<sup>120</sup> A poll of the German population in June 1964 reported that 40% of Germans had not followed the trial via the media.<sup>121</sup> In contrast, a survey in July 1964 indicated that 83% of the German population were aware of the Auschwitz trial and 42% possessed knowledge that it was situated in Frankfurt.<sup>122</sup> At the beginning of 1965, it was reported by the *Institut für Demoskopie (Public Opinion Research Centre)* that 57% of the German population objected to additional Nazi trials.<sup>123</sup> It also important to note that the subset of the population that reported that they were explicitly opposed to the Auschwitz trial was comprised of those that had come of age under the Third Reich and fought for Hitler.<sup>124</sup> Moreover, they were distressed that the Auschwitz Trial had damaged the reputation of the German population on an international front.<sup>125</sup> This does not support a presumption of indifference on behalf of Germany rather it purports a general sense of embarrassment and guilt.

The Auschwitz Trial engaged the German population in the question of how the Holocaust could be addressed in a sustainable way. Boschki argues that it became evident that education would serve as a key preventative measure to prospective anti-Semitism.<sup>126</sup> In 1960 and 1962, the German Ministry of Education adopted curricula inclusive of its Nazi past in all educational

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<sup>118</sup> Boschki, *supra* note 64.

<sup>119</sup> Burchard, *supra* note 58 at 824.

<sup>120</sup> Pendas, *supra* note 94.

<sup>121</sup> *Ibid.*

<sup>122</sup> *Ibid.*

<sup>123</sup> *Ibid.*

<sup>124</sup> *Ibid.*

<sup>125</sup> *Ibid.*

<sup>126</sup> Boschki, *supra* note 64.

institutions.<sup>127</sup> Social studies “during the 1960s and 1970s adopted several empirical approaches to study the degree of historical understanding and awareness of, as well as attitudes towards, National Socialism and the Holocaust.”<sup>128</sup> The truths of the Auschwitz Trial shaped this shift in German history as the narratives of victims are one of the primary sources of history.<sup>129</sup> The shift in German attitude could not be driven by foreign sources, it needed to come from within.

## **2. JASENOVAC AND THE YUGOSLAV HOLOCAUST**

### **A. Jasenovac: The Auschwitz of the Balkans**

Although concentration camps are primarily associated with the Nazi regime during World War II, concentration and extermination camps existed outside of German-occupied European nations.<sup>130</sup> Amongst those camp was Jasenovac, a concentration and extermination camp established in 1941 on the banks of the Sava River approximately one hundred kilometres south of Zagreb, Croatia.<sup>131</sup> Alike to Auschwitz, Jasenovac was comprised of a complex of satellite camps, including agricultural farms, which spanned 240 square kilometres.<sup>132</sup>

Jasenovac was established and governed by the Ustaša Party of the Independent State of Croatia (NDH), which controlled wartime Croatia under the presidency of Ante Pavelić. World War II provided an opportunity for the Ustaše to attempt to establish an independent Croatia, and from 1941 onward, Greater Croatia became a genocidal dictatorship.<sup>133</sup> The Independent State of Croatia was an ally of the Nazi German regime, and the Ustaše endeavoured to assist the Nazis in ethnically cleansing the territory of Jews, Serbs and Roma.<sup>134</sup> Huber, a former president of the Jasenovac survivors’ organization, alleges that the Ustaše’s management of Jews and Roma was derived from Nazi Germany, whereas the persecution of Serbs was the outcome of a “domestic racism” unique to Croatia.<sup>135</sup> Pavelić was an acquaintance of both Hitler and Mussolini, and he

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<sup>127</sup> *Ibid.*

<sup>128</sup> *Ibid.*

<sup>129</sup> *Ibid.*

<sup>130</sup> Roger W Byard, “Jasenovac” (2021) 61:1 *Med, Sci & L* 55.

<sup>131</sup> *Ibid.*

<sup>132</sup> Jasenovac Research Institute, “What was Jasenovac”, online: <<https://jasenovac.org/what-was-jasenovac/>>.

<sup>133</sup> Samuel Totten & Paul R Bartrop, *Dictionary of Genocide, Volume 1:A-L* (London: Greenwood Press, 2008).

<sup>134</sup> Mirjana N Radovanov Mataric, Book Review of *The Smell of Human Flesh: A Witness of the Holocaust* by Cadik I Danon, (2013) 27:1 *J of the N Amer Society for Serbian Stud* 167.

