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**Forgetting the unforgivable:  
Amnesties following the Algerian  
war of independence  
(1962-2012)**

LAILA FATHI

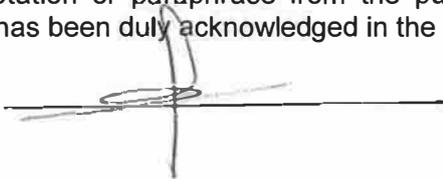
Thesis submitted for the degree of  
PhD

2016

School of Law  
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## Abstract

This thesis investigates the amnesty process in France between 1962 and 2012, following the Algerian War of Independence. The research focuses on two questions. First, what was the role of the amnesties in the context of the Algerian war? Second how do amnesties affect the prospect of post-transitional justice?

This thesis contends that the impact of amnesty legislations is both integral and reactive to political dynamics of post-conflict transformation. Through the use of historical archives as well as semi-structured interviews, this thesis reaches the following conclusions. Firstly it suggests that understanding the role of amnesty laws during political transformations requires looking beyond traditional approaches of accountability in post-conflict settings. Second, the symbolical dimensions of the French amnesty and their evolution over time emphasises the interactive dynamics between transitional justice mechanisms and aspirations of political transformation. In the case of France, these interactions are enters in competition with ideas and representations of the past held by social and political actors. The amnesty process has been an important feature of the political reconstruction of France and notably of restoration of national cohesion. It is also a nexus for contentious politics. Since the 1990s the emergence of a social movement rallying victims, human rights activists and researchers challenge the official narrative on the conflict endorsed by the amnesty. It focuses on two major actions: disclosing the past of those responsible for the crimes, but who were never prosecuted nor disqualified from playing a role in the colonial repression, and the official recognition of forgotten episodes of the conflict through the creation of alternative initiatives of commemoration.

Beyond the French case, this thesis addresses issue of contemporary demands for accountability and the role of legal institutions in managing conflicting interpretations of the past. Examining this role helps reach a better understanding of how amnesty legislation evolves overtime and how they affect the outcomes of post-transitional justice.

# Glossary

C.A	Cour d'Appel
C.A.C	Centre des Archives Contemporaines
Cass.Crim	Chambre Criminelle Court de Cassation Cons.
Const	Conseil Constitutionnel
E.C.H.R	European Convention of Human Rights
E.Ct.H.R	European Court of Human Rights
F.I.D.H	Fédération Internationale des droits de l'Homme
F.L.N	Front de Libération Nationale
G.A.P.R	Gouvernement Algerien Provisoire
J.O.F.R	Journal Officiel de la République Française
L.D.H	Ligue des Droits de l'Homme
N.C. Pen.	Nouveau Code Pénal
O.A.S	Organisation Armée Secrete
T.G.I	Tribunal de Grande Instance

# Chapter 1

## Introduction

Using France's evolutionary response to the Algerian War (1954–1962) as a contemporary case study, this thesis examines the impact of amnesty laws on the politics of memory of conflict.

'Peace of memories rests on the knowledge and disclosure of the past,' said French President François Hollande in his presidential address to the Algerian Parliament on 20 December 2012.<sup>1</sup> With these words, President Hollande inaugurated the commemoration of the Fiftieth Anniversary of the end of the war on the independence of Algeria (1954-1962) under the sign of appeasement. For decades France and Algeria had disputed the legacy of the conflict; social and political tensions exacerbated a sentiment of unfinished business. The significance of this political address is that it marks a distinct break from the previous attitude towards one of the most violent conflicts in France's history. The Algerian War, as it is commonly called, was the theatre of a brutal confrontation between the French army and a nationalist Algerian movement over the independence of Algeria from France's colonial dominion. Unlike traditional conflict, the Algerian war opposed the French army against a people fighting for the recognition of their right of self-determination and the end of the colonial rule. The means used by France to quell the Algerian insurrection extended beyond the traditional borders of legality. However, at the time France was not 'at war' with Algeria. Officially, the army had been sent to reinforce police operations to restore order and quell an insurrectional terrorist movement. The French army, granted police powers, developed a counterinsurgency strategy based on torture, rape and assassination of opponents. After the war, the grant of amnesties sought to close the Algerian chapter. Indeed, the grant of amnesties, both to the Algerian fighters and the French who fought to maintain Algeria as French, facilitated the peace negotiations and helped French society to move on from the trauma of the war. Decades later, the absence of legal proceedings and the political silence

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<sup>1</sup> Allocution Devant les Deux Chambres Réunies du Parlement Algérien 'Devoir de Vérité sur la Violence, les Injustices, les Massacres, la Torture' available at:

<http://www.elysee.fr/declarations/article/allocution-devant-les-deux-chambres-reunies-du-parlement-algerien/> [last accessed 13 December 2013]

'Il est nécessaire que les historiens aient accès aux archives', 'la paix des mémoires repose sur la connaissance et la divulgation de l'histoire' [author's translation].

around the use of torture by the French army gave the impression that the war was to remain a denied *event*, and its darkest episodes better-off forgotten.

For decades the acts perpetrated by the French army and the French colons during the War on the Independence of Algeria were not discussed publicly. It took the interest of historians and journalist to open this dark period of French history. The silence was often attributed to a political willingness to turn the page. Yet the Algerian War has had an important impact on the political transformation of France and came to affect the *sacrosanct* republican ideal of the unity of the French Nation. It split French opinion over the question of the legitimacy of the French operations and led to the termination of the Fourth Republic in 1958. The issue of torture itself has deeply divided French society.

Since the 1990s, dealing with the Algerian past has undergone a quiet but significant transformation. This has been the outcome of a combination of two important factors. First, the official recognition of the Algerian war on October 18, 1999, by the National Assembly<sup>2</sup> and the liberalisation of the archives. Consequently, the wider public and historian were getting more interested in this period of French history that was until then inaccessible. The production of works of investigative history notably triggered an intense debate about the methods used by the French army and the degree of the violence unleashed against Algerian nationalists. While some of these debates catalysed official gestures of recognition, the persistence of the amnesties still prevented the possibility of investigating and prosecuting past violations. To this day, France's approach towards the Algerian past is characterised by a range of distinct and unstructured processes. Journalists and historians attempted to further the recognition process by publicly disclosing information that was until then inaccessible to the public. The courts did not sanction these efforts and despite signs showing the readiness of French society to revise its history, France has yet to develop a comprehensive strategy to address the issue of past violence.

My interest in conducting research on the Algerian War as a case study to understand the impact of amnesty laws was initially aroused by the contradictory impression of, on the one hand, an general public 'obsession' for the French Algerian past and, on the other hand, the absence of formal process of revision of the French colonial past. I was struck by the persistence of use of amnesty laws enacted during the colonial period as a

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<sup>2</sup> Loi n° 99-882, relative à la substitution, à l'expression 'aux opérations effectuées en Afrique du Nord', de l'expression 'à la guerre d'Algérie ou aux combats en Tunisie et au Maroc' parue au "Assemblée, Débats" 11 June 1999, 5710-33, ( hereafter Law 99-882).

growing number of consolidated democracies engage in reviewing the violence of past regimes. The prevalence of using international and domestic courts to deal with issues of revision of past crimes led me to consider that the struggles over the memory of past crimes are also largely located in the sphere of justice.

This introductory chapter will firstly identify the general objectives of this thesis. Secondly, it will state the main research questions and present the arguments developed. Thirdly, it will outline the structure of the research. Finally, it will discuss the methodological approaches adopted in conducting the research.

## I. Why the Amnesty Laws?

The concept of amnesty generally refers to a formal and defined measure by which convictions and punishments for particular offences may be avoided or extinguished. France has a long history in granting amnesties that can be traced back to the Revolution. It subscribes to the exercise of sovereign power and has been used as a political instrument to facilitate national reconciliation after serious political crisis. Historian Stéphane Gacon explains that amnesty laws form part of a ‘codified game that punctuates French history’.<sup>3</sup> His work on the use of amnesties in France from 1830 to 1986 led him to contend that amnesty ‘are an expected moment in the ritual progression of the conflict, be it political, social, religious or regional’.<sup>4</sup>

There has been a rich academic debate on the granting of amnesties in the aftermath of a conflict and the meaning of such measure. The term ‘amnesty’ itself derives from the Greek word ‘*amnestia*’-meaning forgetting-and embeds connotations of both clemency and forgetting past acts. Amnesty’s kinship to forgetting can be traced in history. The treaty of Westphalia (1648), for example, obligated its signatories to ‘perpetual oblivion and amnesty’ regarding offences perpetrated during the Thirty Years War.<sup>5</sup> In the French tradition, the idea of forgetting was developed as a form of forgiveness. The notion of forgiveness, generally seen as the overcoming of hate, revenge and anger, holds strong religious connotations.

In post-conflict settings, amnesties have long been used to alleviate tensions found in the social body destroyed by a civil war, to recreate a sense of solidarity and unity between

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<sup>3</sup> Stéphane Gacon, *L’Amnistie de la Commune à la Guerre d’Algérie* (Edition du Seuil 2002), 356.

<sup>4</sup> Ibid, 357.

<sup>5</sup> Bardo Fassbender, Westphalia, Peace of (1648), Max Planck Encyclopedia of Public International Law [MPEPIL], February 2011.

the members of the society.<sup>6</sup> Ruti Teitel, pioneer in the field of transitional justice, usefully refers to amnesty in such contexts as ‘transitional amnesties’.<sup>7</sup> She notably contends that amnesty has an instrumental character that offers potential to advance political transformation.<sup>8</sup> Yet, many of the authors who focus on the use of amnesties have highlighted the challenge for a post-conflict society to relate the act of forgiveness to the notion of justice. Mark Freeman aptly explains, if it is accepted that amnesty may deal with issues related to the transition of a society to peace they are not a transitional mechanism.<sup>9</sup> He notably underlines that amnesty is a transitional justice issue. However, to him amnesty cannot be considered a transitional justice mechanism. To Freeman, amnesty is paradox of justice, where is that where it can form an integral element of a transitional process and also constitute a “direct impediment to transitional justice, especially to the holding of criminal trials”.<sup>10</sup>

This paradox notably highlights that while much has been said about the role of amnesty laws to solve conflict, a gap in the literature is evident. It concerns the relation between amnesty laws and the emergence of demands for justice after the transition is completed. The literature review that follows is organised into three sections. It begins with a discussion of amnesty within the paradigm of transitional justice. It then considers the present status of the scholarship, and finally, it identifies the gaps that this thesis aims to address.

## II. **Amnesty and the Discourses of transitional justice**

Transitional justice is a field of enquiry that specifically studies ideas and practices related to the way in which societies face past abuses. It analyses how societies undergoing a political transformation address the issue of violations perpetrated by or during the precedent regimes.<sup>11</sup>

Within the context of societies in transition, the grant of an amnesty is not a straightforward proposition or process. Amnesties generally results from a political

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<sup>6</sup> Andreas O’Shea, *Amnesty for Crime in International Law and Practice* (Springer, Netherland, 2002), 35.

<sup>7</sup> Ruti G. Teitel, *Transitional Justice*, (Oxford University Press, 2002) 55.

<sup>8</sup> *Ibid*, 56.

<sup>9</sup> Mark Freeman *Necessary Evils: amnesties and the search for justice*. (Cambridge; New york: Cambridge University Press, 2010),19.

<sup>10</sup> *Ibid*, 19.

<sup>11</sup> Arthur Paige, 'How ‘Transitions’ Reshaped Human Rights: A Conceptual History of Transitional Justice' [2009] 31(2) Human Rights Quarterly 359.

bargain that may be negotiated between the opposing parties to the conflict. The introduction of amnesty as part of a reconciliation process raise the question its role in contributing to – or conflicting with – achieving an effective and sustainable reconciliation.

In the 1990s, this question gained prominence as a first generation of scholars addressed the ‘peace versus justice dilemma’.<sup>12</sup> More widely, these discussions relate to the thorny conflict between retributive and restorative approach to justice.<sup>13</sup> As regimes attempt to overcome past violences through the use of retributive mechanisms, societies are asked to draw a thick line under the past. Indeed criminal trials, seek to facilitate the transition and promise that will end once those responsible for the crimes are punished. On the other hand, non-retributive mechanisms of justice seek to invest in the rehabilitation of the offenders and their reintegration in society. Yet within these debates authors have generally focused attention to the effectiveness of international law in enforcing a state’s duty to prosecute.<sup>14</sup> Claire Moon notably stresses that early literature on transitional justice is based on an ‘entirely dualised way of thinking about issues central to transitional justice’.<sup>15</sup> More recently this dualised conceptualisation of justice paved way for more practical approaches.<sup>16</sup> Authors highlight that the transitional justice paradigm is not able to resolve fundamental questions on the nature of transition itself.<sup>17</sup> Past approaches unpacked the issue of post-conflict resolution in terms of opposed dichotomies: truth versus justice, restoration versus retribution, peace versus justice. As

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<sup>12</sup> For a historical view of Amnesty in Latin American see Naomi Roht-Arriaza, ‘Truth Commissions and Amnesties in Latin America: The Second Generation’, [1998] 92 AM. SOC’Y INT’L L. PROC. 313, 313–15.

<sup>13</sup> Juan E. Méndez, ‘Accountability for past abuses’ [1996] 19 Human Rights Quarterly 225-282; Cherif M. Bassiouni ‘Searching for Peace and Achieving Justice: The Need for Accountability. Law and Contemporary Problems’ [1996] Duke University School of Law.

<http://scholarship.law.duke.edu/lcp/vol59/iss4/3> last visited march 2013

<sup>14</sup> See notably Diane Orentlicher ‘Settling Accounts: the Duty to Prosecute Human Rights Violations of Prior Regime [1991] 100 Yale Law Journal, 2537 (See also contribution by Naomi Roht-Arriaza, State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law, [1990] 78 Cal. L. Rev. 474–89. Jose Zalaquett ‘Confronting Human Rights Violations Committed by Former Governments: Principles Applicable and Political Constraints’, in Aspen Institute, *State Crimes: Punishment or Pardon?* (Wye Center, Colorado, 1989) 23-69.

<sup>15</sup> Claire Moon, *Narrating Political Reconciliation: South Africa's Truth and Reconciliation Commission*, (Lanham: Lexington Books, 2008).

<sup>16</sup> Leslie Vinjamury and Jack Snyder "Trials and Errors: Principle and Pragmatism in Strategies of International Justice." *International Security*. 283 (2003): 5-44.

<sup>17</sup> Kieran McEvoy, ‘Beyond Legalism: Towards a Thicker Understanding of Transitional Justice, (2008) 34 J. L. & Soc. (Journal of Law and Society) 411; C. Bell, c. Campbell & f. Ní Aoláin, ‘Transitional Justice: (Re) conceptualising the Field, [2007] 3 International Journal of Law in Context) 81 Ruti G. Teitel, ‘Human Rights in Transition: Transitional Justice Genealogy’, [2003] 16 Harv. Hum. Rts. J. (69

Instead, new generation of authors, such as Louise Mallinder explains, that societies undergo a ‘continual process of re-negotiation of the balance between impunity and accountability as the transition evolves’.<sup>18</sup> By reconceptualising political transformation as a process, regime change should refer to something more profound than, for example, the periodic changes of government in consolidated democracies. The transitional justice literature on amnesty laws is thus characterised by diverse approaches to explore the relationship between amnesty, justice and post-conflict resolution and other fields of study such as development, gender studies, human rights or memory studies.<sup>19</sup>

Today, transitional justice practitioners advocate for a ‘smarter’ approach towards the design of amnesties. They move away from dichotomies and make the case for conditional amnesties, which “do not contradict the general obligation of the States under international law to prosecute gross violations of international crimes and to meet the calls for truth, peace and justice”.<sup>20</sup> Within these debates the issue of amnesty is therefore addressed in terms of ‘potential’ to act as an expedient for peace.<sup>21</sup> The expediency of amnesties is said to alleviate the tensions and facilitate the rehabilitation of past offenders.

## A. Re-conceptualizing the Paradigm of Transitional justice

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<sup>18</sup> Louise Mallinder, *Beyond the Courts? The Complex Relationship of Trials and Amnesty*. In: *International Criminal Law*, Schabas, William A. (Eds), (Edward Elgar Publishing Ltd, Cheltenham 2012), pp. 758-775; Eric A. Posner and Vermeule, Adrian 'Transitional Justice as Ordinary Justice', [2004] 117(3) *Harvard Law Review* 761–825; Leebaw A. Brownyn 'The Irreconcilable Goals of Transitional Justice', [2008] *Human Rights Quarterly* 30(1): 95–118. Tricia D. Olsen, Leigh A. Payne and Andrew G Reiter, *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy*, United States Institute of Peace. 2010 Keesing's World News

<sup>19</sup> Christine C. Bell, 'Transitional Justice, Inter-disciplinarity and the State of the ‘Field ‘ or ‘Non-Field’' [2009] 3(1) *International Journal of Transitional Justice* 1-27; Eric Posner, Adrian Vermeule, 'Transitional Justice as Ordinary Justice', [2004] 117(3) *Harvard Law Review* 761–825; Brownyn Ann Leebaw, 'The Irreconcilable Goals of Transitional Justice', [2008] *Human Rights Quarterly* 30(1) 95–118. Tricia D. Olsen, Leigh A. Payne and Andrew G. Reiter, *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy* (D.C: U.S. Institute of Peace Press, 2010).

<sup>20</sup> Anastasia Kushleyko 'Accountability v. “Smart Amnesty” in the Transitional Post-conflict Quest for Peace. A South African Case Study', in Szablewska, Natalia, and Sascha-Dominik Bachmann. *Current Issues in Transitional Justice: Towards a More Holistic Approach* (Springer series in transitional justice. 2015), 31-53.

<sup>21</sup> Christine C. Bell, 'Transitional Justice, Inter-disciplinarity and the State of the ‘Field ‘ or ‘Non-Field’' [2009] 3(1) *International Journal of Transitional Justice* 1-27; Eric Posner, Adrian Vermeule, 'Transitional Justice as Ordinary Justice', [2004] 117(3) *Harvard Law Review* 761–825; Brownyn Ann Leebaw, 'The Irreconcilable Goals of Transitional Justice', [2008] *Human Rights Quarterly* 30(1) 95–118. Tricia D. Olsen, Leigh A. Payne and Andrew G. Reiter, *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy* (D.C: U.S. Institute of Peace Press, 2010).

Reconciliation, we are told, is achieved when the nation's politics become normalised, conducted in deliberate and peaceful ways and the predominant issues are not transitional'.<sup>22</sup> Concepts like 'truth' or 'justice' or 'reconciliation' carry various connotations notoriously hard to pin down. Johan Galtung notably explains that 'reconciliation is a theme with deep psychological, sociological, theological, philosophical, and profoundly human roots – and nobody really knows how to successfully achieve it'.<sup>23</sup> As Neil Kriz observes:

In responding to trauma, groups and nations tend to function similarly to individuals. Societies shattered by the perpetration of atrocities need to adapt or design mechanisms to confront their demons, to reckon with these past abuses. Otherwise, for nations, as for individuals, the past will haunt and infect the present and future in unpredictable ways. The assumption that individuals or groups who have been victims of hideous atrocities will simply forget about them or expunge their feelings without some form of accounting, some semblance of justice, is to leave in place the seeds of future conflict.<sup>24</sup>

As transitional justice became a dominant field of inquiry to address past violence it has been under strong critical attention. Traditional approaches to transitional justice tend to reduce the success to transition to a society's capacity to abide by liberal principles while it overlooks the criticism brought to liberalism itself.<sup>25</sup> Notably, that colonial wars are excluded from this field of inquiry. However if left unaddressed, ashes of past atrocities may breed new violence. Authors have argued that the inability of transitional justice to address injustices in colonial context can be remedied by adopting a structural justice approach. Indeed recent times have witnessed an increase of interest in connecting transitional justice to colonial injustices. A transitional veneer developed to address these post-colonial demands of justice seems to be centred on the idea of acknowledgement and reconciliation.<sup>26</sup> Transitional justice offers the potential to

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<sup>22</sup> Erin Daly and Jeremy Sarkin, *Reconciliation in Divided Societies: Finding Common Ground* (Pennsylvania Studies in Human Rights, University of Pennsylvania Press, Philadelphia 2007).

<sup>23</sup> Johan Galtung, 'After violence, reconstruction, reconciliation, and resolution: Coping with visible and invisible effects of war and violence' in Mohammed Abu Nimer (ed), *Reconciliation, Justice, and Coexistence: Theory & Practice*, (Landham Md. Lexington Books 2001)4.

<sup>24</sup> Neil J. Kriz, *Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights. Law and Contemporary Problems*. (Duke University School of Law 1996).

<sup>25</sup> Ayal Gross, 'The Constitution, Reconciliation, and Transitional Justice: Lessons from South Africa and Israel', [2004] 40 *Stanford Journal of International Law* 1, 52-5.