<sup>135</sup> Lisa M Adeli, *From Jasenovac to Yugoslavism: Ethnic Persecution in Croatia During World War II* (Michigan: UMI, 2004).

shared the same fascist and racist ideologies.<sup>136</sup> As Hitler endeavoured to create an Aryan state, Pavelić strove to create a “purely Croatian area for living” and a “pure Croat nation”.<sup>137</sup> Serbs were persecuted for being racially and religiously distinct from Croats, and the Jews and Roma were to be completely exterminated as they were considered lower races.<sup>138</sup> At the beginning of 1941, Pavelić ordered Vjekoslav Luburic to pay an official visit to Germany, during which he visited numerous German concentration camps.<sup>139</sup> Upon his return to the NDH, he re-organized existing camps, and established new camps modelled after those in Germany, including Jasenovac.<sup>140</sup>

Similar to the Auschwitz, the prisoners of Jasenovac lived under extremely brutal conditions: an inadequate diet, wretched accommodations, and physical cruelty.<sup>141</sup> However, it is alleged that atrocities that occurred within the confines of Jasenovac were exceedingly egregious in comparison to Auschwitz. “Unlike the German camps where industrialized genocide was conducted, in Jasenovac that genocide was done in a way never recorded in the history of the human race.”<sup>142</sup> The Nazis has employed methods that required minimal contact between victim and executioner, such as firing squads or gas chambers, whereas the Ustaše availed themselves of personal, sadistic, and perverse methods of prolonged torture of their victims.<sup>143</sup> In his book, *The Smell of Human Flesh: A Witness of the Holocaust*, survivor Cadik Danon recounts how two hundred children of various ages were killed with a simple carpenter’s hammer, one by one, and thrown into a pit, which he was forced to dig and conceal.<sup>144</sup> Among the inmate punishments cited was to bind a naked inmate to a pole and to continuously pour water on them in the winter,

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<sup>136</sup> Thomas Popovich, “The Primary Sources on the Persecution of Minorities in the Independent State of Croatia 1941-1945” in Barry M Lituchy, ed, *Jasenovac and the Holocaust in Yugoslavia: Analyses and Survivor Testimonies Presented at the First International Conference and Exhibition on the Jasenovac Concentration Camp* (New York: Jasenovac Research Institute, 2006) 89.

<sup>137</sup> Jasenovac Research Institute, *supra* note 129.

<sup>138</sup> *Ibid.*

<sup>139</sup> *Ibid.*

<sup>140</sup> *Ibid.*

<sup>141</sup> Raphael Israeli, *The Death Camps of Croatia: Visions and Revisions, 1941-1945* (New Jersey: Transaction, 2013) at 127.

<sup>142</sup> Jasenovac Research Institute, *supra* note 129.

<sup>143</sup> Mataric, *supra* note 131.

<sup>144</sup> *Ibid.*

until the inmate froze to death.<sup>145</sup> Other heinous methods of killing and torture were describe in Zivanovic's expert report, some of which were:

- Some of the victims were given "special treatment" by nailing them alive to trees, using long masonry nails. They were then left to die slowly as they bled and went mad from excruciating pain, reminiscent of the Roman crucifixion mode of punishment, in which Jesus Christ, the adored icon of the fervently Catholic Ustasas, had himself perished.
- Many victims were stabbed in the chest, or had their throats slashed by knives, or had their eye balls extracted from their sockets by their executors. Many pregnant women were stabbed in their stomachs and the fetuses were extracted from their wombs, only to be also stabbed, while their mothers' breasts were cut ruthlessly.
- In Jasenovac there was a huge furnace, named Picili's Furnace, where victims were thrown alive and burned. That was the Ustasha version of the Nazi crematoria, with the difference that the latter took in bodies of the gassed victims, while in Jasenovac the furnace at once filled the two functions of killing and burning.
- Unlike Nazi Germany, which lumped men, women, and children together for annihilation in gas chambers and then in crematoria, the Ustasha established a special camp for children. Most atrociously, Catholic nuns, or others who pretended to be such, who in other occupied countries often risked their lives to rescue Jewish children, were here instruments of extermination; they murdered the kids under their surveillance, including those who cried at night or could not control their bowel function. They would take small children by their legs and crush their fragile heads against the wall until death. This horror could not be verified or certified twenty years after the war when the report was written, but it was described in detail by survivors.<sup>146</sup>

The Nazis were astounded by the cruelty exhibited by the Ustaše in Jasenovac. Hitler's representative in Zagreb, General von Horstenau, recorded in his personal diary that Jasenovac was the epitome of horror, and Arthur Hefner, a Reich transport officer, wrote that Jasenovac was one of the most horrific camps, which could only be compared to Dante's Inferno.<sup>147</sup>

The Ustaše were endorsed by the Catholic clergy. It is purported that Ustaša authorities were assisted by Catholic priests in organizing "the systematic murder of Orthodox priests, the burning of many Orthodox churches, and the forced baptisms of Serbs into the Catholic faith" during the war.<sup>148</sup> This assistance extended into the administration and operations of Jasenovac. It has been suggested that the massacre of Serbs was sanctioned by the Croatian Catholic Church as a means to advance Catholicism by eradicating the members of the Orthodox Church.<sup>149</sup> Catholic clergymen held prominent positions within the Jasenovac administration, most notably, the ruthless Catholic monk Miroslav Filipović-Majstorović, who served as the camp director.<sup>150</sup>

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<sup>145</sup> Israeli, *supra* note 138.

<sup>146</sup> Israeli, *supra* note 138 at 136-7.

<sup>147</sup> Jasenovac Research Institute, *supra* note 129.

<sup>148</sup> Adeli, *supra* note 132 at 42.

<sup>149</sup> *Ibid.*

<sup>150</sup> *Ibid.*

Even the highest Catholic leadership condoned ethnic cleansing. Ivan Šarić, the Roman Catholic Archdiocese of Vrhbosna (Sarajevo), publicly supported the Ustaše and genocide as a means of creating national unity.<sup>151</sup> Nevertheless, the most controversial figure was Archbishop of Zagreb Alojzije Stepinac, the most prominent Catholic official in the NDH. Stepinac fully endorsed the leadership of Ante Pavelić and the Ustaša party.<sup>152</sup> Although his endorsement of the genocide is unclear and remains a topic of debate, it is evident that his focus on expanding Catholicism in Croatia caused his wilful blindness to the atrocities committed by the Ustaše.<sup>153</sup> Susan Zocotti contends that his ambivalence was reflective of the attitude of the Vatican, which cannot be excused for its failure to intervene:

The argument was made after the war to justify the papal silence with regard to the Germans, but it did not apply to the Croats. The Ustasha fanatics who were tormenting Jews and Serbs were practicing Catholics. Some of them might have been beyond the reach of moderating influences at the time, but not all. The Church leadership in Rome should at least have tried.<sup>154</sup>

The estimate of victims killed at Jasenovac varies from a hundred thousand to one million.<sup>155</sup> Generally, it is believed to be in the realm of 700,000.<sup>156</sup> Of the victims, it is estimated that 25% were children, 25% were women and 10% were elderly.<sup>157</sup> The majority of the victims were Serbs, approximately 25,000 were Jews and at least 30,000 were Roma.<sup>158</sup> It is alleged that all Jews within the state of Yugoslavia were sent to Jasenovac up until 1942, after which Croatian Jews were deported to Auschwitz for extermination.<sup>159</sup> Cadik Danon alleges that 82,000 Jews had lived in Yugoslavia in 1941, and a mere 18% remained by 1945.<sup>160</sup> A 1946 report of the National Commission for the Crimes of Occupying Forces and their Collaborators, prepared for the International Commission of War Crimes, concluded that an exact number of victims would never be feasible, yet based on survivor testimony and evidence, it could be ascertained that

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<sup>151</sup> *Ibid.*

<sup>152</sup> *Ibid.*

<sup>153</sup> *Ibid.*

<sup>154</sup> Adeli, *supra* note 132 at 127.

<sup>155</sup> Israeli, *supra* note 138.

<sup>156</sup> Antun Miletić, "Establishing the Number of Persons Killed in the Jasenovac Concentration Camp 1941-1945" in Barry M Lituchy, ed, *Jasenovac and the Holocaust in Yugoslavia: Analyses and Survivor Testimonies Presented at the First International Conference and Exhibition on the Jasenovac Concentration Camp* (New York: Jasenovac Research Institute, 2006) 3.

<sup>157</sup> *Ibid.*

<sup>158</sup> Jasenovac Research Institute, *supra* note 129.

<sup>159</sup> Israeli, *supra* note 138.

<sup>160</sup> *Ibid.*



Jasenovac claimed the lives of 500,000 and 600,000 people.<sup>161</sup> Re-evaluation and analysis of the number of victims continues.<sup>162</sup> Irrespective of the exact figure, it can be ascertained that genocide took place on the soil of Jasenovac.

In April 1945, the Ustaša blew up the infrastructure of the camp and killed the majority of the remaining inmates in order to destroy any evidence the approaching Partisans would have happened upon.<sup>163</sup> The liberators discovered simply ruins, ash, smoke and corpses.<sup>164</sup> In 1965, a monument was erected, followed by a memorial museum and the designation of Jasenovac Memorial Park.<sup>165</sup> During the Civil War in the 1990s, the entire Jasenovac complex was levelled to the ground, and the only standing structure is the commemorative stone flower that was erected in 1965.<sup>166</sup> There remains no signs of the atrocities committed on that soil.

### **B. A Failure to Remember Jasenovac**

Since the liberation of the camp in 1945, public recognition of the atrocities committed at Jasenovac has been suppressed by governments and institutions for numerous reasons.<sup>167</sup>

Following World War II, Yugoslavia was reunited into a single state under a communist regime led by Josip Broz Tito. Tito endeavored to rid Yugoslavia of ethnic politics and used all available means to attain his goal.<sup>168</sup> His vision was coined “Yugoslavism, the ideal of uniting the various South Slavic peoples (i.e. Serbs, Croats, Slovenes, Bosnian Muslims, and others) into one political entity, and national particularism, and curtailing the aspiration of many of those same peoples to establish separate national states.”<sup>169</sup> The controversy of Jasenovac had no place in reuniting Yugoslavia.