<sup>26</sup> See for example Courtney Jung, 'Canada and the Legacy of the Indian Residential Schools: Transitional Justice for Indigenous Peoples in a Nontransitional Society,' in *Identities in Transition: Challenges for Transitional Justice*, ed. Paige Arthur (Cambridge: Cambridge University Press, 2011); Michelle Bonner

address historical injustices of settlers' colonialism in terms of harm. However the paradigm of transitional justice needs to be adjusted so as to be apt to recognize how the structural injustice of the colonial system endures beyond the moment of violation, shaping and constraining the conditions of life experienced by both the dominant population and particular groups.<sup>27</sup>

A second cluster of critical evaluation is interested in exploring the relationship between processes of reconciliation and the emergence of post-transitional demands of justice. This approach, advocates for a more inclusive engagement towards past injustice. Cath Collins notably argues that post-transitional justice outcomes are influenced by a combination of factors.<sup>28</sup> For her, the strategies adopted by states to deal with past injustice achieve reconciliation are responsive and inevitably influenced to the legal context the mode of transition and its ensuing impact on the relation between old and new order. Examination of the reception of an amnesty over time, in turn, enables an exploration of how social movements or groups may affect accountability settlements.

However, in the context of colonial injustices, such enterprise is rendered complex by an initial difficulty. Indeed, by its very nature settlers' colonial injustice implies continuity between past and present. Settlers' colonial theory disrupts the affirmation that colonisation ended with the cessation of colonial governance.<sup>29</sup> As notably argued by Patrick Wolfe, settlements should be seen as a structure rather than an event which unfolds in stages according to a persistent 'cultural logic of elimination' in support of settlers hegemony.<sup>30</sup> As part of this movement, a recent contribution by Jennifer Balint calls for an institutional reform of the paradigm of transitional justice recognising the

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and Matt James, 'The Three R's of Seeking Transitional Justice: Reparation, Responsibility and Reframing in Canada and Argentina,' *International Indigenous Policy Journal* 2(3) (2011): 1–29; Damien Short, *Reconciliation and Colonial Power: Indigenous Rights in Australia* (Aldershot: Ashgate, 2008);

<sup>27</sup> Jennifer Balint, Julie Evans and Nesam McMillan, 'Rethinking Transitional Justice, Redressing Indigenous Harm: A New Conceptual Approach' [2014] 8(2) *International Journal of Transitional Justice*.

<sup>28</sup> Cath Collins, *Post-transitional Justice: Human Rights Trials in Chile and El Salvador*. (University Park: Penn State University Press, 2010).

<sup>29</sup> See for example Edward Said, *Orientalism* (New York: Pantheon Books, 1978); Samir Amin, *Eurocentrism* (New York: Monthly Review Press, 1989); Robert Young, *White Mythologies: Writing History and the West* (New York: Routledge, 1990); Anthony Anghie *Imperialism, Sovereignty and the Making of International Law*, (Cambridge: Cambridge University Press, 2004); Martti Koskenniemi, *The Gentle Civilizer of Nations*. (Cambridge: Cambridge University Press, 2002). Matthew Craven, *The Decolonization of International Law - State Succession and the Law of Treaties*, (Oxford: Oxford University Press, 2007).

<sup>30</sup> Balint, Evans and McMillan, 'Rethinking Transitional Justice, Redressing Indigenous Harm: A New Conceptual Approach' (n 27) citing Patrick Wolfe, 'Nation and MiscoNation: Discursive Continuity in the Post-Mabo Era,' *Social Analysis* 36 (1994): 93–152;

structural continuities between past and present and future.<sup>31</sup> Exploring specifically the paradigm of transitional justice in the context of settlers' injustices, the concept of past injustice is understood as both material and discursive.

## B. Amnesty and Collective Memory of Past Events

The construction of a narrative about the past can never be politically neutral since it depends on an authoritative construction of the past. Amnesty forms part of a discourse of reconciliation, restoration of national cohesion. It is generally accompanied by measures of rehabilitation of past offenders, and reparation of victims. Amnesty also relates to forgetting of the most contentious episodes of a conflict.<sup>32</sup> As Peter Burke famously put it: 'one way of seeing is one way of unseeing, similarly, one way of remembering is one way of forgetting'.<sup>33</sup> The issue of the memory of past events in the aftermath of a conflict is as much about the present and the future as it is about the past. By understanding that historical narratives about past events are constructed rather than merely discovered, it is possible to identify the locus of power and how it affects the process of revisions of past events.<sup>34</sup>

In *Memory, History and Forgetting*, Paul Ricoeur contends that the amnesties limit the possibility to "juridicise" or adjudicate the offences it covers.<sup>35</sup> To him, 'stopping trials amounts to extinguishing memory in its testimonial expression and saying that nothing has occurred.'<sup>36</sup> Ricoeur's famous argument highlights the danger of the 'handling authorized, imposed, celebrated, and commemorated history'.<sup>37</sup> Ricoeur's critique of amnesty laws resonates particularly strongly in the human rights milieu. Increasingly,

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<sup>31</sup> Balint, Evans and McMillan, 'Rethinking Transitional Justice, Redressing Indigenous Harm: A New Conceptual Approach' (n 27)

<sup>32</sup> Diane F. Orentlicher, 'Settling accounts: the duty to prosecute human rights violations of a prior regime,' [1991] *Yale Law Journal*, 100, 8, 2537.

<sup>33</sup> Peter Burke, *History as Social Memory*, in *Memory: History, Culture And The Mind* 97, 103 (Thomas Butler ed., 1989). 1762 47 *UCLA Law Review* 1747 (2000)

<sup>34</sup> Jonathan D. Tepperman, *Truth and Consequences*, (2002) 81(2) *Foreign Affairs* 140; Priscilla B. Hayner, 'Fifteen Truth Commissions - 1974 to 1994: A Comparative Study' (1994) *Human Rights Quarterly* 16, 597. Among these mechanisms, the establishment of the National Commission on Disappeared Persons and an accompanying reparation scheme in Argentina; the National Commission on Truth and Reconciliation established in 1990 in Chile, the Commission on Truth in El Salvador established in 1992 under the direction of the UN, to investigate serious acts of violence that occurred since 1980, and the Truth and Reconciliation Commission established in post-apartheid South Africa

<sup>35</sup> Paul Ricoeur, *Memory, History, Forgetting*. (Chicago: University of Chicago Press, 2006.) 451.

<sup>36</sup> Paul Ricoeur, *Memory, History, Forgetting*. (n35.) 451, 455.

<sup>37</sup> Paul Ricoeur, *Memory, History, Forgetting* (n35.), 445, 448.

human rights activists advocate for integrating the recognition of past atrocities as part of politics of reconciliation. Post-conflict theorists have morphed this philosophical question into a practical one and inquire whether a sustainable politic of reconciliation is possible without the forgetting of controversial memories? Why is there a need to have an official memory? It is here, that the intermeshed relationship between amnesty and the politics of memory points to the role of post-conflict mechanisms in the political transformation of post-conflict society. Practices of commemoration at the end of a conflict often emerge as the instinctive reaction of a society to the trauma of left by violence. However benevolent these initiatives initially appear, the efforts undertaken to reckon the past translate an official language of recognition. Similarly, mechanisms of post-conflict resolution can be used to produce particular interpretations of past events. The construction of a narrative about the past can never be politically neutral since it depends on an authorised construction of the past. As Pinkerton explains, ‘remembering the past produces that past in the present’.<sup>38</sup> Elizabeth Jelin considers these efforts to be a ‘foundational moment’ in the political construction of a conflicted society.<sup>39</sup> However, she has drawn attention to the fact that ‘transitional justice sets apart institutional and symbolic measures’.<sup>40</sup> Symbolic measures may happen through the creation of special commission of inquiry, trials or official commemorative initiatives. However, this symbolic dimension is viewed as being subjective or a secondary layer to practices and policies regarding the past.<sup>41</sup> Instead, she argues that this is a ‘false distinction’ and that the symbolic aspect to transitional measures is central to the transition itself.<sup>42</sup>

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<sup>38</sup> Patrick Pinkerton *Resisting Memory: The Politics of Memorialisation in Post-conflict Northern Ireland*, [2012] 14(1) *The British Journal of Politics & International Relations* 141.

<sup>39</sup> Elizabeth Jelin, ‘The Politics of Memory: The Human Rights Movement and the Construction of Democracy in Argentina’, [1994] 81:2, *Latin American Perspectives*, 38-58.

<sup>40</sup> Elizabeth Jelin, ‘Public Memorialisation in Perspective: Truth, Justice and Memory of Past Repression in the Southern Corn of South America’, [2007] *The International Journal of Transitional Justice*, Vol1,156.

<sup>41</sup> See notably Nora Sveaass and Nils Johan Lavik, ‘Psychological Aspects of Human Rights Violations: The Importance of Justice and Reconciliation’, [2000] *Nordic Journal of International Law* 69, 35.

<sup>42</sup> Elizabeth Jelin, ‘Public Memorialisation in Perspective: Truth, Justice and Memory of Past Repression in the Southern Corn of South America’, [2007] *The International Journal of Transitional Justice*, Vol1,156.

## C. Domestic Approach Towards Amnesty

Discussions on demands for justice that emerge after the reconciliation ‘deal’ is achieved require adopting a systematic and contextualised approach. Commentators notably highlighted that the solution for a successful resolution of conflict should be found in the society in which it occurs.<sup>43</sup> As contended by Diane Orentlicher, ‘there cannot be a one-size-fits-all approach, for the underlying national and cultural experiences of each society should also be taken into account’.<sup>44</sup> Lundy suggested addressing the issues of justice and accountability ‘below the gaze of formal institutions of transitional justice’.<sup>45</sup> Proponents of this approach advocate the exploration of whether and how transitional justice policies impact on relationships between different actors of transition in, in particular between private actors such as civil society groups, individuals and state institutions.

However, the trajectories of post-conflict justice depend on a combination factors among which are patterns of transitional legacy and changes in the social and institutional environment. In order to follow this need for a systematic and contextualised approach, this thesis analysis remains focused on the intra-judicial process that resulted in the pursuit of criminal justice or lack of thereof in France from 1962 to 2012. While much of this analysis directly relates to the wider literature on democratic consolidation, this thesis is limited to explaining the shifts in legal and political dynamics observed in the proceedings. The examination of domestic proceedings hinges on fundamental questions of law’s application, such as the legal qualification of past events, the enforcement of international law and the recognition of victims. Domestic courts may be involved in

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<sup>43</sup> Chrisine Bell, Colm Campbell and al. ‘Justice Discourses in Transition’, *Social & Legal Studies*,13 (2004) 305; Pablo De Greiff, , *Justice and Reparations: The Handbook of Reparations*, (Oxford University Press Oxford date 2006); Mahmood Mamdani, ‘Reconciliation Without Justice’, *Southern African Review of Books* Nov. Dec. 3–5 issue (1996).

<sup>44</sup> Diane Orentlicher, ‘Settling Accounts’ Revisited: Reconciling Global Norms with Local Agency, *International Journal of Transitional Justice*, Vol.1, 2007, 10-22p.18. A similar approach has been suggested by Rama Mani who advocated for ‘an alternative, holistic, and integrated approach to conceptualizing justice in transition, with three distinct, but interrelated dimensions: legal, rectificatory, and distributive. Cited in Patricia Lundy and Mark McGovern, ‘Whose Justice? Rethinking Transitional Justice from the Bottom Up’, [2008] 35 (2) *Journal of Law and Society*, 274.

<sup>45</sup> Patricia Lundy and Mark McGovern, ‘Whose Justice? Rethinking Transitional Justice from the Bottom Up’, [2008] 35 ( 2) *Journal of Law and Society*, 281; Kieran McEvoy, Lorna McGregor (eds.) *Human Rights Law in Perspective : Transitional Justice from Below : Grassroots Activism and the Struggle for Change*. (Oxford, GBR: Hart Publishing Ltd., 2008).

implementing an amnesty or they may review the decisions of the administrative body related to their grant.<sup>46</sup>

This focus on judicial process is mainly based on the contention that trials serve a social function. As argued by Mark Osiel, domestic proceedings can play an important role in the construction of a social memory about past events and may contribute significantly to the management of conflicted narratives.<sup>47</sup> The use of legal proceedings with intent to revise the past creates a sense of solidarity that is shareable and transmittable to further generations. Others have remarked that efforts engaged in investigating on past crimes may respond to the need of society as a whole and even contribute to the stabilisation of a democratic regime.<sup>48</sup> Ruti Teitel contends that legal prosecutions ‘advance the normative transformation’ of a society.<sup>49</sup> Trials serve therefore the purpose of transformation by combining two objectives: a first one concerns the need for peace and a second objective is to fulfil the need of victims and society for recognition, development and reparation.<sup>50</sup> As such legal proceedings as part of a framework of ‘transformative justice’ which goals extend to the one of a mere transition. This semantic distinction finds its relevance as it extends the frame of analysis beyond the paradigm of transitional justice so as to also include the symbolic dimension of rendering justice. In cases investigating a repressed past, the role of trials to investigate on past events can be compared to the work of the historian to write the history of past events driven by fact-finding and based on evidence.

### III. Transitional Justice and the Decolonization of Algeria

In 1962, the signature of the Evian Agreements put an end to the conflict and terminated 130 years of colonization. During the period of implementation of the Peace Agreements, Algeria was placed under the authority of a Provisional Executive. A committee of the Algerian affairs headed by the French President of the Republic was

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<sup>46</sup> Louise Mallinder ‘Beyond the Courts? The Complex Relationship of Trials and Amnesty. In: William A. Schabas (ed) *International Criminal Law* (Edward Elgar Publishing Ltd, Cheltenham 2012)

<sup>47</sup> Mark Osiel, *Mass Atrocity, Collective Memory, and the Law* (New Brunswick: Transactions Publishers 1993), 3.

<sup>48</sup> Tricia D. Olsen, Leigh A. Payne, and Andrew G. Reiter, *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy* (U.S. Institute of Peace, 2010).

<sup>49</sup> Teitel, *Transitional Justice* (n7), 28.

<sup>50</sup> Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism*, (Princeton University Press, 1996).

created to review of the application of the provisions of the agreements.<sup>51</sup> The transitional government executive was composed of nine members: three were French and nine were Algerians, of whom four were not members of the FLN. The transitional government was established pending the result of the referendum on the independence of Algeria.

From 1961, France prepared for the repatriation of the European settlers. The repatriation of the European settlers was seen as one of the inevitable consequences of the decolonisation of Algeria. In 1962, approximately 650 000 people left Algeria. These movements of ‘repatriation’ included not only the French settlers but also the Algerians indigenous who integrated the French army and almost all of the indigenous Algerian Jews.<sup>52</sup> The war ended in a pervasive atmosphere and general uncertainty leading many of the repatriates to define this return in France as an ‘exodus’.<sup>53</sup>

#### IV. Objectives of Research

The main objective of this research is to examine the contemporary impact of the amnesties on accountability from 1962 to 2012. It specifically explores how the amnesties affect the judicial capacity of trials to frame accountability for acts of torture perpetrated by the French army. It investigates on the interplay between the political construction of a historical narrative and the use of trials to adjudicate past crimes. To what extent can and does law function as a place of memory both as a locus of official circumscribed memory and as locus open – albeit in limited ways – to record a long-suppressed past? It locates these questions in the context of the French amnesty and explores the interplay between France political reconstruction after the cessation of its

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<sup>51</sup> Decret 13 Février 1960 JORF 14 Février 1960 1450. The committee of the Algerian affairs took decisions related to Algerian affairs that were not taken in the Council of Ministers. For more explanation of the role of the Committee, see Maurice Faivre, *Les Archives Inédites de la Politique Algérienne: 1958-1962* (Paris: Editions L’Harmattan 2000) 27.

<sup>52</sup> Jacques Ribs, Kacowicz, Arie Marcelo, and Pawel Lutomski. *Population Resettlement in International Conflicts: A Comparative Study*. Lexington Books, 2007. As the authors explain, before the evacuation from Algeria, 19% often visited the metropolis, 18% had only visited “mainland France once in their life while 45% visited France a few times and 28 % had never been to the metropolis. Les Pieds-Noirs [Texte imprimé] / [Xavier Yacono, Marie Elbe, Albert Bensoussan, Jacques Ribs, etc.] ; présenté by Emmanuel Roblès.

<sup>53</sup> See Abderahmen Moumen. “De l’Algérie à la France. Les conditions de départ et d’accueil des rapatriés, pieds-noirs et harkis en 1962.” *Matériaux pour l’histoire de notre temps* N° 99, no. 3 (July 1, 2010): 60–68. For a historical presentation of the different populations concerned by this exodus – Europeans from Algeria who become pieds-noirs, Israelites natives to Algeria who become Algerian Jews, French of North-African extraction who become French Muslim repatriates.

colonial governance and the rise of a social movement for the recognition of colonial crimes.

As a result, this thesis accounts for alternative factors affecting institutional strength, assesses their potential consequences, and determines the extent to which national trials specifically altered judicial capacity. The purpose of this exercise is to examine the challenges confronted by marginal groups (here victims of torture) with the recognition of their suffering and arising from the complex collective memory and the role of legal institutions in dealing with tensions inherited from a conflict. It primarily focuses on the state's policy of memory of a conflict and how socio-political movements grow to contest the status quo established by the granting of amnesties to ex-combatants.

The selection of the amnesty following the Algerian War is a pertinent case study to illustrate this. The French experience of the amnesty provides a vibrant example to study how post-conflict mechanisms evolve over time. It offers the opportunity to isolate and identify effects of the amnesty on the attribution of guilt and the framing of accountability. Successor presidents thought to continue de Gaulle's policy of restoration of national cohesion by introducing further measures of rehabilitation of the veterans. Following roughly fifty years of amnesty policing, trials began again the 1990s.

The issue of dealing with past violence emerges increasingly as a present-day topic. While such processes benefit from an important body of scholarship regarding Latin America, revising the past in European countries has occurred in a more discreet manner than in their Latin American counterparts. This work seeks to formulate an applicable line of reasoning to understand the long-term effects of amnesty laws. In doing so it understands the need to frame the study of amnesty within a relevant historical context. In the case of amnesty following the Algerian War, this relevant historical context requires integrating the theoretical insights of post-conflict theory on critical post-colonial approach and cultural studies. Transitional justice institutions inevitably engage with 'inherited traditions and centres of power'.<sup>54</sup> Among these traditions, the legacy of wars of decolonisation remains unclear.<sup>55</sup> Third world approaches to international law (TMAIL theory) emerged a valuable critic to the international law theoretical framework and provide with tools enabling to reveal the imperialist, gendered and racist

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<sup>54</sup> Ruti G. Teitel, *Transitional Justice* (n7). 8.

<sup>55</sup> See debate Anthony Anghie *Imperialism, Sovereignty and the Making of International Law*, (Cambridge: Cambridge University Press, 2004); Martti Koskenniemi, *The Gentle Civilizer of Nations*. (Cambridge: Cambridge University Press, 2002). Matthew Craven *The Decolonization of International Law - State Succession and the Law of Treaties*, (Oxford: Oxford University Press, 2007).

underpinnings of international law.<sup>56</sup> This theoretical framework has provided with powerful insights on the relationship between international law and the colonial enterprise.<sup>57</sup> This position shares similar vein to a sociological approach to law and enables to unveil the gender, racial and class demarcation that may run through the judicial system.<sup>58</sup>

Nevertheless, there are inevitable consequences in undertaking a demystification of law. By focusing on the social environment to reveal the political content of law one runs the risks to reinforce the idealisation of the law itself. Such take would also fail to understand how the law governs social relations and what would be the consequences of reforms. Therefore it is necessary to question the nature of law to first understand how it affects agency and second its limitation to spur change. Then it is possible to frame the scope of judicial capacity.

A third reason for my interest in the Algerian amnesties lies in the fact that much of the existing literature on amnesty seems to have ignored the French case when addressing the issue of justice.<sup>59</sup> The field has recently benefited from multiple comparative amassing of data on amnesties on websites such as the Transitional Justice Data,<sup>60</sup> Peace Agreement Database<sup>61</sup> or the Amnesty Law Database,<sup>62</sup> but most accounts only give very summary accounts of amnesty laws following the Algerian War. The Algerian War is undeniably a rich area of investigation. Regarded as a prototype for conflicts in the second half of the twentieth century, it has notably served as a model for the fight against ‘subversion’ and terrorism in Iraq. The political transformation of France from a colonial power to a stable democracy provides an important example of dilemmas shared by societies experiencing a process of transition. The question of transition in the

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<sup>56</sup> Ruth Buchanan, “Writing Resistance Into International Law,” *International Community Law Review* 10, n° 4 (December 1, 2008) 446.