Under the communist regime, the number of victims of Jasenovac was amalgamated into a total number of war casualties, including military and civilian war fatalities. The deliberate

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<sup>161</sup> *Ibid.*

<sup>162</sup> Byard, *supra* note 127.

<sup>163</sup> Israeli, *supra* note 138.

<sup>164</sup> Jasenovac Research Institute, *supra* note 129.

<sup>165</sup> *Ibid.*

<sup>166</sup> *Ibid.*

<sup>167</sup> *Ibid.*

<sup>168</sup> Totten, *supra* note 133.

<sup>169</sup> Adeli, *supra* note 132.

presentation of a single figure sought to repress interethnic enmity.<sup>170</sup> “In the name of ‘Bratstvo i Jedinstvo’ (Brotherhood and Unity), and for a variety of other reasons, Tito’s Yugoslavia failed to come to grips with the legacy of Jasenovac and the Holocaust. It failed to denazify the country. It failed to force Croats, Muslims and Albanians and other collaborators to face their crimes in way that would allow the peoples to really achieve ‘Bratstvo i Jedinstvo’”.<sup>171</sup>

Prior to Tito’s death in 1980, all precursors of ethnopolitics were subjugated by the state. Communism was Yugoslavia’s substitution to confrontation of its past; it bandaged a gaping wound that never healed.<sup>172</sup> Yugoslav historians refrained from conducting a scholarly investigation of the persecution in wartime Croatia in fear of violating Tito’s directives by aggravating divisive tendencies. Therefore, during Communist rule, all historical accounts refrained from mentioning domestic ethnic persecution: victims of the war were all amalgamated into the category “victims of Nazi terror”.<sup>173</sup> In 1964, Professor Živanović, an anthropologist and coroner, was involved in the exhumation of Jasenovac victims when it was abruptly barred by Tito under the rationale that ‘Bratstvo i Jedinstvo’ of the Yugoslav people should not be disturbed.<sup>174</sup>

Alike to the Nazis, numerous Ustaše vanished underground or fled to other countries following World War II. It is alleged that they were assisted by the Roman Catholic Church.<sup>175</sup> Data concerning the trials of Ustaše under Titoism is not readily available, particularly in the English language. Slavko Kvaternik, commander-in-chief of the armed forces of the NDH, and Mile Budak, NDH’s Minister of Education and Faith, were tried and executed as war criminals.<sup>176</sup> Budak was tried along with other members of the NDH government for high treason and war

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<sup>170</sup> Israeli, *supra* note 138.

<sup>171</sup> Barry M Lituchy, ed, *Jasenovac and the Holocaust in Yugoslavia: Analyses and Survivor Testimonies Presented at the First International Conference and Exhibition on the Jasenovac Concentration Camp* (New York: Jasenovac Research Institute, 2006) at liii.

<sup>172</sup> *Ibid.*

<sup>173</sup> Adeli, *supra* note 132 at 127.

<sup>174</sup> Vladimir Umeljič, “The Jasenovac Concentration Camp and Croatia Today: Distortion, Trivialization and Denial. The Balkan Version of the Auschwitz Lie” in Barry M Lituchy, ed, *Jasenovac and the Holocaust in Yugoslavia: Analyses and Survivor Testimonies Presented at the First International Conference and Exhibition on the Jasenovac Concentration Camp* (New York: Jasenovac Research Institute, 2006) 112.

<sup>175</sup> Guy Dinmore, “Croatia Confronting Past as Nazi Ally” *Chicago Tribune* (19 June 1998), online: <<https://www.chicagotribune.com/news/ct-xpm-1998-06-19-9806190162-story.html>>.

<sup>176</sup> Marko Attila Hoare, “Genocide in the Former Yugoslavia Before and After Communism” (2010) 62:7 *Eur-Asia Stud* 1193.

crimes on June 6, 1945 before the Military Court of the Second Yugoslav Army. He was executed the following day.<sup>177</sup> Slavko Kvaternik was tried for war crimes at the 7<sup>th</sup> Yugoslav Trial, which took place between May 29, 1947 and June 7, 1947; he was executed on June 7, 1947.<sup>178</sup> Ante Pavelić lived out his life without restraint until his death in 1959 in a Spanish hospital.<sup>179</sup> Vjekoslav Luburić, commander-in-chief of all the NDH concentration camps, relocated to Spain following the war; he never stood trial.<sup>180</sup> Dinko Šakić, the former commander of Jasenovac, lived freely in Argentina for over fifty years until at long last he was arrested and extradited to Croatia in 1998. On October 4, 1999, a Croatian court found him guilty of crimes against civilians and the personal executions of four inmates and sentenced him to a twenty-year imprisonment term.<sup>181</sup> The prosecution alleged they lacked the grounds to indict Šakić with acts of genocide as he yielded no power over the selection of people to be imprisoned in Jasenovac.<sup>182</sup> His lack of remorse was unmistakably evident:

I am proud of what I did and would do it again. Jasenovac was a legal institution based on law, where all those proved to have worked for the destruction of the Croatian state, and who had been dangerous for public order and safety, were interned. Considering the duration and population of the camp, the death rate was natural and normal. If we shot people, we did it on the basis of the law. There are no states in the world that don't have prisons and camps, and somebody has to perform this thankless duty. I regret that we hadn't done all that is imputed to us, for, had we done that then, today Croatia would not have had problems. There wouldn't have been people to write these lies.<sup>183</sup>

At Šakić's funeral, a Catholic priest addressed the mourners and asserted that "Šakić was a member of the Ustaše who 're-established the Croatian state' in 1941, a reason why 'every decent Croat should be proud of Šakić's name.'"<sup>184</sup> To date, he was one of very few Nazi collaborator in Eastern Europe that were convicted and punished.

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<sup>177</sup> Wikipedia, *sub verbo* "Mile Budak", online: <[https://en.wikipedia.org/wiki/Trial\\_of\\_Mile\\_Budak](https://en.wikipedia.org/wiki/Trial_of_Mile_Budak)>.

<sup>178</sup> Jewish Virtual Library, "Nazi War Crimes Trials: Collaborators Trial (May 29 – June 7, 1947)", online: <<https://www.jewishvirtuallibrary.org/collaborators-trial-may-june-1947>>.

<sup>179</sup> Wikipedia, *sub verbo* "Ante Pavelic", online: <[https://en.wikipedia.org/wiki/Ante\\_Pavelić#Initial\\_exile\\_and\\_trial](https://en.wikipedia.org/wiki/Ante_Pavelić#Initial_exile_and_trial)>.

<sup>180</sup> Wikipedia, *sub verbo* "Vjekoslav Luburic", online: <[https://military.wikia.org/wiki/Vjekoslav\\_Luburić](https://military.wikia.org/wiki/Vjekoslav_Luburić)>.

<sup>181</sup> Sven Milekic, "No Remorse: A Croatian WWII Camp Commander on Trial" *Balkan Transitional Justice* (19 June 2018), online: <<https://balkaninsight.com/2018/06/19/no-remorse-a-croatian-wwii-camp-commander-on-trial-06-14-2018/>>.

<sup>182</sup> *Ibid.*

<sup>183</sup> Wikipedia, *sub verbo* "Dinko Sakic", online: <[https://en.wikipedia.org/wiki/Dinko\\_Šakić](https://en.wikipedia.org/wiki/Dinko_Šakić)>.

<sup>184</sup> Milekic, *supra* note 178.

Prior to commencement of the Yugoslav War in 1991, the Croatian authorities reduced funding of the Jasenovac Memorial Park and declared the region a protected area. Shortly after an ethnic dispute arose concerning the park; in September 1991, the Croatian Army entered the park by force in violation of the Hague Convention on the protection of historical and cultural monuments. Prior to the liberation of the park by Serbian forces on October 8, 1991, the Croats used explosives to destroy graves, artifacts and the bridge.<sup>185</sup> The protection afforded to Auschwitz did not extend to Jasenovac.

### **C. A Past that Does Not Pass**

The experiences of the Holocaust and Jasenovac affected the citizens of Yugoslavia: it influenced their beliefs and sentiments, which persisted long after World War II. Some harboured resentment towards the Catholic Church of Croatia and the Vatican in regard to their failure to distance themselves from the atrocities committed during World War II and the absence of an apology to the Serbs, Jews and Roma.<sup>186</sup> The results and the reactions to the genocide perpetrated by the Ustaše has had far-reaching ramifications; the suppression of the confrontation of the Ustaša past fueled tensions that culminated in the 1990 Yugoslav war.<sup>187</sup>

The remembrance of Jasenovac differs between the ethnic sides: “the Croats tend to minimize the disaster and to include all Croatian victims of war, not just the victims of the Ustaša at the camp; the Serbs and some Jews describe Jasenovac as the focus of evil, where hundreds of thousands of Serbs and tens of thousands of others were murdered in a process of ethnic cleansing.”<sup>188</sup> The notion that hundreds of thousands of Serbs were killed at Jasenovac came to represent a crucial element in explanations in relation to Serb-Croat affairs.<sup>189</sup> Ozren Žunec contends that Serbs used an inflated number of victims in preparation for future political action, and Hoepken contends that prominent political figures in Serbia promoted a version of national

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<sup>185</sup> Jasenovac Research Institute, *supra* note 129.

<sup>186</sup> Eta Najfeld, “My Eyewitness Account of the Persecution of Serbs and Jews in Croatia, 1941-1945” in Barry M Lituchy, ed, *Jasenovac and the Holocaust in Yugoslavia: Analyses and Survivor Testimonies Presented at the First International Conference and Exhibition on the Jasenovac Concentration Camp* (New York: Jasenovac Research Institute, 2006)130.