<sup>57</sup> See Makau Mutua, “What Is TWAIL?,” *Proceedings of the Annual Meetings of the American Society of International Law* 94 (2000) 32-40; B. S. Chimni, “Third World Approaches to International Law: A Manifesto,” *International Community Law Review* 8 (2006), 3–27; Obiora Okafor, “Critical Third World Approaches to International Law (TWAIL: Theory, Methodology, or Both?),” *International Community Law Review* 10 (2008) 371– 78.

<sup>58</sup> James Boyle, *Critical Legal Studies* (New York: New York University Press, 1992).

<sup>59</sup> Tricia D. Olsen, Leigh A. Payne, et Andrew G. Reiter, *Transitional justice in balance: comparing processes, weighing efficacy* (U.S. Institute of Peace, 2010); Leslie Vinjamuri and Aaron Boesnecker, *Accountability and Peace Agreements: Mapping Trends from 1980 to 2006* ( Geneva Centre for Humanitarian Dialogue, 2007)

<sup>60</sup> <https://transitionaljusticedata.com/>

<sup>61</sup> <http://www.peaceagreements.ulster.ac.uk/>

<sup>62</sup> <http://incore.incore.ulst.ac.uk/Amnesty/about.html>

French case needs to be examined in terms of the question of defining from what moment do we pass from the colonial to the post-colonial? In the French context, this period of history is blurred by the concern to guarantee the continuity of the regime and institutionalizing the silence on the colonial crimes and who is responsible. Over the years, these concerns have merged with contemporary struggles around racial grievances and social integration. France entered the post-colonial phase as brutally as it came out of the colonial model. The growth of anti-racism activism came up against the persistent refusal to admit the reality of France's multicultural society. The French conception of multiculturalism is strongly associated with the negative concept of "communautarism".<sup>63</sup> Thus, contemporary debates of what it means to be French has been strongly directed into a debate on integration and acculturation. On the other hand, the dilation of the lens of historical perception has notably occurred within the North African community. By claiming a 'legacy of oppression', these groups seek to maintain identification with the nation's past.<sup>64</sup> However, the absence or unsatisfactory responses to their demands affect the nature of the claim supported by related social movements. In the case of France, demands for a more comprehensive colonial historiography overflowed the circle of professional historians and reached grassroots civil society movements and are interconnected with anti-racist initiatives. This thesis is certainly the first study to analyse amnesty laws within the paradigm developed by Transitional justice scholars and post-colonial literature.

This thesis seeks to contribute to an emerging body of academic discourse about the impact of amnesty by looking at how amnesties affect the politics of memory of a post-conflict society. As explored above, the transitional justice paradigm does not include the dynamics of contemporary formation of demands of justice in the post-transitional phase, nor does it address the impact of political measures taken to deal with the legacy of human rights violations. Nevertheless, these issues have become all the more pressing as a growing number of consolidated democracies address post-transitional justice issues. This thesis therefor suggests that the study of the impact of amnesties has to be complemented by an examination of the process of formation of post-transitional claims of justice. To do so, it suggests deconstructing the nature of claims of justice through the contextual analysis of how domestic courts receive demands for the revision of past

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<sup>63</sup> In French, the concept of *communautarisme* refers to the grouping of individuals in community. However this becomes a political issue as French republican ideal of society is based on the unity of the Nation.

<sup>64</sup> Dominick LaCapra, *Writing History, Writing Trauma* (2001) pp. 80-81.

crimes. This socio-legal approach facilitates the identification of factors that contribute to the success or failure of post-transitional justice claims. It integrates these claims and their responses within the political aspirations held by the state and civil society communities. The second contribution of this thesis is to bring together the language of memory studies with that of socio-legal studies in order to frame the analysis of claims of justice for historical crimes. This allows for a more comprehensive understanding of the dynamics of explaining the emergence of post-transitional claims for justice and the formation of social movements that challenge transitional trade-offs that were made.

## **V. Research Questions and Summary of the Argument**

One of the most difficult challenges of societies haunted by a violent past is to know at what point can the state demand that society and the victims ‘let go’ of the past. Should victims maintain claims for recognition even when it is known that “victimization” robs individuals and communities of something that will never be returned and never fully repaired? How are these demands managed by successor regimes to a violent past? In turn, the instauration of amnesty in the aftermath of a conflict seems to suggest that, in order to be free from past suffering, the memory of past violence should fall into oblivion. The central question addressed in this thesis is to understand how amnesty laws may affect the prospect of post-transitional justice. It primarily focuses on state policy of amnesty and how socio-political movements of contestations try challenges them. Amnesty affects the post-transitional justice process by limiting and shaping the process of attribution of guilt and responsibilities. This thesis argues that amnesty following the Algerian War was an ambiguous mechanism of reconciliation. The amnesty was used as a political tool of expediency to allow France possibility to extricate itself from the Algerian crisis. It permitted control over the transition process and protection of French soldiers from prosecution of human rights violations. It has also been revealed to be a political means of alleviating other looming tensions by facilitating the reintegration and rehabilitation of the opposition to De Gaulle’s government. However, in the long term, the amnesties severely limit the judicial capacity of domestic courts to prosecute past crimes. The hypothesis is that by endorsing particular patterns and legacies, amnesties were part of transitional trade-offs between past actors in the conflict and newly established institutions. This function limits the didactic potential of trials. The case study undertaken in this thesis reveals how this functional use of amnesties influences the political and social context. First, it affects judges’ interpretation of the otherwise applicable law through the limited qualification of the facts that covered by the amnesty.

Second, it affects the political discourse and serves the ambiguity of language that enables demands for recognition not to be addressed.

This thesis identifies factors that can affect the success of post-transitional justice, assessing their role in the process of reconciliation and determines the extent to which alternative strategies may emerge and re-equilibrate the political and social context to counter the political use of amnesty as a tool to forget the past. In order to demonstrate this, it is relevant to breakdown this argument by exploring further sub-questions:

- Under which conditions are post-transitional justice demands likely to be successful?
- Do amnesties prevent socio-political movements from articulating judicial demands of revision and how?

From the 1990s, the production of work of investigative history, and greater access to the archives has provided an opportunity to challenge the way the Algerian War was understood. The French case enables the exploration of the potential of civil society groups (human rights activists, victim groups, non-governmental organisations, journalists and historians) to influence the official narrative of past crimes. As this analysis reveals, this potential essentially relies on the combination of three factors: the capacity of pro-accountability groups to maintain marginal memories as active; legally framed pressure, and the exploitation of ‘momentums’. This analysis leads to the conclusion that, in post-transitional settings, the role of socio-political movements is more about raising the awareness of the prevalence of injustices than actually accessing retributive justice and that the success of their claim result from a complex legal-institutions-governance triangle.

Whilst the conclusion of this thesis refers specifically to France, it makes an important contribution in the debate addressed by scholars on the issue of amnesty. The resurfacing of demands for accountability reflects society’s need to develop adequate mechanisms to come to terms with the past.

## **VI. Preliminary Considerations**

This section introduces some of the central concepts used in this thesis and addresses the question of how they are used in the academic literature related to the topic of this thesis. The overall aim is not to provide with an encyclopaedic definition, neither to set a priori of the definition given to them. This thesis highlights that the question of amnesty

laws extends beyond questions of retribution to incorporate the issue of reconciliation within a historical debate.

A first semantic challenge to address lies in the understanding of what forgiveness entails within the transitional and post-transitional justice agenda. Transitional justice is about the public and collective acknowledgement of past offence. In the last decades, restorative justice scholarship has put the concept of forgiveness at the centre of its objectives. Within these discussions, the question arises as to whom to forgive and for what. How to define who is responsible in the situation of mass crimes perpetrated by a group? In the case of a collective group demonstrating repentance, should the emotion triggered be viewed similarly to the concept of forgiveness occurring on the individual level? Authors have raised conceptual objections to the notion of a collective forgiveness or 'institutional forgiveness'. Institutions can make a plea for forgiveness on behalf of a group. The act of forgiveness is a process, which involves emotion and a commitment that the wrongful act won't happen again. However, apology, in the form of a speech or a symbolic gesture, necessarily relies on the emission of an emotion at the individual level. The public context can only influence but cannot affect the dynamic of transmission of emotion between victims and perpetrators. For these principal reasons, the interaction between the notion of forgiveness and the concept of reconciliation is unclear. Reconciliation is a concept that can be understood from a secular and religious perspective. Cognitive studies on reparation show that forgiveness may bear different meanings even for members of a similar group and is associated with different variables. They notably remark that individuals can't grant forgiveness as long as the feeling of anger is maintained.<sup>65</sup> In the case of historical injustices, it is necessary that the garbled locus of resistance to change obstacle for future reconciliation may reside in the sphere of emotions.<sup>66</sup>

At first stance, transitional justice seems to suggest that reconciliation requires forgiveness and access to the truth. Typically, this promotion is prevalent via the institution of Truth Commissions, whereby people are encouraged to forgive the offenders and offenders set to talk about the crimes they have perpetrated. Forgiveness is also very much promoted through the use of amnesty. As such, the institutional

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<sup>65</sup> Ricoeur, *Memory, History, Forgetting* (University of Chicago Press 2009).

<sup>66</sup> Damien Short, *Reconciliation and Colonial Power: Indigenous Rights in Australia* (Aldershot: Ashgate, 2008)

amnesty arrangements push individuals to forgive.<sup>67</sup> However, the institutionalisation of forgiveness through transitional justice mechanisms is problematic. Indeed, it seems to deprive individuals of the right to decide whether they should or wish to forgive, and in the long term thus creates frustration that risks breeding further conflict.<sup>68</sup> Institutional demands to forgive can be seen as “false reconciliation”, especially in the absence of complementary measures of truth and justice. Authors have explicitly addressed the dilemma occurring between victims’ need for acknowledgement and society’s willingness to move on. A state-sponsored policy to encourage forgiveness runs the risk of politicisation. Some victims expressed the view that amnesty “high-jacked” the possibility of knowing the truth and felt they were forced to forget the past. Brandon Hamber states “individual healing is often at odds with political, social and international political demands on people to leave the past behind.”<sup>69</sup> In conclusion, the interaction between institutional demands to forgive and reconciliation is characterised by tensions. The transitional justice paradigm limits its understanding of forgiveness to the political and social dimension but fails to integrate the emotional implication to guilt, shame and remorse that may underpin the process of reconciliation on the individual level. While reconciliation is central to the transitional justice agenda, it remains unclear to what extent forgiveness is necessary for the success of reconciliation.

## VII. Structure of the Thesis

This thesis is divided into seven chapters, each of which aims to respond to a set of research questions. Chapter 2 develops a theoretical framework to explore the relationship between amnesty and post-transitional demands of justice. The primary purpose of this chapter is to evaluate the relevant literature on amnesty and then to present the author’s approach in relation to the existing literature in terms of concepts, analytical tools and research methods. After justifying how this theoretical approach helps both to elucidate and respond to the research questions that direct this thesis, it

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<sup>67</sup> John Elster, *Closing the Books: Transitional Justice in Historical Perspective* (Cambridge and New York: Cambridge University Press 2004); Patricia B. Hayner, *Unspeakable Truths: Facing the Challenge of Truth Commissions* (London: Routledge 2002)

<sup>68</sup> Hamber, Brandon, ‘Healing’ in D. Bloomfield, T. Barnes, and L. Huyse (eds), *Reconciliation after Violent Conflict: A Handbook* (Stockholm: International Institute for Democracy and Electoral Assistance 2003) 80.

<sup>69</sup> Hamber, Brandon., ‘Healing’. In D. Bloomfield, T. Barnes, and L. Huyse (Eds.), *Reconciliation after violent conflict: A handbook*. (Stockholm, Sweden: International Institute for Democracy and Electoral Assistance, 2003) 80.

offers an analytical standpoint from which this thesis approaches the 'French case'. It takes the widely accepted view that amnesty is a 'necessary evil' to post-conflict resolution. However, it highlights that, while amnesty deals with transitional issues, it cannot be considered a transitional mechanism. By its very nature, the transitional justice paradigm fails to address the impact that measures taken during the transitional period have in the long term. This chapter develops an analytical framework to assess the impact of amnesty laws in the long term. It notably explores the concept of institutional forgetting of past event as developed by memory studies and uses this notion to confront the question of justice. This analytical framework also seeks to provide tools to examine how post-transitional demands of justice are formed.

Chapters 3 and 4 contextualise the question of amnesty in relation to the Algerian War and explain why there was a process of amnesty in the first place. These two chapters present the political and social conditions that surrounded the amnesty process. Chapter 3 provides historical background to the amnesty laws passed by France in the aftermath of the Algerian War. It will discuss the historical background to the conflict between France and Algerian nationalists from 1954 to 1962. In particular, it elaborates on the use of torture by the French army, and the controversies this raised in public opinion. Chapter 4 examines the amnesty process that followed the end of the war. It focuses on the amnesty process from 1962 to 1981. It demonstrates how the implementation of the amnesty emerged as an answer to the dilemmas faced by the government of Charles de Gaulle and explains that rehabilitation of French ex-soldiers was key to the political reformation in France. It shows that the Algerian Amnesty sought to deal with tensions inherited from the conflict. These preliminary chapters provide a socio-political contextualisation that is necessary to the analysis undertaken in the subsequent chapters. In order to understand key dimensions of contemporary demands for accountability about torture, it is essential to take into account the concomitant political crises of France between 1954 and 1981.

Chapter 5 examines the possibility of engaging criminal law for acts covered by the amnesty. This examination seeks to understand the nature of the relationship of amnesty laws and the normative function of criminal law. The amnesty restricts the attempts to adjudicate the acts of torture perpetrated during the Algerian war as crimes against humanity. The limitations imposed on judicial interpretation create a discrepancy between the normative function of the law and society acknowledgement of the Algerian war. The chapter thus analyses the effects of the Algerian amnesty on the didactic

function of French courts and argues that this has made it difficult to maintain narrative coherence in respect to the new testimonies that were put forth.

Chapter 6 explores further the relation between amnesty and legal proceedings by analysing the effects of amnesty on the dissemination of information about the conflict. It traces the genesis of the controversy around access to the archives on the events of 17 October 1961 in relation to the action for defamation launched by Maurice Papon, ex-head of the Parisian police during the Algerian war, and historian Jean Luc Einaudi. This chapter examines the use of defamation claims by torturers to avoid their past being divulged by journalists and historians.

These analyses then open onto the issue of the judicial capacity of trials to change the official narrative of a conflict. Chapter 7 turns to considering how the findings developed in Chapters 5 and 6 affect the political discourse on the commemoration of the Algerian war. This chapter argues that the amnesty shadowed the question of guilt and responsibilities circulating outside the official commemoration of the conflict. It links the absence of legal recognition of crimes to the lack of commemoration of the victims of the French army, in particular of the victims of torture. To demonstrate this argument, this chapter begins with a brief introduction to politics of memory in France. From the 1970s onwards, France's politics of memory featured efforts to 'conceal' the atrocities of the war and the need to come to terms with the legacy of colonialism. Successive governments undertook the reintegration of the French soldiers and compensated the repatriated colonizers by enacting further amnesty laws in 1974 and 1981. While this policy sought to rehabilitate the French army, it overlooked their responsibility in the perpetration of crimes and injustices during the conflict. In parallel socio-political movements undertook their own processes of recollection on the margins of the official process of commemoration. The official policy of deliberate forgetting resulted in the fragmentation of the memory of the legacy of the war in France. In explicating the role of civil society groups the chapter relies on Pierre Nora's theory on the registering of memory to locate this activation of marginalised memories in terms of cultivating an alternative narrative of past events,

Chapter 8 concludes this project of research on the effects of amnesty on post-transitional demands of justice. It discusses the value of the research, proceeds to reflect on the findings and makes suggestions for future research. It explains that the evolution of the amnesty highlights law's function as a narrative. Ultimately, it shows that these

efforts undertaken to maintain the narrative of the war create tensions between opposing fringes of society.<sup>70</sup>

## VIII. Note on Methodology

This research is based on a historico-legal examination of the Algerian amnesties. This approach is important as it is assumed that most of the initial obstacles to prosecutions, such as immediate security priorities or the lack of judicial capacity are expected to diminish over time. Fieldwork was conducted during 2012–2013 in Paris and was divided into two stages: data collection and interviews.

The first stage of the fieldwork focused on gathering a comprehensive historical account of the Algerian War and the political debate related to dealing with the Algerian past in France. Interviews were conducted in the second stage. This research thus mainly focuses on three types of primary sources: historical archives, official documents and interviews collected during fieldwork.

*Archives* – Research in archives of material prior to 1992 was conducted on site as there are no online resources. Primary sources such as newspaper articles and *memoirs* were researched at the *Bibliothèque Nationale de France* in Paris. I consulted the repository of three major newspapers: *Le Monde*, *L'Observateur* and *l'Express*. Military archives were accessed at the *Service Historique de l'Armée de Terre* (S.H.A.T.) in Vincennes. Archives related to documents issued after 1992 were for the major part available online. *Official documents* – Official documents such as the text of legislation, presidential decrees and parliamentary debates are accessible from the website [www.legifrance.fr](http://www.legifrance.fr).

With respect to cases, the online research proceeded as follows: I adopted a systematic coding method to analyse the content of the cases selected. This method of analysis included elements of legal decisions that could be collected only by a close reading of the judicial opinions, such as legal, factual, analytic, or linguistic, information available in a digest or abstract of the decision. Cases were selected using a database provided on the French website [legifrance.fr](http://legifrance.fr), using the following key terms (in French): Amnistie, Algérie, Torture. I supplemented this with archival research in the library of *the Cour de Cassation* in Paris.

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<sup>70</sup> Emilio Christodoulidis Law's immemorial in Emilio Christodoulidis and Scott Veitch (eds) *Lethe's law: Justice, Law and Ethics in Reconciliation*, (Oxford and Portland Hart 2001), 223.

*Interviews* – This research is informed by a series of formal and informal conversation with relevant protagonists in the conflict and in claims of justice related to the Algerian war. Finding and meeting with those who maintain a claim for historical injustice was not an easy task. Starting in 2011, I gathered a dedicated list of relevant stakeholders who could potentially provide me with answers and at the same time be willing to be cited in my research. There was an initial difficulty even to be able to reach out to these stakeholders, first by email and then by phone. A second difficulty was to ensure that the list of contacts represented a diversity of perspectives, ideologies, and strategies toward the amnesty. I started by contacting five people who seemed relevant to my research. The selection of these five people relied first on a basic research online to find relevant names of actors on three different levels: state-level actors, intermediate actors and direct actors. ‘State level actors’ includes the National Office for Veterans and Victims of War, ONACVG, and the Secretary of State for the Veterans and Memory. The ONACVG is a public body, attached to the Ministry of Defence and the Secretary of State for Defence and Veterans is an individual, currently Monsieur Hubert Falco. However, he did not respond to my request for an interview. On the other hand, it was possible to meet with the Secretary of State for the Veterans and Memory, Monsieur Jean-Marc Todeschini. ‘Intermediate actors’ refer to stakeholders who participated in the debate on the memory of the Algerian war. Research here began with contacting historians Raphaëlle Branche and Sylvie Thénault, whose work in the archives in 1999 made it possible to open the debate on the use of the torture by the French army. I also interviewed journalist Florence Beaugé, who has been at the centre of the defamation trial for disclosing the Algerian past of Jean Marie Le Pen. Thirdly, the interviews also targeted direct protagonists making claims for justice. I was able to contact and meet with Mohammed Garne, who succeeded in his claim for recognition of victimhood, and Josette Audin, wife of Maurice Audin who brought an action of justice against the disappearance of her husband after he was arrested by the French army. Interviews with these key informants were undertaken following a semi-structured approach. (see questionnaire of interview in appendix 2).

At the second stage of the research process, I used a snowball approach, asking each person interviewed to help me identify and contact other stakeholders. This second set of interviews was primarily used to understand the political, institutional, social and cultural dynamics on the ground in France (annexe 1). Interviewees included representatives of victims associations, relatives of tortured victims, lawyers, historians,

academics, and State officials. The data collected through these informal interviews were not used as hard evidence. By coalescing scholarly work and primary resources the examination of the amnesty policy as well as the role of civil society becomes more compelling.

The third form of analysis relied on the observing the changes in the relationship between transitional justice and the rule of law. The growth of civil society movements and their ability to act reflect the relation developed towards the rule of law. In France, the shifts within civil society offer a dynamic narrative of change in response to actions and subsequent inactions on post-conflict resolution at the highest levels of government. While it does not build an entirely causal argument, such a contextual minded focus not only open the breadth of analysis to non-governmental actors, but it also provides significant correlative evidence for any transformations to take place.

## **IX. Ethical review: Doing Research on a Sensitive Issue**

Before starting fieldwork, I read the Research Ethics Guidelines designed by the university and obtained the necessary approvals to undertake the project. I was aware of the particular sensitivity of the issue of the torture during the Algerian war in France. At least two concerns overshadowed my research. A first one concerned the role played by the conflict as a context allied with contemporary structures of oppression, and resistance to oppression. Therefore, my immersion in the French colonial history indulged in an epistemically unequal truth. A second one concerned the meaning given to the testimonies collected for which location and context are intrinsically relevant.

Questioning and listening to people about their past grief requires some preliminary consideration of discretion and tact. Indeed, some of the victims and descendants of victims have been deeply traumatized and scarred by the atrocities they witnessed. Victims of traumatizing events are in a particularly vulnerable position to be affected by discussion their past grief and present-day injustices. As a socio-legal researcher, I was not qualified and equipped to respond to the psychological support some of them demanded. As a consequence, a semi-structured approach was adopted to conduct the interviews, taking a sensitive approach towards some of the issues addressed.<sup>71</sup> A list of questions and themes were prepared beforehand and they were explored further during each interview (see appendix 2). Open-ended and informal questions allowed the

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<sup>71</sup> William Gibson and Andrew Brown, *Working with Qualitative Data* (Sage Publications 2009) 89.

respondents to elaborate on a topic as they chose and to offer their interpretations of events. Mark Hall and Ronald Wright explain that content analysis method consists of systematically ‘recording the content of these opinions for information beyond merely the subject matter and outcome of the case and the parties’ identity’.<sup>72</sup>

Turning to my position, a French Muslim woman with a Moroccan descent and coming from a marginalized community of the Parisian suburb, provides interesting insights on the outsider/insider predicament when conducting research. It also outlines the possibilities of possessing multiple locations and sites of affinity and “identity”, which appear to be increasing with the norms of transnationalism and globalization. My own position and objectives framed the responses I was given (or not given) as well as how I absorbed and analysed (or not) interviews and observations.

Throughout my fieldwork, I tried to remain, as much as possible, transparent in my position, background, and the objectives of my research. This included being open, as much as possible, about my “ethnicity/(ies)” and education and background. I tried, as much as possible to avoid “performing” in certain ways as a short-cut to trust as much as I could. Thus even in highly politicised contexts, where being “a second-generation migrants ” and/or a “Muslim”, depending on which identity “dominated”, could be perceived negatively, I felt an ethical imperative to be clear about my background if I was asked about this information. And, perhaps in an attempted effort to produce a more inclusive narrative, I felt that the objectives of this work would be able to transcend forms of compartmentalisation and categorisation in which predicaments of being an “insider”, “outsider” along lines of nationality, ethnicity, gender, religion, or class predominate.

Post-modernist approach to the responsive responsibility of the researcher, lead me to consider my position in this academic activity. How to respond to remarks inducing that my research had an underlying apologetic agenda against the colonial enterprise? Borrowing Spivek formulation I asked myself can I, as a “subaltern” speak?<sup>73</sup> Of course considering oneself as postcolonial or ‘ethnic’, does not necessarily or naturally qualify one as Third World expert or indeed subaltern. As much as I was asking and observing, I understood the need for others to ask and observe my own position. Besides, her

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<sup>72</sup> Mark A. Hall, Ronald F. Wright, ‘Systematic Content Analysis of Judicial Opinions’ [2006] 6 California Law Rev 96.

<sup>73</sup> Gayatri Spivak, Can the subaltern speak?, in: C Nelson&L Grossberg (eds), Marxism and Interpretation of Culture, pp 271–313 (Chicago, IL: University of Illinois Press 1988).

concerns about the impact of discursive constructions are intimately linked to problematic of the field of development and therefore demands a “hyper self-reflexivity”. The ethical pressures of being responsible for the production of a form of knowledge and history continually forced me, to clarify the objectives of my work -why does a discussion on accountability in relation to the Algerian war matter? - with interviewees and the readers of this thesis.

Be it of an “insider”, “outsider”, “quasi-insider”, or anything else, every researcher will have to face its own set of challenges.<sup>74</sup> A way out is by seeing and accepting the different positions of identities while also seeing and beyond these categories. As a dear colleague shared with me: “whilst affinities and attachments remain, an effort to transcend these and hear human stories must be pursued”.<sup>75</sup>

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<sup>74</sup> Robert G Burgess, *In the Field: An Introduction to Field Research* (Unwin Hyman Ltd 1984) 17. Also see Ruth Horowitz, ‘Remaining an Outsider: Membership as a Threat to Research Rapport’ (1986) 14 *Journal of Contemporary Ethnography* 409.

<sup>75</sup> Conversation with Dr Sanaa Alimia May 2016

## **Chapter 2**

### **Amnesty Legislations**

This chapter sets out the starting point of this research. The purpose of this chapter is to present the author's approach in relation to the existing literature in terms of concepts, analytical tools and research methods. To do so, it is first necessary to situate the research question within the existing literature on amnesty law. It develops a theoretical framework to address the role of amnesty legislation in post-conflict resolution. The primary purpose of this chapter is to situate my thesis (and concerns) within the existing transitional justice debates.

In the past decades, scholars from different disciplines including, but not limited to, law, political science, sociology, anthropology, philosophy, and criminology have contributed to the question of amnesty's role in reconciliation process by engaging in empirical research and essays. Amnesty embeds not only legal connotations but also emotions and inevitably engages with the meaning of justice. However, state practice of the grant of amnesty has centred on the peace versus justice debate. This thesis argues that amnesty affects criminal accountability but also the attribution of guilt, which does not necessarily, requires prosecution. By exploring the effect of amnesty over time, it seeks to further extend the field of inquiry on amnesty beyond the traditional dichotomies of transitional justice. While amnesty reflects political bargaining by opposing parties, over time amnesty becomes the nexus between a particular meaning of justice and the need for peace of past crimes. Yet, the grant of amnesty may bar the possibility for a conflicted society to recover from its wounds and move on.

Amnesty is indeed widely explored in terms of its potential to act as an expedient mechanism for peace. The following overview of the literature seeks to identify the main axis of the relationship that connects amnesty to justice and the need for peace. This chapter argues that understanding the role of amnesty in post conflict settings requires extending our understanding beyond that. It is particularly interested to explore and develop the claims made by the new generation of transitional justice authors such as Mark Freeman and Louise Mallinder, who have brought nuances to the role of amnesty as a 'transitional mechanism'.

Building upon these insights, this chapter first explores the impact of amnesty laws on post-conflict settings. It examines the plurality of meanings embedded within the

concept of amnesty. It lays out the array of dimensions attached to the meaning of amnesty from transitional justice literature and political science standpoint. Second, this chapter begins to develop a framework to analyse the effects of using amnesty over time.

## I. The Promises of Amnesty

In answering the question as to what ensures lasting peace, St. Augustine replied that ‘by punishing past offences we glut our anger; by being compassionate we ensure the future’.<sup>76</sup> It is the same logic that leads to the growth of a restorative justice scholarship promoting the use of non-retributive mechanisms. The deconstruction of the meaning of amnesty demonstrates that it is essentially a tool of restorative justice. This section first discusses the potential of justice mechanisms to promote peace and reconciliation. It then argues that the potential of amnesty as a post-conflict mechanism to successfully bring peace has much more to do with the ability of a society to break with the past than the terms of the amnesty itself. Finally, it explores claims made by authors on the effects of amnesty on the construction of a collective memory about past crimes. It shows that this role extends beyond forgiving to reach the forgetting of past events.

### A. The Meaning of Amnesty

Amnesties have a long history of being used by states in the aftermath of a conflict or political crisis. From ancient Greece to more recent conflicts, States have justified introducing amnesties to stem tensions inherited from conflict and to foster reconciliation.<sup>77</sup>

Over time, amnesty has taken different forms and shapes, borrowing a diversity of roles.<sup>78</sup> For example amnesty can be legislated by a parliament, granted by presidents, or even be included in peace agreements. Amnesty may be enacted either during or after a conflict, in relation to a political crisis and as part of negotiated transitions. In some

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<sup>76</sup> Augustine, Letter ccii, cited in Joachim von Elbe ‘The Evolution of the Concept of the Just War in International Law’ [1939] 33(4) *American Journal of International Law* 667.

<sup>77</sup> Mark Freeman, *Necessary Evils: Amnesties and the Search for Justice* (n 9).

<sup>78</sup> See comparative tools on amnesties such as: Transitional Justice Data: [transitionaljusticedata.com/](http://transitionaljusticedata.com/) Peace Agreement Database: [peaceagreements.ulster.ac.uk/](http://peaceagreements.ulster.ac.uk/) Amnesty Law Database: [incore.ulst.ac.uk/Amnesty/about.html](http://incore.ulst.ac.uk/Amnesty/about.html).

contexts, amnesties are limited to specific types of offences and to specific members of a given population. Similarly, amnesty is granted for a wide range of reasons, from facilitating peace negotiations to being used as a tool for the rehabilitation of ex-combatants.

The term amnesty generally refers to an act of oblivion of past offences. Andreas O'Shea, defines amnesty as an 'immunity in law from either criminal or civil legal consequences, or from both, for wrongs committed in the past in a political context'.<sup>79</sup>

Mark Freeman provides further details and defines amnesty as an:

extraordinary legal measure whose primary function is to remove the prospect of criminal liability and the consequences of criminal sanction for designated individuals or classes of persons in respect to designated types of offenses irrespective of whether the persons concerned have been tried for such offence in a court of law.<sup>80</sup>

The notion of amnesty has often been likened to the grant of pardon.<sup>81</sup> Both amnesty and pardon constitute measures of clemency. They consist in the reduction or elimination of all penalties for specific crimes. However, they have different effects and act differently on the rehabilitation of criminals.<sup>82</sup> Pardon is 'an exemption in respect of the enforcement of the sentence'.<sup>83</sup> Its effect is to release an offender from the execution of a sentence pronounced by a criminal court, or diminish his sanction by transforming it into a less severe sentence.<sup>84</sup> It does not eliminate the civil responsibility of the offender and does not erase the passing of the sentence, which remains in the person's criminal record. As opposed to pardon, amnesty completely erases the sentence pronounced. Article 133-9 of French *Nouveau Code Pénal* (criminal code) provides that

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<sup>79</sup> Andreas O'Shea, *Amnesty for Crime in International Law and Practice* (n 6) 2.

<sup>80</sup> Freeman, *Necessary Evils* (n 9) 13.

<sup>81</sup> Louis Joinet, 'Study on Amnesty laws and their role in the Safeguard [sic] and Promotion of Human Rights', Preliminary Report, June 21 1985 United Nations Economic and Social Council, ECOSOC, E/CN.4/Sub.2/1985/16.

<sup>82</sup> Code Pénal Section III: Of Amnesty. Article 133-9: An amnesty erases the sentences imposed. It carries the remission of all penalties without entailing any restitution. It restores to the perpetrator or accomplice to an offence the benefit of a suspension which may have been granted for a previous sentence. [English translation by John Spencer] Available at:

<https://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations>

<sup>83</sup> Code Pénal Article 133-9 (n 7).

<sup>84</sup> Code Pénal Section II: Of Pardon. Articles 133-7 and 133-8. Article 133-7: A pardon only entails an exemption in respect of the enforcement of the sentence. Article 133-8 A pardon does not defeat the victim's right to obtain compensation for the damage caused by the offence. [English translation by John Spencer]

an amnesty makes the criminal proceedings as if they had not taken place by expunging the conviction.<sup>85</sup>

Unlike amnesty, no judicial body reviews the decision to grant a pardon. Pardon comes from a discretionary decision of the President of the Republic, which cannot be delegated. It may be subjected to specific conditions such as compliance with specific monitoring or assistance measures or compensation of victims, or again, the absence of another conviction during a specified period of time. The decision to grant a pardon takes the form of a ruling countersigned by the Prime Minister and the Minister of Justice. The decision to grant pardon is not published in the *Journal Officiel* (Official Journal). The reasons for the pardon are not made public and the legality or constitutionality of the decision is not subject to control.

Furthermore, amnesty and pardon approach the question of accountability differently. Indeed, measures of pardon are only granted to individuals who have already been convicted for an offence. On the contrary, the grant of amnesty does not necessarily require a judgment. As Bruno Py explains, by granting amnesty, the legislator is led to 'review the facts and acts carried out in order to remove any criminal stigma they could have in the future'.<sup>86</sup> By contrast, pardon does not exclude the possibility of determining the legal or moral guilt of the criminal. In the words of legal scholar Austin Sarat, 'pardon presupposes the very moral guilt that amnesty precludes'.<sup>87</sup>

One question that emerges is how the remission of criminal stigma affects the recognition of the crime. Briefly, the condemnation of a criminal serves two purposes: to acknowledge the responsibility of the offender and to ensure that the offender repairs the harm caused. Without the endorsement of a conviction, amnesty abolishes this possibility. By examining amnesties according to their phenomenological effects, Klaus Günther points to the notion of attributions of guilt. He distinguishes amnesties that prevent the legal classification of acts as crimes and the attribution of guilt from those which do not have such effect.<sup>88</sup> As such, amnesties can either have the effect of lifting the possibility of punishment or lifting the possibility of criminal proceedings at

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<sup>85</sup> See Code Pénal Article 133-9 (n 7); in French: 'L'amnistie efface les condamnations prononcées. Elle entraîne sans qu'elle puisse donner lieu à restitution, à la remise des peines.'

<sup>86</sup> Bruno Py 'Amnistie: le choix dans les dates' [2002] 4 Droit pénal 5.

<sup>87</sup> Austin Sarat and Nasser Hussain, *Forgiveness, Mercy, and Clemency* (Stanford: Stanford University Press 2007) 159.

<sup>88</sup> Klaus Günther, 'The Criminal Law of "Guilt" as Subject of a Politics of Remembrance in Democracies' in E. Christodoulidis and Scott Veitch (eds), *Lethe's Law: Justice, Law and Ethics in Reconciliation* (Oxford and Portland: Hart Publishing 2001) 3-16.

all. This distinction leads to the question of what is the role of a criminal trial apart from leading to punishment? As will be shown further below, trials also play a role in the attribution of guilt. This separation of trial from punishment is an important opening for the role of truth commissions as being able to satisfy some of the aspects of trials without going through the criminal justice process. French legal scholar Bruno Py argues that ‘facts’ covered by an amnesty are considered to be a ‘legal fiction’.<sup>89</sup> This does not mean that the acts that are inexistent, rather that amnesty acts retroactively to effectively erase the sanction attached to the criminal offence. As such this leads to an ambiguous situation whereby the crimes covered by the amnesty are not deemed to have never existed but they cannot be prosecuted. On a doctrinal level, the debate about amnesty sits at the heart of the opposition between the ‘retributive school of justice’ and the ‘restorative school of justice’. Within the retributive approach to justice, amnesty is viewed as a deviation from the normal course of justice.<sup>90</sup> Indeed, retributive theory is a crime-focused approach and comprises a retrospective view in which the concept of justice entails punishment. As such it considers that criminal justice plays a central role in the restoration of the rule of law.<sup>91</sup> John Rawls notably developed the argument that before political society can be cultivated, serious crimes must be adjudicated and conflict resolved.<sup>92</sup> Prosecutions therefore serve a political purpose by laying the foundation for a transition that disavows the political norms of predecessors and works ‘to construct a new legal order’.<sup>93</sup> Within this role, punishment has the potential to act as both retribution and as a deterrent.<sup>94</sup> On the other hand, the restorative school of thought emphasises non-prosecutorial mechanisms, the rehabilitation of past offenders and the restoration of relations between members of a society. Inspired by a utilitarian vision, a new generation of authors contends that amnesty laws offer the potential to strengthen a new regime’s democratic institutions, prevent the repetition of

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<sup>89</sup> Py ‘Amnistie’ (n 11) .

<sup>90</sup> Diane Orentlicher, ‘Swapping Amnesty for Peace and the Duty to Prosecute Human Rights Crimes’ [1997] 3(2) *International Law Studies Association Journal of International & Comparative Law*; Leila Nadya Sadat, ‘Exile, Amnesty and International Law’ [2006] 81(3) *Notre Dame Law Review*.

<sup>91</sup> On state duty to prosecute, see the argument put forward by Naomi Roht-Arriaza, ‘State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law’ [1990] 78 *California Law Review*; Diane Orentlicher, ‘Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime’ [1991] 100(8) *Yale Law Journal*; Miriam Aukerman, ‘Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice’ [2002] 15 *Harvard Human Rights Journal*.

<sup>92</sup> John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press 1971).

<sup>93</sup> Teitel, *Transitional Justice* (n 7) 30.

<sup>94</sup> O’Shea, *Amnesty for Crime in International Law* (n 6) 82.

abuse in the future, aid political reconciliation, and have a therapeutic effect on society.<sup>95</sup> The concept of amnesty presents the particularities, which are to be anchored in these two schools of thoughts. It has a retributive dimension because it recognises the criminal character of the act it covers. As Mallinder explains, ‘in extinguishing liability for a crime, amnesty assumes that a crime has been committed’.<sup>96</sup> But it is also restorative oriented to the extent that it embeds and political considerations. Andreas O’Shea offers a mitigated approach and suggests considering amnesty as a ‘refinement of the understanding of punishment’,<sup>97</sup> a trade-off between victims and perpetrators, but also between victims of past violations and future victims.<sup>98</sup>

## B. The Amnesty Debate in Transitional Justice Scholarship

Transitional justice is a field of inquiry that makes it possible to address how societies overcome a period of violence. Within the past decade, several scholars have begun to stress the need to reassess the foundations of transitional justice. A central theme that unites these critics reflects their unease with the bifurcation inherent within many post conflict schemes. This theme is captured by a provocative question: what is transitional justice transitioning ‘from’ and what it is transitioning ‘to’?

This following discussion of transitional justice as a concept frames the question of amnesty within the use of amnesty as an alternative means to break from violence. Amnesty introduced in the aftermath of a conflict presents one of the most contentious issues associated with peace-building and reconciliation.<sup>99</sup> The shift from violence, inherent in the concept of a post-conflict ‘transition’, is by implication a shift from impunity to an accountability framework. Victims abused during conflict may seek accountability and retribution after the end of the conflict. Yet without condition

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<sup>95</sup> Jaime Malamud-Goti, ‘Transitional Governments in the Breach: Why Punish State Criminals?’ [1990] 12(1) Human Rights Quarterly; Martha Minow ‘The Hope for Healing: What Can Truth Commissions Do?’ in Robert I. Rotberg and Dennis Thompson (eds), *Truth v. Justice: The Morality of Truth Commissions* (Princeton: Princeton University Press 2000).

<sup>96</sup> O’Shea, *Amnesty for Crime in International Law* (n 6) 2.

<sup>97</sup> O’Shea, *Amnesty for Crime in International Law* (n 6) 82.

<sup>98</sup> Ronald C. Slye, ‘The Legitimacy of Amnesties under International Law and General Principles of Anglo-American Law: Is a Legitimate Amnesty Possible?’ [2002] 43 Virginia Journal of International Law.

<sup>99</sup> ATLAS, *Armed Conflicts, Peacekeeping, Transitional Justice: Law as a Solution*. Available at: [biicl.org/atlas](http://biicl.org/atlas) [last accessed June 2013].

attached, amnesty mechanisms run the risks simply reassert and cement the tensions that lead to the conflict in the first place.

## 1. Amnesty and International Law

With the development of international criminal law, amnesty is presumed to be illegal.<sup>100</sup> Indeed International Law provides that states have the obligation to investigate violations, to prosecute the perpetrators and if their guilt is established to punish them.<sup>101</sup> Criminal prosecution is a fundamental aspect of justice and peace. Since 1945, international law has steadily reinforced the State's duty to prosecute crimes identified by international criminal law.<sup>102</sup> The Rome Statute provides for jurisdiction over serious violations of the rules applicable in internal armed conflicts.<sup>103</sup> In the International

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<sup>100</sup> See the Princeton Principles on Universal Jurisdiction 2001, which proposed: 'Amnesties are generally inconsistent with the obligation on states to provide accountability for serious crimes under international law', Principle 7, Princeton Principles on Universal Jurisdiction 28 (2001), Princeton University Program in Law and Public Affairs, Princeton University, Princeton, 2001. See also, Inter-American Court of Human Rights, Barrios Altos Case (*Chumbipuma Aguirre et al. v. Peru*) 14 March 2001; *Rodriguez v. Uruguay*, Communication No. 322/1988, UN Human Rights Committee, 19 July 1994; Human Rights Committee General Comment No. 20 on Art. 7 (replacing General Comment 7) concerning prohibition of torture and cruel treatment or punishment, 10 March 1992.

<sup>101</sup> Commission on Human Rights, *Question of the Impunity of Perpetrators of Human Rights Violations (civil and political)*: revised final report prepared by Mr Joinet pursuant to Sub-Commission Decision. 1996/119, E/CN.4/Sub.2/1997/20Rev.1.2, 2 October 1997, para. 27.