<sup>187</sup> Adeli, *supra* note 132.

<sup>188</sup> Israeli, *supra* note 138.

<sup>189</sup> Stipe Odak & Andriana Benčić, “Jasenovac – A Past That Does Not Pass: The Presence of Jasenovac in Croatian and Serbian Collective Memory of Conflict” (2016) 30:4 East Euro Pol & Societ & Cul 805.

identity based on the notion that Serbs were recurring victims, under the threat of genocide.<sup>190</sup> Croatians considered assertions of this nature insinuations that they were collectively responsible for the atrocities committed by the Ustaša regime.<sup>191</sup> In the late 1980s, Franjo Tudman (later President of Croatia) released a book, in which he alludes that Jasenovac was a myth. This was interpreted as a denial of the genocide of Serbs by the Ustaše.<sup>192</sup> Tudman also proposed that the figure of six million Jewish victims of the Holocaust was an overestimate.<sup>193</sup> The new Croatian state, established in 1991, added insult to injury by the reintroduction of Ustaša symbols, laws and constitutions.<sup>194</sup> The kuna, the former Ustaše currency, was resurrected, members of rightist parties resumed the old fascist salute at rallies and Jewish cemeteries have been defiled.<sup>195</sup> The past of World War II became the present of the 1990s conflicts.

Josip Sopta, a priest and historian, contends that the failure of Communists to publicly acknowledge the realistic number of Ustaša victims and the related atrocities was the leading precipitating factor to the wars in the 1990s.<sup>196</sup> “That lack of readiness to come to terms with the past, he claims, provoked a desire for revenge.”<sup>197</sup> “In July 1999, the Republic of Croatia filed before the ICJ in The Hague, the “application of the Convention on the Prevention and Punishment of the Crime of genocide (Croatia v. Serbia)” accusing the Federal Republic of Yugoslavia represented by the Republic of Serbia as its legal successor, for violations of the 1948 *Convention on the Prevention and Punishment of the Crime of Genocide*. In 2010, Serbia presented a *Rejoinder* against Croatia for breaches of the same convention.”<sup>198</sup> With respect to both states, the breaches were alleged to have occurred during the conflicts that took place between 1991 and 1995. The topic of Jasenovac emerged at numerous points in their respective arguments; it has been instrumentalized for propaganda purposes and the provoking of endless debates.<sup>199</sup>

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<sup>190</sup> *Ibid.*

<sup>191</sup> *Ibid.*

<sup>192</sup> *Ibid.*

<sup>193</sup> Hoare, *supra* note 173.

<sup>194</sup> Najfeld, *supra* note 183.

<sup>195</sup> Dinmore, *supra* note 172.

<sup>196</sup> Odak, *supra* note 186.

<sup>197</sup> *Ibid* at 818.

<sup>198</sup> Odak, *supra* note 186 at 813.

<sup>199</sup> *Ibid.*

The dissolution of the former Yugoslavia did not leave the past in the past. Jasenovac continues to occupy a role in Serbian and Croatian relations. At the 1997 International Conference and Exhibition on the Jasenovac Concentration Camps held in London, Aleksandar Mošić conceded that the case of Jasenovac had not yet been denazified; he alleged in order to restore ethnic relations, recognition of the victims and their suffering was necessary.<sup>200</sup> As recently as 2016, Stipe Odak and Andriana Bencić wrote:

The symbolic strength of Jasenovac in the collective memory of Serbs and Croats is apparent because it appears as a regular reference (in a more or less explicit manner) when other mass atrocities and sufferings that took place in their respective territories from WWII onwards are interpreted. Although historically distanced by seventy years, the events surrounding Jasenovac are still constantly recurring in both political and private, official and unofficial, spheres of life, functioning as a specific symbol around which narratives of ethnic, national, and religious understanding as well as inter-group conflicts are thought and constructed.”<sup>201</sup>

Further support that the past continues to influence the politics of Croatia was produced in a 2020 report to MYPLACE.<sup>202</sup>

There is no end in sight for the use of Jasenovac as a provocative instrument of contention between the Serbs and Croats. The suffering persists. At one point, a commemorative plaque at Jasenovac listed the names of those exterminated, however, by April 2006 the Croats had replaced the plaque with a marble plate that contains mere information concerning the site.<sup>203</sup> In 2020, Serbian producer, Predrag Antonijević, released a new feature film “Dara of Jasenovac”, which portrays the experience of Jasenovac from the perspective of a young Serbian girl. The film has been heavily criticized for being anti-Croatian, anti-Catholic Serbian nationalist propaganda.<sup>204</sup> It appears the past has yet to rest.