<sup>102</sup> Office of the United Nations High Commissioner for Human Rights (OHCHR) *Rule-of-Law Tools for Post-Conflict States: Amnesties* (New York and Geneva: United Nations 2009). Available at: [refworld.org/docid/4a953bc82.html](http://refworld.org/docid/4a953bc82.html) [last accessed 1 September 2013]. For a discussion of the relative merits and weaknesses of the UN position, see Freeman, *Necessary Evils* (n 9).

<sup>103</sup> Rome Statute. Article 8(2)(c) and (e). Article 8(2)(c): In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause: (i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment; (iii) Taking of hostages; (iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable. Article 8(2)(e): Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts: (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities; Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law; (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict; (iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives; (v) Pillaging a town or place, even when taken by assault; (vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions; (vii) Conscripting or enlisting children under the age of fifteen

Criminal Court the issue of large-scale instances of war crimes and crimes against humanity has been dealt by prosecuting the main agents responsible for these crimes. These legal norms are derived from a range of sources, including the Hague Conventions, the Geneva Conventions, including Additional Protocols I, II and III. As Yoram Dinstein explains, ‘given the complementarity principle enshrined in the Rome Statute, domestic courts also have jurisdiction over these offences where enabling legislation providing for domestic jurisdiction over war crimes and crimes against humanity identified in the Rome Statute has been passed. On this basis one could go a step further and assume that a duty to prosecute under international criminal law attaches to such offences, with the corollary that amnesties for such crimes could not normally be recognized’.<sup>104</sup>

The ‘near universal ratification of the Geneva Conventions and the widespread enactment of appropriate domestic legislation lead to a strong view that there is an obligation to prosecute grave breaches of the Geneva Conventions (and genocide), as a customary rule of international law’.<sup>105</sup> According to the principle of universal jurisdiction over “grave breaches” of the Geneva Conventions of 1949 and Additional Protocol I States party must also suppress all other violations and can take whatever legislative, administrative or disciplinary measures deemed appropriate.<sup>106</sup> ‘States party to either or both the Geneva Conventions and Additional Protocol I are formally obliged to prosecute or extradite any person suspected of grave breaches, wherever the commission of the crimes occurred and whatever his or her nationality’. In its Commentary of the Geneva Conventions of 1949, the ICRC explains that this obligation

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years into armed forces or groups or using them to participate actively in hostilities; (viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand; (ix) Killing or wounding treacherously a combatant adversary; (x) Declaring that no quarter will be given; (xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons; (xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict; (f) Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

<sup>104</sup> Yoram Dinstein, ‘The Universality Principle and War Crimes’ [1998] 71 *International Law Studies*, Special issue on The Law of Armed Conflict: Into the Next Millennium 17 and 21.

<sup>105</sup> ICRC Advisory Service compilation of national implementation mechanisms of international humanitarian law. Available at: [gva.icrc.org/ihl-nat](http://gva.icrc.org/ihl-nat).

<sup>106</sup> A. Segall, *Punishing Violations of International Humanitarian Law at the National Level: A Guide for Common Law States*, Geneva: ICRC 2001) 30-38.

is “absolute”.<sup>107</sup> Indeed it further explains ‘the Geneva Conventions was intended to prevent the vanquished from being compelled in an armistice agreement or a peace treaty to renounce all compensation due for breaches committed by persons in the service of the victor’.<sup>108</sup> This provision seeks to prevent States from avoiding their obligation to prosecute those accused of grave breaches, insofar as this may form part of war reparations.<sup>109</sup> One would therefore assume: ‘that any amnesty covering a person accused of grave breaches could not ordinarily have any legal effect in the State promulgating the amnesty, nor could it be given recognition in other States’.<sup>110</sup>

However, the question arises whether serious violations of other rules of armed conflicts also entail such a duty. Yasmin Naqvi explains that The Hague Conventions and Regulations (where many of these other crimes are identified) themselves do not specify a duty for States Parties to prosecute those who have perpetrated grave offence.<sup>111</sup> However, a presumption of inclusion of the humanitarian rules included in the Regulations annexed to the Hague Convention IV of 1907 can be found from the Nuremberg International Military Tribunal of 1945 which held that they ‘were recognized by all civilized nations and were regarded as being declaratory of the laws and customs of war’.<sup>112</sup> Furthermore, the Statute of the International Criminal Tribunal

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<sup>107</sup> J. Pictet (ed), *The Geneva Conventions of 12 August 1949, Commentary: IV Geneva Convention* (hereinafter *Commentary on Geneva Convention IV*) (Geneva: ICRC 1960) 602. Furthermore, the *Commentary* states that: ‘The universality of jurisdiction for grave breaches is some basis for the hope that they will not remain unpunished and the obligation to extradite ensures the universality of punishment’ 587.

<sup>108</sup> *Commentary on Geneva Convention IV* (n 40) 603

<sup>109</sup> *Commentary on Geneva Convention IV* (n 40). The *Commentary*, continues: ‘As the law stands today [...] [o]nly a State can make such claims on another State, and they form part, in general, of what is called ‘war reparations’.’ Principle 15 in a UN text on the right to reparation proposes that judicial or administrative sanctions or ‘a judicial decision restoring the dignity, reputation and legal rights of the victim and/or of persons connected with the victim’ may constitute satisfaction as part of reparations. Revised Set of Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law, prepared by Mr. Theo van Boven pursuant to decision 1995/117 of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN Doc. E/CN.4/Sub.2/1996/17, 24 May 1996.

<sup>110</sup> *Commentary on Geneva Convention IV* (n 40). The *Commentary*, continues: ‘As the law stands today [...] [o]nly a State can make such claims on another State, and they form part, in general, of what is called ‘war reparations’.’ Principle 15 in a UN text on the right to reparation proposes that judicial or administrative sanctions or ‘a judicial decision restoring the dignity, reputation and legal rights of the victim and/or of persons connected with the victim’ may constitute satisfaction as part of reparations. Revised Set of Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law, prepared by Mr. Theo van Boven pursuant to decision 1995/117 of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN Doc. E/CN.4/Sub.2/1996/17, 24 May 1996.

<sup>111</sup> Yasmin Naqvi, ‘Amnesty for War Crimes: Defining the Limits of International Recognition’ [2003] 85/851 *International Review of the Red Cross* 597.

<sup>112</sup> International Military Tribunal, Trial of the Major War Criminals, 14 November 1945-1 October 1946, Vol. 1, Nuremberg, 1947 254. The International Military Tribunal stated: ‘Crimes against international

for the former Yugoslavia provides for jurisdiction over ‘violations of the laws and customs of war’.<sup>113</sup> Finally, it has to be noted that during negotiations in drafting the Rome Statute it was a guiding principle that definitions of war crimes and crimes against humanity should reflect customary international law.<sup>114</sup>

The principle of complementarity in the Rome Statute may lead to the assumption that a general duty to prosecute exists. Indeed, the Rome Statute implies a duty for States to prosecute individuals’ accused of crimes within the jurisdiction of the Court.<sup>115</sup> If States are unable or unwilling to fulfill this duty, the ICC will assume jurisdiction. However, as Naqvi notes, this point is debatable. Indeed, it cannot be assumed from the complementarity principle that an absolute duty to prosecute is attached to international crimes.<sup>116</sup> It remains however the case that the inclusion of the large majority of serious violations of the laws and customs of war in the authoritative list of crimes identified by the Rome Statute and the existence of universal jurisdiction was reinforced with the creation of hybrid courts, or regional courts such as the Inter-American Courts of Human Rights.<sup>117</sup> The conditions that enable the creation of these courts point towards the idea of an international consensus upon the irrefragable duty of State to prosecute certain kind of crimes.<sup>118</sup>

As Yasmin Naqvi explains: ‘The unsettling response as to whether a customary duty to prosecute could be assumed on the basis of the complementarity principle of the Rome Statute applies equally to serious violations of humanitarian law committed in non-international armed conflicts. In fact, given the historic reluctance of States to assume precise duties in relation to the law of armed conflict in internal conflicts, there is more

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law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced’(USA, France, UK & USSR v Göring & ors [1947] 1 Trial of the Major War Criminals before the International Military Tribunal 223) .

<sup>113</sup> Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, UN Security Council Res. 827 (1993), UN Doc. S/RES/827, 25 May 1993 (hereinafter ICTY Statute), Article 3.

<sup>114</sup> H. von Hebel and D. Robinson, ‘Crimes within the Jurisdiction of the Court’ in R. Lee (ed), *The International Criminal Court, The Making of the Rome Statute: Issue, Negotiations, Results* (The Hague: Kluwer Law International 1999) 122.

<sup>115</sup> Article 17(1)(a) of the Rome Statute provides: ...the Court shall determine that a case is inadmissible where [t]he case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution.

<sup>116</sup> Naqvi, ‘Amnesty for War Crimes’ (n 111)599.

<sup>117</sup> Naqvi, ‘Amnesty for War Crimes’ (n 111)599.

<sup>118</sup> William A. Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge: Cambridge University Press 2006).

reason to be hesitant about inferring a mandatory system of enforcement from the negotiations of the Rome Statute.<sup>119</sup>

Transitional Justice scholarship sought to embrace these debates and itself entered the ‘age of accountability’.<sup>120</sup> This emphasis on accountability coincides with the creation of the United Nations ad hoc tribunals and the reinforcement of retributive measures to deal with past crimes.<sup>121</sup> The strong argument for greater accountability however clashes with the persistence of the use of amnesty legislation.<sup>122</sup> During the preparatory stages of the creation of the ICC, several negotiating states resisted calls that amnesties be explicitly prohibited in the Rome Statute 1998. International law also encourages the use of amnesty at the end of an armed conflict. Article 6(5) of Protocol II of the Geneva Conventions notes that: ‘At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained’.<sup>123</sup> In its commentary on Protocol II, the International Committee of the Red Cross (ICRC) specifies that the object of article (6)5 is to ‘encourage gestures of reconciliation which can contribute to re-establishing normal relations in the life of the nation which has been divided’.<sup>124</sup> Furthermore, semantic analysis of the language used in the Rome Statute seems to tilt the argument towards a positive duty to prosecute. The international court jurisprudence also seems to point towards the prohibition of amnesties. The 2004 decision of the Appeal Chamber of the Special Court of Sierra Leone confirmed that amnesties cannot bar the prosecution of international crimes before international or foreign courts by virtue of the existence of universal jurisdiction to prosecute war crimes perpetrated in non-international armed conflict.<sup>125</sup> It notably states that ‘[w]here jurisdiction is

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<sup>119</sup> Naqvi, ‘Amnesty for War Crimes’ (n 111)601.

<sup>120</sup> Francesca Lessa and Leigh Payne (eds), *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives* (Cambridge: Cambridge University Press 2012) 58.

<sup>121</sup> Lessa and Payne, *Amnesty on the Age of Human Rights* (n 120).

<sup>122</sup> Slye, ‘Legitimacy of Amnesties under International Law’ (n 98) 179.

<sup>123</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) Art. 6(5), June 8, 1977, 1125 U.N.T.S. 609, 614.

<sup>124</sup> Claude Pilloud, Christophe Swinarski and Bruno Zimmerman (eds) *Commentary on Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, Commentary of article 6(5) of Additional Protocol II* 1402.

<sup>125</sup> *Prosecutor v. Morris Kallon and Brima Buzzy Kamara*, Special Court for Sierra Leone, SCSL-2004-15- AR72(E) and SCSL-2004-16-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty (Appeals Chamber, 13 March 2004) (hereinafter Lomé Decision), para 8, 68,70. See also

universal, a State cannot deprive another State of its jurisdiction to prosecute the offender by the grant of amnesty'.<sup>126</sup>

It is beyond the scope of this research to determine whether the duty actually exists in customary international law. However these debates are significant to show how domestic courts can give effect to an amnesty by choosing not to exercise its jurisdiction over the crimes it covers.<sup>127</sup>

## 2. Amnesty and the Goal of Peace

In the 1990s the democratic transitions in Latin America reshuffled the debate on amnesty.<sup>128</sup> Amnesties enacted by outgoing regimes in Latin America have come under attack by human rights advocates and anti-impunity campaigners for being used as a shield for perpetrators of crimes.<sup>129</sup> This movement triggered important discussions on the permeability of international law to non-retributive measures. In Uruguay<sup>130</sup> or Brazil,<sup>131</sup> for example, domestic legal institutions have been called on to review the validity of amnesty. Such amnesties were considered illegitimate because offering immunity without requiring an initial inquiry into the facts.<sup>132</sup> Another example has been to seek justice via the use of universal jurisdiction in the effort to extradite former Chilean dictator General Augusto Pinochet from the United Kingdom

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*Prosecutor v. Augustine Gbao*, Decision on Preliminary Motion on the Invalidity of the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court, SCSL-04-15-PT-141 (25 May 2004).

<sup>126</sup> *Prosecutor v. Morris Kallon and Brima Buzzy Kamara* (Lomé Decision) para 67.

<sup>127</sup> Naqvi, 'Amnesty for War Crimes' (n 111) 599.

<sup>128</sup> See the Orentlicher-Nino debate: Orentlicher, 'Settling Accounts' (n 16); Carlos S. Nino, 'The Duty to Punish Past Abuses of Human Rights Put into Context: The Case of Argentina' [1990] 100(8) Yale Law Journal; Diane Orentlicher, 'A Reply to Professor Nino' [1991] 100(8) Yale Law Journal; Diane Orentlicher, "'Settling Accounts" Revisited: Reconciling Global Norms with Local Agency' [2007] 1(18) International Journal of Transitional Justice. (See also contributions by Roht-Arriaza, 'State Responsibility to Investigate and Prosecute' (n 16) and Jose Zalaquett 'Confronting Human Rights Violations Committed by Former Governments: Principles Applicable and Political Constraints' in Justice and Society Program of the Aspen Institute(ed), *State Crimes: Punishment or Pardon?* (Queenstown: The Aspen Institute 1989) 23-69.

<sup>129</sup> Naomi Roht-Arriaza and Lauren Gibson, 'The Developing of a Jurisprudence on Amnesty' [1998] 20(4) Human Rights Quarterly.

<sup>130</sup> A law declaring an expiration of the state's punitive authority was passed in 1986 and grants Amnesty to acts of repression committed by military and police officers in the period of the dictatorship from 1973 to 1975: see Elin Skaar, 'Legal Development and Human Rights in Uruguay 1985-2002' [2007] 8(2) Human Rights Review 62.

<sup>131</sup> The Amnesty law of 28 August 1979 covers the crimes committed under the military dictatorship.

<sup>132</sup> Mallinder, *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide* (Oxford and Portland: Hart Publishing 2008) 6.

to stand trial in Spain in the late 1990s.<sup>133</sup> In spite of these important developments, it still remains difficult to assert that Amnesty is deemed inconsistent with international law.<sup>134</sup>

Furthermore, authors questioned the potential of amnesty as a tool of justice by inquiring on its potential to act as an expedient for peace. Is peace possible when perpetrators have not been prosecuted? It seeks to facilitate the restoration of peace, forgiveness and truth-recovery. It is argued that amnesty is an expedient for peace by encouraging leaders of dissident groups to participate in the democratic process.<sup>135</sup> This role is played by protecting ex-soldiers from the stigma of prosecution and enabling their reintegration in society- by facilitating the release of prisoners, protecting State agents from prosecution, encouraging exiles to return, or even merely recognizing the cultural or religious traditions). One key example is the case of Sierra Leone. In this case the Truth and Reconciliation Commission acknowledged that the Lomé Agreements would not have been possible without the granting of an amnesty.<sup>136</sup> Besides, prosecuting criminals in situation of mass violence is not always possible and in some cases limited amnesties have been more efficient in achieving reconciliation.<sup>137</sup> Naqvi further explains, that ‘in armed conflicts where serious violations of the laws of war and international humanitarian law have been committed on a massive scale, peace and justice for victims has to be balanced against the need for a progressive response and not provoke or maintain further violence’.<sup>138</sup> In these circumstances a ‘restorative justice approach incorporating limited amnesties, focusing

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<sup>133</sup> In 1986 President Alfonsin passed a law granting amnesty to some of the military personnel who had participated in the dictatorship of 1976-1983. The Law of Due Obedience of June 1987 allowed junior officers to escape legal retribution.

<sup>134</sup> Mallinder, *Amnesty, Human Rights and Political Transitions* (n 132) Chapter 3 Mark Freeman and Max Plensky, ‘The Amnesty Controversy in International Law’ in Lessa and Payne, *Amnesty in the Age of Human Rights Accountability* (n 120).

<sup>135</sup> See Michael P. Scharf, ‘Swapping Amnesty for Peace? Was There a Duty to Prosecute International Crimes in Haiti?’ [1996] 31(1) *Texas International Law Journal* 4-9, discussing the unwillingness of Haitian leaders to leave if they faced prosecution.

<sup>136</sup> Sierra Leonean TRC, Vol 2, Chapter 2 ‘Findings’ in Truth and Reconciliation Commission of Sierra Leone, ‘The Final Report of the Truth and Reconciliation Commission of Sierra Leone’, 5 October 2004.

<sup>137</sup> See the ‘amnesty for truth’ argument used by the Constitutional Court of South Africa in the AZAPO case to justify the Promotion of National Unity and Reconciliation Act 34 of 1995: *The Azanian Peoples Organization (AZAPO) v. The President of the Republic of South Africa and ors.*, Case CCT 17/96, (South Africa), 1996 683-685. See also J. Dugard, ‘Dealing with Crimes of a Past Regime: Is Amnesty Still An Option?’ [1999] 12(4) *Leiden Journal of International Law* 1009; O’Shea, *Amnesty for Crime in International Law* (n 6) 310.

<sup>138</sup> Naqvi, ‘Amnesty for War Crimes’ (n 111)

on the normalising rather than the punitive objectives of criminal law, has been advanced as a more appropriate model'.<sup>139</sup> Another reason why states choose to grant amnesty to past offenders is to prevent, once and for all, the past from seeding renewed conflict. As such, the granting of amnesty finds justification as a political tool used to alleviate the tensions and facilitate the rehabilitation of past offenders. Indeed, political leaders may choose to grant an Amnesty to ex-combatants as the result of a political bargain between opposing parties in favour of assuring political stability over criminal justice.

The persistence of the use amnesty in state practice reflects another conceptualisation of justice. Amnesty enables to deal with situation that cannot be resolved in a courtroom. As Tom Hadden explains, a strict retributive approach aiming at the punishment of all violators may serve to maintain tensions rather than reconcile opposing parties.<sup>140</sup> Gerhard Werle further suggests that 'refraining from punishing crimes under international law can be necessary in individual cases to restore domestic peace and make national reconciliation possible'.<sup>141</sup> The argument that prosecution may impede the peace process was advanced in the case of South Africa. Martha Minow notably stressed that prosecutions are 'slow, partial and preoccupied with the either/or simplifications of the adversary process'.<sup>142</sup> In her work on the Truth Commission process she highlights that the 'adversarial nature of prosecution tends to depreciate the pain and suffering for those who survive violence and on healing societies torn by hatred and brutality'.<sup>143</sup> Further, it was suggested that the indictment of perpetrators might have the counter-productive effect of stigmatising criminals and excluding them from the reconciliation process.<sup>144</sup> Hence authors have turned to the use of amnesty as an

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<sup>139</sup> Ruti Teitel, 'Transitional jurisprudence: The Role of Law in Political Transformation' [1997] 106(7) Yale Law Journal.

<sup>140</sup> Tom Hadden, 'Punishment, Amnesty and Truth: Legal and Political Approaches' in Adrian Guelke (ed), *Democracy and Ethnic Conflict: Advancing Peace in Deeply Divided Societies* (Basingstoke: Palgrave Macmillan 2004) 212.

<sup>141</sup> Gerhard Werle, *Principles of International Criminal Law* (The Hague: T.M.C. Asser Press 2005) 66.

<sup>142</sup> Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Boston: Beacon Press 2007) 88-9; André Du Toit, 'The Moral Foundations of the South African TRC: Truth as Acknowledgment and Justice as Recognition' in Rotberg and Thompson, *Truth v. Justice* (n 20).

<sup>143</sup> Minow, *Between Vengeance and Forgiveness* (n 63) 236; see also Yael Danieli, 'The Right to Restitution, Compensation, and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms: Preliminary Reflections from a Psychological Perspective' in Eduardo Vetere and Pedro David (eds), *Victims of Crime and Abuse of Power: Festschrift in Honour of Irene Melup* (New York: United Nations 2005) 261.

<sup>144</sup> Payam Akhavan, 'Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?' [2001] 95(1) American Journal of International Law.

alternative to prosecution. The reference of the concept of *Ubuntu* in the 1994 Interim Constitution of South Africa reflects the moral dimension embedded in the notion of Amnesty and emphasises its role in preventing vengeance. It states that: ‘there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for Ubuntu but not for victimization’.<sup>145</sup> This led Martha Minow to conclude that the South African amnesties enabled the restoration of the dignity of victims by protecting them against further violence and that the suffering they endured is integrated within the wider narrative of nation building in the aftermath of the conflict.<sup>146</sup>

While on the premise the grant of amnesty contradicts the principle of criminal justice on accountability, it can also offer an alternative solution to the need for justice. It is therefore crucial to define the conditions for an internationally acceptable amnesty.