### 3. THE LEGACIES: AUSCHWITZ AS OPPOSED TO JASENOVAC

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<sup>200</sup> Aleksandar Mošić, “Discussant Comments on the First Session Papers” in Barry M Lituchy, ed, *Jasenovac and the Holocaust in Yugoslavia: Analyses and Survivor Testimonies Presented at the First International Conference and Exhibition on the Jasenovac Concentration Camp* (New York: Jasenovac Research Institute, 2006) 23.

<sup>201</sup> Odak, *supra* note 186.

<sup>202</sup> *Ibid.*

<sup>203</sup> Israeli, *supra* note 138.

<sup>204</sup> Rory Yeomans, “Controversial Serbian Holocaust Film Isn’t Anti-Croat Propaganda”, *Balkan Transitional Justice* (16 February 2021), online: <<https://balkaninsight.com/2021/02/16/controversial-serbian-holocaust-film-isnt-anti-croat-propaganda/>>.

Rebecca Wittmann argues that although the Auschwitz Trial created enhanced public awareness of the reality of Auschwitz, it offered a misleading portrayal of Nazi responsibility. It failed to delineate the complicit behaviour of the collaborators, including the public, which allowed Nazism to flourish. Furthermore, she contends that the use of the German penal code was welcomed by the German public as it differentiated the individual German from the Nazi criminals on trial; the provisions concerning intent and motive coined the convicted Nazis as atypical monsters, distinguishable from the ordinary citizen. Thus, the trial did little in terms of delivering justice for the victims of the Holocaust.<sup>205</sup> Devon Pendas also contends that the trial failed to portray the true nature of the Holocaust as a “total social event” and a genocide, nonetheless, this was hardly surprising given the limitations of the German law itself.<sup>206</sup> Furthermore, he suggests that the determination of success versus failure is dependent on whose terms govern evaluation of the results.<sup>207</sup>

I would concede with Wittman and Pendas in terms of the fact that German criminal law was not well equipped, substantively nor procedurally, to deal with genocide. Yet, I would argue that the Auschwitz Trial sowed the seeds of a sense of collective shame and guilt amongst the German population that led Germany to take slow steps to confront its past and ensure that the state would never reoffend. Germany’s actions have influenced the international forum of criminal law.

Germany’s Holocaust legislation grew from this collective shame and guilt. The German Penal Code lacked any specific provision aimed at punishing the so-called Auschwitz lie until 1994.<sup>208</sup> In 1985, legislation was enacted in Germany prohibiting the denial of the extermination of the Jews; however, the law was subsequently strengthened in 1994, 2005, and 2015.<sup>209</sup> An individual who publicly endorses, repudiates, or minimizes the genocide against the Jews is guilty of an offence that carries a maximum penalty of five years imprisonment.<sup>210</sup> “The dissemination of

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<sup>205</sup> Wittman, *supra* note 46.

<sup>206</sup> Pendas, *supra* note 94.

<sup>207</sup> *Ibid.*

<sup>208</sup> Laurent Pech, “The Law of Holocaust Denial in Europe” in Ludovic Hennebel & Thomas Hochmann, *Genocide Denials and the Law* (London: Oxford University Press, 2011) 185.

<sup>209</sup> *Ibid.*

<sup>210</sup> Klaus Dahmann, “No Room for Holocaust Denial in Germany”, *DW* (23 December 2005), online: <<https://www.dw.com/en/no-room-for-holocaust-denial-in-germany/a-1833619>>.

these kinds of ‘historical facts’ is punishable as a criminal offence in Germany. This is because in Germany it was recognized a long time ago that the ‘Auschwitz Lie’ is not only blasphemy, and a deep insult to Holocaust victims, but more importantly it prepares the spirit for a repetition of the same crimes.”<sup>211</sup> France followed suit in 1990 with the enactment of the Gayssot Law. The Gayssot law criminalizes the public renunciation of one or more “crimes against humanity” as defined and ruled on, essentially, by the International Military Tribunal of Nuremberg in 1945-1946. The offence carries a maximum one-year imprisonment term and a maximum fine of €45,000. In addition, the offender may be liable for damages to Jewish and other associations and may be responsible for incurring the costs related to the publication of the decision.<sup>212</sup> Other European nations have adopted similar positions regarding the Holocaust denial. Revisionism has extended into the international arena, and the European Court of Human Rights has labeled the Holocaust an established historical fact, permitting infringement on the freedom of expression in circumstances of Holocaust denial.<sup>213</sup> “With respect to Holocaust denial, however, the court has come to adopt a very restrictive stance: freedom of expression does not protect a freedom to deny “clearly established historical facts.” As a result, Holocaust deniers have been unable to rely on Article 10 ECHR to challenge national criminal convictions.”<sup>214</sup> The last few decades have encompassed a shift in denial law from a hate speech approach to precise ad hoc statutes prohibiting denial in the international legal body.<sup>215</sup>

A broader international consensus condemning genocide denial is necessary. The denial of the Jasenovac genocide is a blatant example of a state’s rejection of its own past. The “Jasenovac Lie” has played a prominent and active role in the Serbian-Croatian ethnic relations. Tito’s Yugoslavia suppressed the recognition of the NDH perpetrated genocide, and the silence created incomprehension and deep-rooted resentment, rather than the unity and brotherhood Tito

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<sup>211</sup> Vladimir Umeljčić “The Jasenovac Concentration Camp and Croatia Today: Distortion, Trivialization and Denial. The Balkan Version of the “Auschwitz Lie” in Barry M Lituchy, ed, *Jasenovac and the Holocaust in Yugoslavia: Analyses and Survivor Testimonies Presented at the First International Conference and Exhibition on the Jasenovac Concentration Camp* (New York: Jasenovac Research Institute, 2006) 112 at 117.