Questions on the legitimacy of amnesty, their compatibility with international law, are resolved through the understanding of accountability in terms of ‘a practical continuum’. As Ronald Slye sees it, amnesty is ‘the realistic price one has to pay for ending a destructive war or removing a government that has committed gross violations of human rights in the past’.<sup>147</sup> Amnesty therefore can be crucial in a state’s trajectory towards political transformation. The political use of amnesty ultimately leads to the question not only whether peace is possible, but what kind of peace do we want. For Andreas O’Shea, amnesty is the ‘achievement of a state of affairs in a particular political context that reflects the ultimate goal of humanity’.<sup>148</sup> Further he continues by justifying this calculus and says that ‘the need for retribution, denunciation, deterrence and reform must be outweighed by the need for transition peace, reconciliation, forgiveness or truth’.<sup>149</sup> Therefore the grant of amnesty depends on a practical sum of choices. The utilitarian use of amnesty reflects the recognition that in some cases the success of transition depends on a move away from traditional normative assumptions. Thus amnesty mirrors a more reflective and focused approach to justice and peace.<sup>150</sup>

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<sup>145</sup> Interim Constitution of South Africa 1994, Postamble.

<sup>146</sup> Minow, ‘Hope for Healing’ (n 96).

<sup>147</sup> Slye, ‘Legitimacy of Amnesties under International Law’ (n 98) 198.

<sup>148</sup> O’Shea, *Amnesty for Crime in International Law* (n 6) 35; Hadden, ‘Punishment, Amnesty and Truth’ (n 61) 212.

<sup>149</sup> O’Shea, *Amnesty for Crime in International Law* (n 6) 82.

<sup>150</sup> Per Bergling, *Rule of Law on the International Agenda* (Antwerp and Oxford: Intersentia 2006); Jon Elster, *Closing the Books: Transitional Justice in Historical Perspective*, (Cambridge and New York: Cambridge University Press 2004); Mohammed Cherif Bassiouni (ed), *Post-Conflict Justice* (Ardley:

Chandra Sriram highlights this need for a utilitarian approach and explains that ‘in reality the choice is seldom “justice” or “peace” but rather a complex mixture of both’.<sup>151</sup> The strength of this approach develops its full potential when expanded beyond the traditional language of development. Jessica Gavron notably contends that ‘the amnesty was conceived, in part, to facilitate the recording of the truth rather than the denial of the past, thus the traditional association of Amnesty with amnesia is inverted’.<sup>152</sup> In Uganda, for example the amnesty process was complemented by a ‘truth-seeking’ and ‘truth-telling’ processes.<sup>153</sup> She further states that ‘victims have the right of access to relevant information about their experiences and to remember and commemorate past events affecting them’.<sup>154</sup> Another example is Colombia which deconstructed the traditional representation of their past. The Justice and Peace Law imposed a ‘duty on individuals claiming an amnesty to make reparations to victims, who could claim against the legal and illegal assets of such individuals’.<sup>155</sup> In circumstances where perpetrators had limited or no assets, victims could be compensated by a State reparation mechanism.<sup>156</sup> The Colombian Constitutional Court, similar to the Omagh bombing judgment, also allowed ‘victims to claim against both individuals and organisations, with the effect that any member of an organisation found responsible for atrocities can be sued’.<sup>157</sup>

By way of conclusion: despite its controversial foundation, the grant of amnesty is undeniably useful in post-conflict societies as it makes it possible to deal with a whole range of issues that ‘cannot be satisfied by action in the courts’.<sup>158</sup> It reflects the

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Transnational Publishers 2002); Teitel *Transitional Justice* (n 7); Teitel, ‘Transitional Jurisprudence’ (n 60) 2014.

<sup>151</sup> Chandra L. Sriram and Suren Pillay (eds) *Peace versus Justice? The Dilemma of Transitional Justice in Africa*. (Scottsville: University of KwaZulu-Natal Press 2010) 1.

<sup>152</sup> Jessica Gavron, ‘Amnesties in the Light of Developments in International Law and the Establishment of the International Criminal Court’ [2002] 51(1) *International and Comparative Law Quarterly* .

<sup>153</sup> Agreement on Accountability and Reconciliation between The Government of The Republic of Uganda and The Lord’s Resistance Army/Movement, 29 June 2007.

<sup>154</sup> Agreement on Accountability and Reconciliation between The Government Of The Republic Of Uganda And The Lord’s Resistance Army/Movement, 29 June 2007, paras 8.3.

<sup>155</sup> Chandra L. Sriram and Suren Pillay (eds) *Peace versus Justice? The Dilemma of Transitional Justice in Africa*. (Scottsville: University of KwaZulu-Natal Press 2010) 1.

<sup>156</sup> Chandra L. Sriram and Suren Pillay (eds) *Peace versus Justice? The Dilemma of Transitional Justice in Africa*. (Scottsville: University of KwaZulu-Natal Press 2010) 1.

<sup>157</sup> Chandra L. Sriram and Suren Pillay (eds) *Peace versus Justice? The Dilemma of Transitional Justice in Africa*. (Scottsville: University of KwaZulu-Natal Press 2010) 1.

<sup>158</sup> Patricia Hayner, *Unspeakable Truths: Facing the Challenge of Truth Commissions* (London: Routledge 2002) 11.

need for an approach to conflict that stretches beyond narrow views on justice based on strict retribution. Where prosecutions can address the need for punishment, amnesty provides another way to address the need for reconciliation.<sup>159</sup> To understand the use of amnesty, it is necessary to explore the question of justice beyond strict dichotomies.

### C. Amnesty and the Politics of Memory

This thesis investigates the impact of amnesty on the politics of memory of a conflict. As the previous section explains, amnesty is an institution that engages with diverse sets of dynamics related to dealing with violence. It has notably highlighted the utilitarian use of amnesty to overcome the limitations of a strict retributive approach to justice. Decades after the end of a conflict, the obstacles to prosecution that justified the grant of amnesty – the fragility of democratic institutions, lack of judicial capacity and military resistance – are set to reduce over time, and tensions may arise as demands for recognition of past crimes prevail. One issue that emerges concerning the effects of amnesty after the transition relates to the perception that amnesty entails the forgetting of past crimes. The term ‘amnesty’ is etymologically rooted in ancient Greek ἀμνηστία (*amnestia*), which connotes oblivion and the forgetting of past events. The Oxford English dictionary defines amnesty as ‘an act of forgetfulness, an intentional overlooking, and a general pardon of past offences’.<sup>160</sup> The ‘forgetting’ of past event is not necessarily excluded from post- conflict resolution programs. In El Salvador, for example, President Alfredo Cristiani claimed that to ‘build a better future’ it was necessary to ‘erase, eliminate and forget everything in the past’.<sup>161</sup> Forgetting in order to bring a close to an unmanageable past may be at first attractive to governments. Hirsh contends the construction of particular memories of the past can be used to motivate and incite populations towards committing atrocities.<sup>162</sup> This has notably been the case in Former

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<sup>159</sup> Jonathan G. Bass, *Stay the Hand of Vengeance. The Politics of War Crimes Tribunals* (Princeton: Princeton University Press 2000) 284. See also Lynn Berat and Yossi Shain, ‘Retribution or Truth-Telling in South Africa? Legacies of the Transitional Phase’ [1995] 20(1) *Law & Social Inquiry* 182-83 (referring to evidence that leaders in the South African security forces would guarantee the stability of the new order only if there was Amnesty for past actions of the security forces).

<sup>160</sup> OHCHR, *Rule of Law Tools for Post-Conflict States* 5.

<sup>161</sup> Cited in Mallinder, *Amnesty, Human Rights and Political Transitions* (n 132) 53.

<sup>162</sup> Herbert Hirsch, *Genocide and the Politics of Memory: Studying Death to Preserve Life* (Chapel Hill: University of North Carolina Press 1995).

Yugoslavia and the 1994 Rwandan genocide. David Bell notably contends that perceptions of the past have been essential in de-legitimising previous regimes and establishing new claims to political authority.<sup>163</sup> However, Minow warns that the ‘failure to address the roots of past violence is likely to ensure that the consequences of mass violation will persist and may give rise to new rounds of revenge’.<sup>164</sup> Hence she argues that in a healthy society, an individual has access ‘to both an individual memory and a collective memory’.<sup>165</sup>

The connection between collective memory and national reconciliation remains unclear. A ‘unified memory’ of past human rights violations can be an effective tool for reconciliation and healing for individuals and local communities. Judt explains the period that witnesses the construction of a historical narrative needs to be regarded as intimately linked to the transitional justice paradigm. He explains that the late 1940s in Germany constitute ‘the period during which Europe’s post-war memory was molded’, which constituted a key element of reconstruction of German society and contributed to the design of future policy options.<sup>166</sup> By building continuity with the past, memory does the work of laying the foundation for identity, on an individual and a cultural level.<sup>167</sup> However the grant of amnesty breaks this continuity without addressing the circumstances that led to the crimes. The use of amnesty to act as a waiver to prosecutions can in some cases have been a direct obstacle to the establishment of truth and compensation mechanisms.<sup>168</sup> In settings where amnesty is granted, it is not rare

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<sup>163</sup> Duncan Bell, ‘Introduction: Memory, Trauma and World Politics’ in Duncan Bell (ed), *Memory, Trauma and World Politics: Reflections on the Relationship Between Past and Present* (Basingstoke: Palgrave Macmillan 2006).

<sup>164</sup> Minow, ‘Hope for Healing’ (n 20) 236.

<sup>165</sup> Hirsch, *Genocide and the Politics of Memory* (n 162) 13.

<sup>166</sup> Tony Judt, ‘The Past Is another Country: Myth and Memory in Post-War Europe’ in Jan-Werner Müller (ed), *Memory and Power in Post-War Europe: Studies in the Presence of the Past* (Cambridge: Cambridge University Press 2002) 173.

<sup>167</sup> For literature about law, memory and dealing with the past see for instance Austin Sarat (ed), *Trauma and Memory: Reading, Healing and Making Law* (Stanford, : Stanford University Press 2008); Christian Joerges and Navraj Singh Ghaleigh (eds), *Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism over Europe and its Legal Traditions* (Oxford: Hart Publishing 2003); Shoshana Felman, *The Juridical Unconscious. Trials and Traumas in the Twentieth Century* (Cambridge: Harvard University Press 2002); Martha Minow, *Breaking the Cycles of Hatred: Memory, Law and Repair* (Princeton :Princeton University Press 2002); Austin Sarat and Thomas R. Kearns (eds), *History, Memory and The Law* (Ann Arbor: University of Michigan Press 2002); Christodoulidis and Veitch , *Lette’s Law* (n 13); Lawrence Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (New Haven and London: Yale University Press 2001); Mark Osiel, *Mass Atrocity, Collective Memory, and the Law* (New Brunswick: Transaction Publishers 1997).

<sup>168</sup> Anita Ferrara, *Assessing the Long-term Impact of Truth Commissions: The Chilean Truth and Reconciliation Commission in Historical Perspective* (Abingdon and New York: Routledge 2015). In

that controversies over past crimes resurface decades after the end of a conflict.<sup>169</sup> Given the nature of memory and its modes of transmission, as seen below, it is likely that contestation over the meaning of the past spans decades, even affecting several generations. The intervention of the State in the field of memory to establish official narratives of past violence is problematic for several reasons.

The interests of post-conflict scholarship in practices of commemoration grew out of seeking to understand how memory can form part of a framework of transformative justice. Post-transitional governments have sometimes addressed this issue by establishing investigatory mechanisms to look into past crimes. For example, Indonesia mandated a Commission of Truth and Friendship to ‘accumulate, synthesise, and interpret individual memories so as to offer society as a whole an official interpretation of its shared past’.<sup>170</sup> Similarly, the Aylwin Government in Chile entrusted the Truth and Reconciliation Commission with producing an account of the origins and evolution of the armed conflict, focusing on victims’ experiences of past violence. These alternative mechanisms have enabled adding a meaningful acknowledgement of past abuses to conflict resolution while addressing victims’ need for truth.<sup>171</sup> Other states may have addressed the issue of memory indirectly and invested in symbolical measures to unlock the disclosure of the truth and end the secrecy.

In conclusion to this first section, it may be said that amnesty laws are a complex mechanism of conflict resolution. On the one hand, amnesty seeks to respond to the need for peace and reconciliation. However, the effects of amnesty on the remembrance of past violence lead one to inquire how the forgetting of past crimes affects the need for recognition of victims. The crimes covered by the amnesty are not deemed never to have existed. This means that it is not that the acts that are inexistent, but that amnesty acts retroactively to effectively erase the sanction attached to the criminal offence.

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particular see *Almonacid-Arello et al v. Chile* (Admissibility Petition), Inter-Am. C.H.R Case No 1.057, Report No 44/02 (Judgment of 9 October 2002) para. 150.

<sup>169</sup> Elizabeth Jelin, *State Repression and the Labors of Memory* (Minneapolis: University of Minnesota Press 2003).

<sup>170</sup> Terms of references for the Commission of Truth and Friendship Established by the Republic of Indonesia and the Democratic Republic of Timor-Leste, 10 March 2005 (emphasis added). See Kimberly Lanegran, ‘Truth Commissions, Human Rights Trials, and the Politics of Memory’ [2005] 25(1) *Comparative Studies of South Asia, Africa and the Middle East* 111.

<sup>171</sup> Truth and Reconciliation Commission *Truth and Reconciliation Commission of South Africa Report* (Cape Town: Truth and Reconciliation Commission 1998).

Assessing how amnesty contributes to post-conflict national reconciliation within the transitional justice paradigm is made difficult for three principal reasons. First, such an assessment can suffer from a lack of coherent approach towards amnesty, due to the unsettled status of amnesty under international law. While international custom has yet to crystallise, State practices shows that amnesty laws are often introduced to tackle on-going conflicts and insurgencies, and is included in negotiated peace agreements. A second reason is that a counterfactual scenario, i.e. non-adoption of amnesty or the hypothetical effects of a trial, are impossible to test and that correlation does not necessarily mean causation.<sup>172</sup> Further Mark Osiel warns against selective bias in attempting such analysis:

Countries whose relevant experience of transition does not support the author's favoured position on this question (such as Spain, El Salvador, Brazil, and several others) are simply ignored, like inconvenient cases that an opposing advocate can be expected to call to the court's attention. Such methods should be no more acceptable in serious legal scholarship than in social science, where the main point is precisely to compel our confrontation of inconvenient facts.<sup>173</sup>

Thirdly, by framing amnesty in terms of dichotomies (peace versus justice, truth versus oblivion, and impunity versus accountability), transitional justice fails to address the ever-evolving nature of transition and reconciliation. Authors have therefore advocated a contextualised and more comprehensive approach. The next section explores how this approach makes it possible to deconstruct amnesty's interaction with resurfacing demands of justice.

## II. Analytical Framework

This research seeks to understand how amnesties affect the prospect of post-transitional demands of justice. It suggests that exploring the effects of amnesty on the prospect of justice is relevant in the present but also in the future after the transition is over. It notably argues that amnesty is more than a transitional mechanism: its effects are also observable in the political construction of the society in which they are implemented. The previous section explored the meaning of amnesty laws and demonstrated that it is a

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<sup>172</sup> Freeman, *Necessary Evils* (n 9).

<sup>173</sup> Mark Osiel, 'Modes of Participation in Mass Atrocities' [2005] 38(3) Cornell International Law Journal.

tool of justice whose effects in the long term are difficult to address within the transitional justice paradigm. Indeed, the paradigm of transitional justice tends to overlook how amnesty affects the recognition of accountability of past perpetrators.

This section turns to developing a framework of analysis that will enable the exploration of how the granting of amnesties may constitute a limitation on law's capacity to respond to demands for justice for past violations, building its foundations on a 'contentious politics' approach and combining sociological considerations with legal methods of analysis.

### III. Judicial Capacity of Domestic Legal Proceedings to Produce a Narrative

One of the primary legal effects of amnesty is to remove the prospect and consequences of criminal liability for designated categories of individuals.<sup>174</sup> However, Lawrence Douglas argues that the role of criminal justice is not only to punish but is also a pedagogic endeavour.<sup>175</sup> Indeed, the ultimate goal of a trial is to find whether the accused is guilty or innocent. Furthermore, the process of the hearing of witnesses implies truth finding. Judges therefore play a central role in the formation of post-transitional justice outcome, through their interpretative role.

The exploitation of judicial proceedings to challenge the transitional bargain is becoming increasingly popular.<sup>176</sup> However achieving 'Truth' through legal proceedings is an elusive goal. The historiographical interpretation of past events may lead to over simplification or even in some cases distortion. The intervention of law in the construction of a national history is a 'perilous endeavour'.<sup>177</sup> Claims of justice

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<sup>174</sup> Freeman, *Necessary Evils* (n 9)

<sup>175</sup> Lawrence Douglas, 'The Didactic Trial: Filtering History and Memory into the Courtroom' [2006] 14 *European Review*; see also Lawrence Douglas, *The Memory of Judgment* (n 162) and Lawrence Douglas (1998) 'The Shrunken Head of Buchenwald: Icons of Atrocity at Nuremberg'[1998] 63 *Representations*.

<sup>176</sup> Martti Koskeniemi, 'Between Impunity and Show Trials' [2002] 6 *Max Planck Yearbook of United Nations Law* 32. On the difficulties of ascribing individual responsibility without condemning the whole community in the case of the acts of genocide perpetrated in Rwanda. See Jean-Marie Kamatali, 'The Challenge of Linking International Criminal Justice and National Reconciliation: The Case of the ICTR' [2003] 16(1) *Leiden Journal of International Law* 124.

<sup>177</sup> For references for law as narrative, see for instance: Bert van Roermund, *Law, Narrative and Reality. An Essay in Intercepting Politics* (Dordrecht, Boston and London: Kluwer Academic Publishers 1997); Bernhard S. Jackson, *Making Sense in Law: Linguistic, Psychological and Semiotic Perspectives* (Liverpool: Deborah Charles Publications 1995); Austin Sarat and Thomas R. Kearns (eds), *The Rhetoric of Law* (Ann Arbor: University of Michigan Press 1994); Peter Goodrich, *Legal Discourse: Studies in Linguistics, Rhetoric and Legal Analysis* (London: Macmillan Press 1987).

constructed on the establishment of a shared ‘truth’ risk becoming transformed into a broader struggle of recognition between narratives and thus overshadowing the demands of victims or their relatives. The first risk is the risk of over simplification embedded in the individualisation of criminal accountability. Observing the trial of Eichmann, Hannah Arendt criticised the overtly didactic purpose of the prosecution of Eichmann and warned against the use of trials for didactic ends.<sup>178</sup> It is not the role of the Courts to write history, but to grant justice. The most obvious reason for this is that judges and jury are not trained historians and cannot establish historical ‘truth’. Their role is to decide on individual cases.<sup>179</sup> Against Arendt’s critique, Douglas defends the Nuremberg and Eichmann trials as an imaginative, if flawed, response to extreme crimes<sup>180</sup> Debates on historical crimes happening in front of courts cast light upon the power imbalances within the transitional state, the goals and structure of the post-conflict society and the competing narratives that attempt to explain the causes of the violence.

### A. Law as a Narrative

A first limb of this analytical framework relies on considering the role of law to act as a narrative of past events. Ronald Dworkin compares judges to writers and refers their interpretative function to a larger definition of narrative coherence whereby legal processes participate in the construction of a coherent narrative of what happened.<sup>181</sup> At the most basic level, the construction of a narrative about the past draws meaning from the ‘master narrative’, that is the conceptual framework for historical interpretation.<sup>182</sup> This framework usually relies on periodization, assessment of the contributions of the different historical actors and turning point events.<sup>183</sup> The master

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<sup>178</sup> Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: Viking Press 1963) 254.

<sup>179</sup> James Thayer, ‘Judicial Notice and the Law of Evidence’ [1990] 3 *Harvard Law Review* 3, 305. Lawyers and judges often seek to use history instrumentally to make their point. See also Richard Matasar, ‘Personal Immunities under Section 1983: The Limits of the Court’s Historical Analysis’ [1987] 40 *Arkansas Law Review*.

<sup>180</sup> Douglas, *Memory of Judgment* (n 175).

<sup>181</sup> Douglas, *Memory of Judgment* (n 175) 250.

<sup>182</sup> Jan M. van Dunné, ‘Narrative Coherence and its Function in Judicial Decision Making and Legislation [1996] 44(3) *American Journal of Comparative Law*.