<sup>212</sup> Jessie Aitken, “Understanding the Gayssot Law”, *Jailing Opinions*; online: <<http://www.jailingopinions.com/gayssotlaw.html>>.

<sup>213</sup> Pech, *supra* note 208.

<sup>214</sup> *Ibid* at 210.

<sup>215</sup> Martin Imbleau, “Denial of the Holocaust, Genocide, and the Crimes Against Humanity” in Ludovic Hennebel & Thomas Hochmann, *Genocide Denials and the Law* (London: Oxford University Press, 2011) 235.



envisioned.<sup>216</sup> Eventually, a central government was no longer powerful enough to unite the diverse, emotionally charged ethnic states, and the Yugoslav Civil War commenced in 1991. In the aftermath of the 1990s Balkan Wars, the United Nations established the International Criminal Tribunal of the former Yugoslavia.

It is alleged that the ICTY failed in educating the former Yugoslav populations regarding war crimes committed during the division of the nation.<sup>217</sup> “The ICTY has had little progressive effect on Serb political leaders, parties, institutional change, or society, due primarily to the staying power of traditional Serb nationalism. This nationalistic perspective views the Serbs as victims and most outsiders, including the ICTY, as the victimizers.”<sup>218</sup> This should serve as a lesson to the international legal community; the Serbian perspective will remain impenetrable until the truth of the past, including Jasenovac, is recognized.

#### 4. CONCLUSION

*When the present does not recognize the wrongs of the past, the future takes its revenge. For that reason, we must never, never turn away from the opportunity of confronting history together – the opportunity to right a historical wrong.*

*Governor General, Michaëlle Jean*

The Holocaust has had a remarkable impact on the field of international criminal law. Auschwitz has come to represent the Holocaust, and it is used as the reference point for unprecedented war crimes, including genocide and crimes against humanity. Domestic and

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<sup>216</sup> Wittman, *supra* note 46 at 195.

<sup>217</sup> Mark A Wolfgram, “Didactic War Crimes Trials and External Legal Culture: The Cases of the Nuremberg, Frankfurt Auschwitz, and Majdanek Trials in West Germany” (2014) 26:3 Glob Change, Peac & Secur 281.

<sup>218</sup> *Ibid* at 284.

international legal forums have come under attack when crimes of such magnitude are unable to render conventional justice. Many scholars oppose embracing trials for pedagogical purpose. Nonetheless, pedagogy elicits legislative changes, which have an accumulative effect on justice.

The Auschwitz Trial's function could not be limited to fact finding of Nazi offences. The truth of the Nazi genocide of the Jews could not be established in a vacuum, it's recognition as a judicial truth was dependent on the acknowledgement of the German industrialized genocide, which was portrayed through the truths of Auschwitz. In comparison to prior Nazi proceedings, Germans were more apt to accept the trial as fair as it was conducted under German law and a German judiciary. The dialogue that emerged following the Auschwitz Trial supported the education of the German nation. Education was not memorizing that Hitler killed 6 million Jews, rather it was comprehending how the German public was convinced that the Holocaust was necessary, and thus, endorsed the Nazi regime through explicit conduct or wilful blindness. The confrontation of the past is a requisite to sustaining peace. Germany paved the path for the international criminalization of the repudiation of genocide; a denial so charged that it immortalizes tensions and conflicts.

A failure to confront the past fuels vengeance, and vengeance will be perpetuated indefinitely until the truth is recognized. The former Yugoslavia serves as an example. The suppression of the truth of Jasenovac and the Ustaša regime has fueled ethnic tensions since the end of the Second World War. The failure to confront the Ustaša past ignited a civil war over four decades later. The resentment and anger between the Serbs and Croats served both as a precursor to the 1990s war and a justification for the actions taken by both sides during the war. Evidence concerning the Ustaša genocide was presented at numerous trials heard before the UN sanctioned International Criminal Tribunal for the former Yugoslavia; the ICTY sought to hold accountable those that perpetrated war crimes during the 1990s, and to contribute to lasting peace between the former Yugoslav nations. The international legal community recognized the cumulative effects of suppressing the "Yugoslav Holocaust" during the Second World War.

Genocide is an offence that necessitates recognition to allow the past to lie in the past.