<sup>183</sup> Van Dunné, ‘Narrative Coherence’ (n 182).

narrative serves the function of structuring the past. In the realm of law, this narrative colours the judges' assumptions about their role in interpreting law and historical evidences.<sup>184</sup> Conversely, the narrative produced in courts, is influenced through debate and the presentation of historical evidence.<sup>185</sup> Ronald Dworkin has argued that legal interpretation is inevitably linked to political commitment and that procedures of legal interpretation are politically loaded.<sup>186</sup> The relevance of this approach stems from the fact that judges participate in the didactic function of trials through the interpretation they provide. This interpretative function of the law and the facts results in the production of a particular narrative and meaning given to an event. Subsequently, Law's function in the construction of meaning about what took place in the past point to role of law in memory transmitting, and community strengthening.<sup>187</sup> Dunné referring to Mac Cormick's work explains that the law as a narrative resumes by its coherence, which can be tested on two different levels. A first level refers to the concept of narrative coherence that is 'the justification of findings of fact and the drawing of reasonable inferences from evidence'.<sup>188</sup> A second level concerns the examination of law's 'justifiability under high order principles or values' or of its so called normative coherence.<sup>189</sup> Examples generally given are preambles of statutes, declaration of intentions or introductions. The function of amnesty as a constraining norm can be assessed through the deconstruction of the process of 'law's narrativism'.<sup>190</sup>

A central question therefore emerges as to whether amnesty acts like norms that give an orientation and direction towards the interpretation of other norms or as a norm containing values? The function of amnesty as a constraining norm can be assessed through the deconstruction of the process of interpretation of law in cases related to the acts covered by the amnesty.

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<sup>184</sup> See Hayden White, *Meta-history: The Historical Imagination in Nineteenth Century Europe* (Baltimore: Johns Hopkins University Press 1973 ix-x and 5-7.

<sup>185</sup> David Couzens Hoy, 'Interpreting the Law: Hermeneutical and Post-Structural Perspectives' [1985] 58 Southern California Law Review .

<sup>186</sup> Ronald Dworkin, 'Law as Interpretation' in William Mitchell (ed), *The Politics of Interpretation* (Chicago: University of Chicago Press 1983) 249.

<sup>187</sup> For literature about law, memory and dealing with the past, see for instance: Sarat *Trauma and Memory* (n 167); Joerges and Ghaleigh *Darker Legacies of Law* (n 85) ; Felman, *Juridical Unconscious* (n 167) ; Minow, *Breaking the Cycles of Hatred* (n 167); Sarat and Kearns, *History, Memory and the Law* (n 167); Christodoulidis and Veitch, *Lethe's Law* (n 167); Douglas, *Memory of Judgment* (n 175) Osiel, *Mass Atrocity* (n 43).

<sup>188</sup> Van Dunné, 'Narrative Coherence' (n 182).

<sup>189</sup> Van Dunné, 'Narrative Coherence' (n 182).

<sup>190</sup> Van Dunné, 'Narrative Coherence' (n 182).

## B. Rules of Proceeding on the Admission of Evidence

Secondly, this analytical framework relies on understanding the process of creation of a judicial ‘truth’. In the courtroom, the truth being measured by way of evidence, there is an important link between the progression of legal proceedings and the historiography of past crimes.<sup>191</sup> Legal proceedings offer an opportunity for victim to provide their own ‘narrative’ about the conflict. Proceedings of criminal trials follow the accusatory regime in which the debate is public, oral and contest-oriented. The record of their testimony guarantees that their version of history will not fall into oblivion. Kristen Campbell has identified this link in her study on the production of legal archives during the proceedings at the International Criminal Tribunal of Former Yugoslavia (ICTY).<sup>192</sup> She highlights the role played by legal archives as a mnemonic device.<sup>193</sup> With the sudden termination of the Milosevic case, ICTY Prosecutor Carla Del Ponte declared that the tribunal had achieved its objective: to set down a historical record.<sup>194</sup> As such, similar to practices of commemoration, trials form part of a framework of transformative justice. As Gready explains a transformative justice approach allows shifting the focus of inquiry from the ‘legal to the social and political, and from the state and institutions to communities and everyday concerns’.<sup>195</sup> As such, this approach enables to address the structural violence of past crimes. This enables addressing the role of judges within a historiography of the conflict. Judges and historians are both concerned by the past, yet unlike the latter, the allocation of punishment introduces a forward-looking element in the legal process, for instance in determining the chances of re-socialisation.

By framing the question about amnesty within the discussion on the didactic function of trials, this thesis points to the rules of proceedings on the admission of evidence. In

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<sup>191</sup> Andreas Schedler, ‘Conceptualizing Accountability’ in Andreas Schedler, Larry Diamond and Marc F. Plattner (eds) *The Self-Restraining State: Power and Accountability in New Democracies* (Boulder: Lynne Rienner Publishers 1999) 14.

<sup>192</sup> Kirsten Campbell, ‘The Laws of Memory: The ICTY, the Archive, and Transitional Justice’ [2013] 22(2) *Social & Legal Studies*, . See also Eric Ketelaar, ‘Truths, Memories and Histories in the Archives of the International Criminal Tribunal for the Former Yugoslavia’ in H. G. van der Wilt, J. Vervliet, G. K. Sluiter and J. Th. M. Houwink ten Cate (eds), *The Genocide Convention: The Legacy of 60 Years* (Leiden and Boston: Brill 2012).

<sup>193</sup> Campbell, ‘The Laws of Memory’ (n 192).

<sup>194</sup> Press Conference by the ICTY prosecutor Carla Del Ponte, The Hague, 12 March 2006. Available at: [un.org/icty/latest-e/index.htm](http://un.org/icty/latest-e/index.htm).

<sup>195</sup> Paul Gready, (2014) "From Transitional to Transformative Justice: A New Agenda for Practice (110)

this regard, defamation proceedings offer an interesting illustration to explore the nature of evidence admitted by judges. One key variable for the examination of this type of proceedings is that defamation can either be civil or criminal and in civil actions the standard of proof is significantly easier to satisfy than in criminal proceedings. Furthermore, unlike criminal prosecutions, the idea of punishment in defamation litigation is rendered in the form of compensation or reparation. Because the judges are more concerned with repairing the damage than retribution against the offender, defamation proceedings offer less of a moral dilemma. Therefore, the outcome carries a less important political cost. In the process of a hearing, judges may order the disclosure of documents so as to verify the accuracy of the claims. It also may require individuals to appear in court to be cross-examined about past events and for the veracity of their accounts to be probed and tested.<sup>196</sup>In addition, Douglas explains that ‘those taking the action only have to present evidence which proves that the harm was ‘more likely than not’ caused by the defendant, in contrast to a prosecutor having to prove ‘beyond a reasonable doubt’ that the accused was responsible.<sup>197</sup> Furthermore, defamation proceedings can constitute a political reality. By opening investigations of crimes of smaller stakes, they can provide victims and justice actors with an opportunity to hear hidden accounts and shape the content of history.<sup>198</sup> Defamation has thus permitted the strategic exploitation of legal proceedings to expand the judicial capacity of courts to deal with claims of justice related to historical crimes. Defamation proceedings occurring in the context of a quest for attributing responsibility for the war crimes perpetrated during the Algerian war made it possible to hear claims made by historians against retired officers. As such, it reveals that the success of defamation proceedings lies more in the fact that trials proceedings provide a public space to discuss and record the memory of past victims and survivors than the direct outcome of the trials. Hence, even when there is little or no attribution of individual responsibility, a form of limited sanction can advance a historical record and the construction of public shareable knowledge about past repression.

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<sup>196</sup> Lawrence Douglas, ‘The Didactic Trial: Filtering History and Memory into the Courtroom’ [2006] 14 *European Review*; see also Lawrence Douglas, *The Memory of Judgment* (n 162) and Lawrence Douglas (1998) ‘The Shrunken Head of Buchenwald: Icons of Atrocity at Nuremberg’[1998] 63 *Representations*.

<sup>197</sup> Douglas, ‘Didactic Trial’ (n 196) 516.

<sup>198</sup> Douglas, ‘Didactic Trial’ (n 196) 516.

#### IV. **Amnesty and the Contentious Politics Model**

Amnesty, as explored above, is said to provide the conflict with an ending. It seeks to reconcile opposing parties around the idea of forgiveness and forgetting of past grudges. Demands for the reopening of space to review past crimes highlight the role played by social movements and the efforts undertaken to create and exploit accountability opportunities after transition. The success of these efforts is largely attributed to legal changes occurring in the post-transitional society.<sup>199</sup> In exploring how change in accountability can occur, this thesis also seeks to understand how “accountability movements” can be formed.

‘Contentious politics’ is a field of inquiry interested in the connection of clusters of actors making claims on behalf of a public or the collective. The analysis of the process of formation of collective political struggles helps understanding the nature of post-transitional claims of justice.<sup>200</sup> Contentious politics particularly looks at claims that bear on someone else’s interests. Contentious politics theorists rely on four major aspects to assess the success of a group mobilization. The first one refers to the external circumstances or ‘political opportunities’ that permit a group to act. Secondly, this action needs to be internally structured. Next, it requires a ‘collective process of interpretation, attribution [and] social construction [that] mediates between opportunity [and] action’.<sup>201</sup> The fourth element relates to the ‘repertoires of contentions’ or the ‘means by which people engage in contentious collective action’.<sup>202</sup> Contentious politics is a causally coherent domain with distinctive properties. It is causally coherent in the sense that similar cause-effect relationships apply throughout the field of inquiry. It is distinctive in the sense that some features of contentious politics appear nowhere else in social life.

##### A. Social Movements of Change

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<sup>199</sup> Elin Skaar, ‘Post-transitional trials in Argentina, Chile, and Uruguay’, Presented at: the 2010 Congress of the Latin American Studies Association, Toronto, Canada October 6-9, 2010.

<sup>200</sup> Doug MacAdam, Charles Tilly, Sidney G. Tarrow, ‘Comparative Perspectives on Contentious Politics’ in Mark I. Lichbach and Alan S. Zuckerman (eds), *Comparative Politics: Rationality, Culture, and Structure* (Cambridge: Cambridge University Press, 2009) 31.

<sup>201</sup> Doug MacAdam, Charles Tilly, Sidney G. Tarrow, ‘Comparative Perspectives on Contentious Politics’ in Mark I. Lichbach and Alan S. Zuckerman (eds), *Comparative Politics: Rationality, Culture, and Structure* (Cambridge: Cambridge University Press, 2009) 31.

<sup>202</sup> Doug McAdam, Sidney G. Tarrow and Charles Tilly (eds), *Dynamics of Contention* (Cambridge: Cambridge University Press 2001) 41.

Contentious politics involves interaction between a set of actors to create a social movement. Charles Tilly and Sidney Tarrow define social movement as ‘a sustained campaign of claim-making based on organisations, network, traditions and solidarity to sustain these activities’.<sup>203</sup> Social movement actors can have multiple and overlapping identities whereby some civil society actors may be a grouping of individuals who act both collectively and individually. The range of actors involved in cases of transformation of narratives of accountability widens as a political space opens. Over time new actors can enter the arena of dispute over human rights violations and recognition of responsibilities. What determines the formation of social movements is, as Tilly and Tarrow explain, a ‘sustained challenge to power holders’.<sup>204</sup> As such, the success of a social movement relies on the development of strategies that can be communicate effectively and balance the expectation of the audience while producing resonant frames. It is further argued that the success of a movement to effectively compete with a government requires the support of a diverse network of actors.<sup>205</sup> Jay Winter and Emmanuel Sivan point to the growth of civil society as the locus where many groups develop their own strategies of remembrance, sometimes in tandem with the state and other times against it.<sup>206</sup> Their impact on contentious politics depends on their resources, legitimacy, and the ability to extend the acceptance of their narrative within wider society.

## B. Political Participation of Individual in the Reconciliation Process

Conflicts and reforms within a society in a process of reconciliation grow out of the interaction between contentious and institutional politics. This triggers the formation of new forms of organisations and networks, which can turn into social movement campaign. Popkin and Bhuta highlight ‘the pivotal role played by human rights groups and individuals in attempting to ensure that amnesty laws do not result in complete impunity for those responsible for egregious crimes’.<sup>207</sup> Participatory theory of

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<sup>203</sup> Charles Tilly and Sidney G. Tarrow, *Contentious Politics* (USA: Oxford University Press, 2015) 11.

<sup>204</sup> Tilly and Tarrow, *Contentious Politics* (n 204) 148.

<sup>205</sup> Timothy Kubal, *Cultural Movements and Collective Memory: Christopher Columbus and the Rewriting of the National Origin Myth* (New York: Palgrave Macmillan 2008) 8.

<sup>206</sup> Jay Winter and Emmanuel Sivan, *War and Remembrance in the Twentieth Century* (Cambridge: Cambridge University Press 1999).

<sup>207</sup> Margaret Popkin and Nehal Bhut, ‘Latin American Amnesties in Comparative Perspective: Can the Past be Buried?’ [1999] 13(1) *Ethics and International Affairs*.

justice provides a useful lens to approach the question of the mobilisation of private actors and what involvement they have in the justice process. In this paradigm, survivors and their descendants should be able to see themselves as ‘participants’ in positive change with the capacity to organise around solving problems experienced by society as a whole. This approach calls for greater consideration of the ‘unheard voices’ of the conflict resolution process.

Daly and Sarkin usefully suggest breaking down the process of reconciliation into five levels: (1) individual; (2) inter-personal; (3) communal; (4) national; and (5) international. This categorisation makes it possible to observe how strategies and choices adopted by civil society actors, or ‘accountability actors’ shape the political and legal environment.<sup>208</sup> At the individual level, civil society actors are concerned to redress wrongs or retrieve information concerning the whereabouts of victims’ ‘family members, human rights organisations or other form of social organisation’. At a collective level, the action of civil society group subscribes to a project of establishing political accountability at a national and communal level, participation theory links the role of grass-root movements to the process of democratization of the country.<sup>209</sup> Contentious politics adds that the expansion of social movement groups is historical and their degree the participation takes shape within political and cultural opportunities.

### C. Memory as a Strategy for Contentious Politics

Cultural and political factors shape the symbolic environment in which contentious politics take place. In the context of reconciliation, the formation of a collective memory is the symbolic ground upon which the contention is displayed. Not only does the collective memory of a particular event provide symbolic material from the past, but also at the same time it can constrain people’s ability to mobilise by imposing exclusions and prescriptions. In the field of memory, the contention involves the struggle for the recognition of forgotten events and the participation of social groups in the construction of a collective narrative about the past. It seeks to gain recognition of marginal narratives that have been excluded from the collective memory. French

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<sup>208</sup> Cath Collins, *Post-transitional Justice: Human Rights Trials in Chile and El Salvador*. (University Park: Pennsylvania State University Press 2010) 60.

<sup>209</sup> Truth and Reconciliation Commission of South Africa, Truth and Reconciliation Commission of South Africa Report (2003); Raquel Aldana, ‘A Victim-Centered Reflection on Truth Commissions and Prosecutions as a Response to Mass Atrocities’ [2006] 5(1) *Journal of Human Rights*.

sociologist Maurice Halbwachs initiated the discussion on collective memory by addressing it in terms of the inevitable interplay between an individual's experience of an event and its reconstruction by society. Collective memory, helps to form a collective identity, is not just a collection of individual memories. With the concept of collective memory, it is useful to understand at a general level the effect of a rhetorical exclusion or inclusion of a past in a community's consciousness. The past of a nation is constructed through institutions of transition such as investigatory and legal proceedings. Policy actors select which particular historical episodes should be recalled according to their objectives.<sup>210</sup> The process of construction of an official narrative of past events forms part of the transitional process but it can also stir up and project controversies around a particular memory.<sup>211</sup> A politics of memory presumes a degree of consensus and dialogue between individual subjectivities and a societal or collective sense of belonging. The construction of an official narrative of the past is necessarily adjusted to present circumstances. As Valerie Rosoux rightly contends, 'references to the past are rarely made per se' and that 'their importance derives from the intentions of the speaker'.<sup>212</sup>

The contention over memory begs the question why is the past important? As observed by Georg Simmel, state-sponsored initiatives of commemoration of past crimes creates opportunities for socialisation and rebuilding bonds between people.<sup>213</sup> On the other hand, the obstacles to their participation indicate how pockets of resistance can rise.<sup>214</sup> To Simmel, 'the unifying power of the principle of conflict nowhere emerges more strongly than when it manages to carve a temporal or contextual area out of competitive or hostile relationships'.<sup>215</sup> Contentious politics reveals several complications concerning collective memory. First, there is no such a thing as a single memory. Official memories provide reference points for framing the memories of groups. If the latter is totally dominant, then society could be described as totalitarian. If, on the other hand, individuals have no access to a collective consciousness, then

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<sup>210</sup> Valerie V. Rosoux, Human Rights and the "Work of Memory" in International Relations, [2004] 3(2) Journal of Human Rights, 160.

<sup>211</sup> Teitel, *Transitional Justice* (n 7).

<sup>212</sup> Valerie Rosoux, Human rights and the 'Work of Memory' in International Relations, [2004] Journal of Human Rights 160.

<sup>213</sup> Georg Simmel, *Conflict* (New York: The Free Press 1955) 98.

<sup>214</sup> Georg Simmel, *Conflict* (New York: The Free Press 1955) 98.

<sup>215</sup> Georg Simmel, *Conflict* (New York: The Free Press 1955) 98.

society does not meaningfully exist.<sup>216</sup> However official narratives presented as the truth about past events often distort past memory and extend beyond simply giving a factual account. Second, the concept of ‘truth’ is essentially political. While it inevitably embeds absolute and ethical aspects, its intensely political character renders the nature of the pursuit of justice and the truth-seeking process intrinsically complex.<sup>217</sup> Feminist, post-colonial, and Marxist literature has gone a long way in questioning dominant narratives of ‘truth production’, showing how the claims to ‘truth’ cannot be separated from forms of power and political control.<sup>218</sup> What is the truth? Whose truth is it anyway? Thus what is often sought as a ‘truth’ in the purest sense of the term is, rather, a selective narrative whose purpose is to legitimise the political consensus by which violence ended. We find an integrated, dictatorial memory, commanding, all-powerful, spontaneously actualising a memory without a past that ceaselessly reinvents tradition, and linking the history of its ancestors to the undifferentiated time of heroes, origins and myth.

The emergence of counter-memories pinpoints the ellipses, short cuts and repressions of the past and challenges the capacity of official memories to providing the only all-encompassing narration. Rebecca Saunders and Kamran Aghaie argue that counter-memories are generally the result of informal, private or socially marginalised contexts.<sup>219</sup> These counter memories can normally coexist with a hegemonic perspective on the past or they can engage in overtly disputing the dominant narrative of the past. In recent years, civil society actors have undertaken to counter the denial of past crimes in terms of rights and justice. In Spain, for example, a campaign spearheaded by the *Asociacion Para la Recuperacion de la Memoria Historica* (Association for the Recuperation of Historical Memory, ARMH), focusing its efforts on locating and identifying the bodies of republican non-combatants as well as demanding official recognition of Francoist crimes, has gathered momentum.<sup>220</sup> After the death of General Franco in Spain, the successor regime introduced a set of amnesty laws which not only prevented any trials to investigate and prosecute past human rights violations but

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<sup>216</sup>Hirsch, *Genocide and the Politics of Memory* (n 162) 96.

<sup>217</sup> Steven Shapin, *A Social History of Truth: Civility and Science in Seventeenth-Century England* (Chicago and London: University of Chicago Press 1994).

<sup>218</sup> Manuel Garcia-Carpintero and Max Kolbel (eds) *Relative Truth* (Oxford: Oxford University Press, 2008).

<sup>219</sup> Rebecca Saunders and Kamran Scot Aghaie, ‘Introduction: Mourning and Memory’ [2005] 25(1) *Comparative Studies of South Asia, Africa and the Middle East*.

<sup>220</sup> Paloma Aguilar, ‘Transitional or Post-Transitional Justice? Recent Developments in the Spanish case’ [2008] 13(4) *South European Society and Politics*.

also restricted the possibility of discussing publicly the legacy of the civil war and Franco eras.<sup>221</sup> The 1977 amnesty law prevented any trials or public debate on the legacy of the civil war and Franco.<sup>222</sup> However in 2007, the Pacto del Olvido, a tacit silent pact, began to crack.<sup>223</sup> Human rights advocates and victims' groups put pressure on the government and this resulted in the creation of an Inter-ministerial Commission to investigate the 'moral and legal rehabilitation' of the victims of the civil war. In November 2007, the government met their demands and enacted the Law of Historical Memory, which officially declares that the repression of the Franco era was illegitimate and requires the government to remove all statues and memorials, which were glorifying the dictatorship.<sup>224</sup> This law enhanced the rights of recognised victims and also of unrecognised victims. As explained by Paloma Aguilar, the human rights framing of the law enabled a move away from victor/defeated dialectic and re-coded the Civil War memory so as to contest the consensus that had led to a silence on the scale of the repression.<sup>225</sup>

The concept of sites of memory or *lieux de mémoires* is useful here to address how ritualised practices of commemoration of past events came about and how they are integrated in an initiative of transitional justice. It generally refers to particular places or artifacts that evoke a connection to the past, such as museums or plaques that commemorate specific events.<sup>226</sup> Pierre Nora explains that sites of memory require 'conformity to pre-established [sic] accounts and symbolic frameworks' in which 'each event acquires meaning only in relation to a legendary organisation of the past'.<sup>227</sup> It can also include sites already charged with past memories to which new connotations are added. Moreover, the notion of sites of memory does not only refer to material markers. There are also symbolic dates in which the past becomes present

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<sup>221</sup> Paloma Aguilar, 'The Memory of the Civil War in the Transition to Democracy: The Peculiarity of the Basque case' [1998] 21(4) West European Politics. See also Paz Rojas Baeza's account of the sense of meaningfulness: 'Impunity: An Impossible Reparation' [2000] 69(1) Nordic Journal of International Law 28; Paloma Aguilar, 'Justice, Politics and Memory in the Spanish Transition' in Alexandra Barahona De Brito, Carmen González-Enríquez and Paloma Aguilar (eds), *The Politics of Memory: Transitional Justice in Democratizing Societies* (Oxford: Oxford University Press 2001).

<sup>222</sup> Ley 46/1977 de 15 de Octubre (BOE No 248, de 17 de Octubre), de Amnistía, 1977 (Spain).

<sup>223</sup> Ley 46/1977 de 15 de Octubre (n 131).

<sup>224</sup> Ley 52/2007 de 26 de Diciembre por la que se reconocen y amplían derechos y se establecen medidas en favor de quienes padecieron persecución o violencia durante la Guerra civil y la dictadura.

<sup>225</sup> Aguilar, 'Transitional or Post-Transitional Justice?' (n 129).

<sup>226</sup> Steve Stern, *Remembering Pinochet's Chile: On the Eve of London 1998* (Durham: Duke University Press 2004).

<sup>227</sup> Pierre M., *Les lieux de mémoire: la République, la Nation, les Français* (Paris: Gallimard 1997) 33.

through public rituals, when feelings from the past are activated and meanings investigated, memories constructed and renovated.<sup>228</sup> Nora explains that the creation of ‘sites of memory’ or territorial markers enables a revitalisation of social group history.<sup>229</sup> Jelin observes that these markers have to involve governmental decisions and resources to last over time.<sup>230</sup> The dynamics of memorialisation play an important role in the redefinition of the nation and the reconstruction of broken relationships.<sup>231</sup> In contrast to historical objects, sites of memory have no referent, Nora highlights. They are their own referent. Sites of memory turn critical history into historical criticism. This is what makes the study of sites of memory relevant for the purpose of this thesis. The creation of sites of memory can offer an opportunity to challenge the official historical language on past events and shake its selective and ‘exclusive’ foundation. Although these objects are themselves unable to account for the myriad of experiences and stories relating to past human rights crimes, it allows for a revision of the historical narrative. Particularly in the context of traumatic events, renewed memories become the locus of conflict and competition among different narratives of that past, with opposing interpretations being suppressed, contested or subverted. The concept of sites of memory and their dynamic of construction challenges the assumption that without an authoritative sanction a future revelation, counter memories are bound to remain marginal and at the periphery of the collective consciousness.

## Conclusion

Much has been written on the potential of amnesties to expedite the resolution of a conflict or a political crisis. This chapter has evaluated the existing literature, and examined the assumptions and predictive functions of amnesty legislation in post-conflict settings. It emerged that the literature overlooks some important aspects of the role of amnesty laws in post-conflict settings. The proposed framework seeks to develop tools to understand the relation of amnesty, accountability and memory. The first section illuminated the nature of this relationship by exploring the effects of amnesty on

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<sup>228</sup> Nora, *Lieux de Mémoire* (n 219) 36.

<sup>229</sup> Pierre Nora, ‘General Introduction: Between Memory and History’ in *Realms of Memory: Rethinking the French Past*. Translated by Arthur Goldhammer. (New York: Columbia University Press 1996).

<sup>230</sup> Irwin-Zarecka, *Frames of Remembrance* (n 139) 147.

<sup>231</sup> Iwona Irwin-Zarecka, *Frames of Remembrance: The Dynamics of Collective Memory* (New Brunswick and London: Transaction Publishers 1994) 115.

accountability. It explained that the principal role of amnesty is one of expediency. Understanding that post-conflict resolution is an evolving process highlights that it is difficult to evaluate the impact of amnesty on political transformation. From one context to another, the practice of amnesty differs significantly according to the crimes covered, the purpose and the mode of implementation. The framework developed in the second section throws light on areas or spaces where an assessment can nonetheless be undertaken. These preliminary insights provide the seeds for the analysis of French court's application of the amnesty and to understand further the obstacles confronting attempts to circumvent the effects of the amnesty. This framework is later applied to untangle the political and memorial dimensions of judicial proceedings (Chapters 5, 6 and 7).

## **Chapter 3:**

### **“La Sale Guerre”**

### **France and the Independence of Algeria (1954-1962)**

‘Torture in colonial Algeria became a routine even before we knew about it. But the hatred of the man that manifests itself in this practice is an expression of racism.’

Jean-Paul Sartre, ‘Une Victoire’<sup>232</sup>

This chapter provides important contexts for understanding the French amnesty laws in Algeria by presenting the historical background to the war of independence of Algeria and the political transformation of France from a colonial power to a stabilised democracy. It focuses on France’s strategy to counter the Algerian insurrection and the wider history of Algerian and European involvement in the country.

From 1954 to 1962 Algeria was the theatre of a brutal confrontation between the French army and the Algerian nationalists, which resumed in the recognition of the right to self-determination of the Algerian people. The economic and political dominance of the colonisers, and the political desire to maintain the Algeria a French territory all played a role in turning an insurrection into a full-scale war. However, unlike traditional warfare, the Algerian war did not oppose two armies against each other. In order to counter the anticolonial movement, the French government institutionalised an approach based on the deployment of military forces in operations of police and the gathering of intelligence to destroy the nationalist movements.

The chapter is divided into three parts. The first section is interested in exploring the French attitude towards the Algerian population under the colonial rule and strategy developed in order to repress the nationalist movement. It then focuses specifically on the controversies related to the use of torture by the French army during the conflict. The final section explores the impact of the conflict on France and the ensuing polarisation of French society on the decolonisation process.

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<sup>232</sup> *L’Express*, n° 360 (Paris, 6 March 1958).

## I. The end of French colonial rule (1945-1954)

The reasons for the emergence of an Algerian insurrection in Algeria are located in the French history of the colonisation of Algeria. The growth of an Algerian nationalist movement calling for the independence of Algeria was a serious threat to the stability of the French Republic. This section first explains that Algeria was at the heart of an ambitious imperialistic project based on universalism and a hegemonic cultural ideology. It continues by exploring how the Algerian nationalist movement managed to bring France at war. This first section lays the contextual framework for understanding the French counterinsurgency doctrine, which is analysed in more detail in section II.

### A. The Colonial Administration of Algeria

Invaded by the French in 1830, Algeria was not only a territorial conquest but also a settlement colony.<sup>233</sup> From 1848, the Algerian territory constituted three French departments incorporated into the French Republic. Algeria was the colonial holding and most of its inhabitants were of French origin.<sup>234</sup> The society in Algeria was composed of a mixture of settlers of French, Spanish, Italian and Maltese descent.<sup>235</sup>

The status of the indigenous Algerians in the colonial society relied on an imperial ideology with distinctive French principles. Algeria was a French territory, which belonged to the French Republic.<sup>236</sup> The French imperialistic ideology justified the extension of French sovereignty on the basis that it could only be beneficial to those to whom it was extended. The colonial administration of Algeria relied on the idea of *Algérie Française* (French Algeria). The notion of *Algerie Francaise* translated the conceptualisation of the Algerian territory as an extension of France. On an ideological level, France developed a system of governance based on the belief that France held a mission to civilise (*une mission civilisatrice*) the colonised indigenous population. This

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<sup>233</sup> For a comprehensive history of the colonization of Algeria see Benjamin Stora and William B. Quandt, *Algeria, 1830-2000: A Short History* (Ithaca: Cornell University Press 2001).

<sup>234</sup> Le Sueur, *Uncivil War* (n 3) 17.

<sup>235</sup> Alistair Horne, *A Savage War of Peace: Algeria 1954-1962* (London: Macmillan 1977) 51.

<sup>236</sup> Article 85 French Constitution 1946: "The French Republic, one and indivisible, recognizes the status of territorial communities. The territorial communities of the Republic shall be the Communes, the Departments, the Regions, the Special-Status communities and the Overseas Territorial communities" ("La République française, une et indivisible, reconnaît l'existence de collectivités territoriales. Ces collectivités sont les communes et départements, les territoires d'outre-mer. » <<http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/la-constitution/les-constitutions-de-la-france/constitution-de-1946-ive-republique.5109.html>>

mission to civilise was deployed in three models of integration of the Algerian indigenous people: assimilationism, associationism and coexistence. The first model refers to ‘the pursuit of a unitary conception of the state that excluded, in principle all particularities for ethnic, religious or social groups’.<sup>237</sup> On the other hand, the associationist model recognises the specificities of each group and accordingly associates local and traditional institutions to the colonising administration. The coexistence model consisted in the recognition of different legal systems coexisting alongside to the French judicial institutions. As such, Islamic and *Israelite* (Jewish) jurisdictions were established in their respective communities and the Algerian indigenous population were ‘subject’ destined to become a French citizen. In practice, the government acceptance of the coexistence of different local system based on personal law did not put an end to the project of a full assimilation and was loaded with tensions.<sup>238</sup> These tensions are particularly visible in the condition attached to the grant of French citizenship. A *Senatus-consulte* was issued in 1865 by which stated, first, that all indigenous Algerian Muslims were French subjects, French nationals, and as such could serve in the French army and navy and be appointed to minor civil functions. Second, the law also laid down a process of naturalisation by which indigenous Algerian males could acquire French citizenship – but only if they abandoned their civil personal status under Muslim law and agreed to be bound in all matters by the civil and political laws of France rather than Muslim law.<sup>239</sup> ‘Naturalization’ to French citizenship was not widely taken up. Later, in 1919, legislation was introduced which allowed a limited number of Muslims who had fought in the French Army during the First World War access to French citizenship, but still with the condition of renouncing civil personal status. The system of voting divided voters into two electoral colleges, the first consisting of French citizens, European and Algerian Muslims, and the second, which consisted of certain males of local civil status to elect certain officials including almost one and a half million Algerian.<sup>240</sup> In 1936, the Blum-Violette project proposed that a number of educated Algerians (around 25,000 out of a population of 6 million) could

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<sup>237</sup> Todd Shepard, *The Invention of Decolonization: The Algerian War and the Remaking of France*, 22-23 quoting the Commission Relations entre les Commuautés, La Cour d'Appel d'Alger, 'Le regime juridique des statuts prives et des juridictions civiles en Algérie' (Algiers 9 December 1960) 1, Centre des Archives Contemporaines des Archives Nationales, CAC/AN 950395/76 at footnote 9.

<sup>238</sup> Todd Shepard, *The Invention of Decolonization: The Algerian War and the Remaking of France*, 42.

<sup>239</sup> James Le Sueur, *Uncivil War: Intellectuals and Identity Politics during the Decolonization of Algeria* (Philadelphia: University of Pennsylvania Press 2001) 20.

<sup>240</sup> Todd Shepard, *The Invention of Decolonization: The Algerian War and the Remaking of France*, 25.

become French citizens without having to abandon their personal status. But the European settlers opposed this initiative and the project was not discussed in the French parliament. Belatedly, the Ordinance of 7 March 1944 implemented the Blum-Violette proposals.<sup>241</sup>

In practice, the assertion that Algeria was an extension of the French national territory and the project of assimilation of the Algerian people did not necessarily mean that indigenous Algerians would benefit from full equality in terms of rights. Economically, Algeria was a fractured society, a land of enormous contrast between the European settlers and the indigenous population. Economic domination was permitted and it went hand-in-hand with European monopolisation of political power in Algeria. Agricultural production, and in particular the products of the vineyards, were destined for the French market.<sup>242</sup> In addition, the colonial law authorised the dispossession of the best land for the benefit of the European settlers. In 1840, a first decree confiscated land from all those indigenous Algerians who had taken up arms against the French in the initial pockets of resistance against French rule. Two other ordinances allowed the confiscation of non-developed land for which no justifiable titles under French law were held before 1830.<sup>243</sup> An act passed in 1863, which had proclaimed tribes to be the rightful owners of the land they had enjoyed in perpetuity, was offset by the Warnier Act of 1873, which made communal land available for sale and once sold, this land remained subject to French land codes. Then, following a revolt in Kabylia, several million acres of land were confiscated from Muslims by way of punishment. As a result, three-quarters of the Algerian population, who, almost without exception, were Muslim, lived in poverty.<sup>244</sup> 50% of male Muslims were unemployed and only one in six Muslim children went to elementary schools. In 1948, Muslims earned on average an estimated 16,000 old francs

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<sup>241</sup> The Ordinance of 7 March 1944 acceded to all political claims made before the war. Its first two articles proclaimed the equality of rights and duties as well as the repeal of all emergency measures, as had been demanded by the Muslim Congress in June 1936. Article 2 enacted the Blum-Violette project by admitting into the Electoral College 65,000 people belonging to the political, military, cultural, administrative, economic and social elites. Article 4 promised French citizenship to the rest of the Muslims, on terms to be determined by the future National Assembly. Meanwhile, it admitted them immediately into a second electoral college of Muslims only, representing two-fifths of local assemblies (councils and general and financial delegations). This second college was then granted equal representation with the first college at the National Assembly by the Ordinance of 17 August 1945.

<sup>242</sup> Eric R. Wolf, *Peasant Wars of the Twentieth Century* (New York: Harper & Row 1969) 222-24 and John Dunn, *Modern Revolutions: An Introduction to the Analysis of a Political Phenomenon* (Cambridge: Cambridge University Press 1972)154. See also Mohamed Choukri, *For Bread Alone* (London: Saqi Books 2007).

<sup>243</sup> 1844 and 1846.

<sup>244</sup> Bernard Droz and Evelyne Lever, *Histoire de la guerre d'Algérie* (Paris: Le Seuil 1982) 37-38.

per year whilst the European equivalent was 450,000 Francs. As Crenshaw Hutchinson points out, on the eve of the “Algerian Revolution”, no political reform was in sight to develop Algeria and alleviate the poverty of the indigenous Algerian population.<sup>245</sup>

Furthermore, the regulation of the civil rights of the indigenous population consisted of constitutional laws blended with imperial policies that safeguarded the interests of the small population of European settlers. After the Second World War, in 1947, an elected Algerian Assembly was created, which had the power to modify laws that were relevant to Algeria and passed in Metropolitan France. To college elected the same number of deputies. The first college comprised about 500,000 French colons and around 60,000 Muslims who were considered sufficiently ‘Europeanised’ to belong to this group. Under this electoral system, the vote of a European effectively counted around ten times more than that of a Muslim. With half of the seats in this Assembly held by *colons* and a two-thirds majority required to pass any legislation, the *colons* had an effective veto over any measure considered too progressive. Moreover, the French were not averse to election rigging in order to ensure that any Muslims with nationalist leanings were kept away from the Assembly. The most striking example was the 1948 elections, which were systematically falsified by the Governor-General, Marcel Naegelen, to ensure that Muslims who were favourable to the French presence and unlikely to question the status quo were elected.<sup>246</sup>

Overall, the relationship with the Algerian indigenous population was characterised by an obstinate and authoritarian paternalism.<sup>247</sup> In addition to a paralysing system of governance, the indigenous Muslim population was maintained in a state of permanent inferiority.<sup>248</sup> Behind the guise of a “mission to civilise” the indigenous population, principles of sovereignty of the people, equality, unity and indivisibility were never fully applied to the indigenous.<sup>249</sup>

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<sup>245</sup> Martha Crenshaw Hutchinson, *Revolutionary Terrorism: The FLN in Algeria, 1954-1962* (Stanford: Hoover Institution Press, Stanford University 1978); D. Bruce Marshall, *The French Colonial Myth and Constitution-Making in the Fourth Republic* (New Haven: Yale University Press 1973) 5.

<sup>246</sup> Charles-Robert Ageron, *La Guerre d’Algérie et les Algériens, 1954-1962* (Paris: Armand Colin 1997) Vol 2, 608.

<sup>247</sup> Phillip C. Naylor, *France and Algeria: A History of Decolonization and Transformation* (Gainesville: University Press of Florida 2000) 24; Charles André Julien, *L’Afrique du Nord en marche: nationalismes musulmans et souveraineté française* (Tunis: Cérès 2001) 94.

<sup>248</sup> Patricia M. E. Lorcin, *Imperial Identities, Stereotyping, Prejudice and Race in Colonial Algeria* (London: I.B. Tauris 1995) 7.

<sup>249</sup> Nicolas Bancel, Pascal Blanchard and Françoise Vergès (eds) *La République Coloniale: Essai sur un Utopie* (Paris: Albin Michel 2003) 27.

## B. The Outbreak of the War

Early sparks of Algerian nationalism can be traced to around World War I among the Algerian labour community in France. It took some time for a cohesive and united Algerian liberation movement to organise itself.<sup>250</sup> In 1937, the *Étoile Nord-Africaine* (North African Star) was one of the first modern Algerian nationalist organisations, followed by the Algerian People's Party (PPA) and the *Association des Ulamas* (Algerian association of religious leaders).<sup>251</sup>

In 1943, Ferhat Abbas released his *Manifesto of the Algerian People*.<sup>252</sup> The manifesto outlined the 'evils of colonial rule' and denounced the continued oppression of Muslims. The Algerian nationalists defined their program around three central ideas: putting an end to the French occupation, returning ownership land to the indigenous Algerians and establishing a policy of social democracy. Broadly, the Algerian nationalists rejected the concept of assimilation and claimed the right of self-determination of the Algerian people. They denounced the discriminatory system of governance whereby the European settlers and Algerian indigenous people were living in two mutually exclusive worlds.<sup>253</sup>

In 1944, de Gaulle's provisional government initiated a programme to educate the Muslim population and abolished the *Code de l'indigenat* (code of the indigenous people). A new administrative entity, the *Union Française* (French Union), was created to coordinate and combine resources and efforts in order to 'civilise' the colonies, improve their well-being perfect their democratic institutions and ensure their security.<sup>254</sup> It was defined in the constitution as an institutional framework situated in between a Federation and a Commonwealth. Within this framework, an executive council ruled with the cooperation of the members of the community. As a result of this transformation, the definition of "cooperation" was understood in a flexible manner.<sup>255</sup>

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<sup>250</sup> Andrew Heggoy, 'The Origins of Algerian Nationalism in the Colony and in France' [1968] 58(2) *The Muslim World* 128–140.

<sup>251</sup> Helen Chapin Metz (ed), *Algeria: A Country Study* (Washington: Federal Research Division, Library of Congress 1994) 37.

<sup>252</sup> Metz, *Algeria* (n 16) 37.

<sup>253</sup> Crenshaw Hutchinson, *Revolutionary Terrorism*. (n 10).

<sup>254</sup> Général Georges Catroux, 'L'Union française, son concept, son état, ses perspectives' [1953] 18(4) *Politique Étrangère* 233–66; Jacques Frémeau, 'L'union française: le rêve d'une France unie?' [2004] 1 *Mémoires/Histoire* 163–73.

<sup>255</sup> See Article 60 of the Constitution of 1946; Catroux, 'L'Union Française, 240; Frémeau, 'L'Union française' (n 19).

The French Union sought to reflect French Republican values and emphasised the principle of equality of rights and obligations without distinctions of race and religion.

The government initial response to the growth of an indigenous anti-colonial movement in Algeria was, therefore to undertake reforms in the hope of reducing tensions. However, the calls for independence grew louder. On the day of the liberation of France from the German occupation (8 May 1945), the nationalists also scheduled a celebratory march. The liberation of France was associated with the demands of liberation of the Algerian people. However, it quickly turned into violent clashes in the cities of Guemla and Setif. The security forces fired at the Algerian section of the 14 July Paris March, when an Algerian flag was raised. Out of this event seven people, six of whom were Algerians died. A parliamentary debate ensued, during which Algerian Deputy, Abdelkader Cadi, asked the Assembly: “Why do the French police lose their cool in front of Algerians? [...] why is there such discrimination?”<sup>256</sup>

When the revolt came, it was officially launched on 1 November 1954 with a series of coordinated attacks against military installations, police posts, warehouses and public utilities.<sup>257</sup> The attacks were conducted by no more than nine men who would form the Front de Liberation National (FLN), National Liberation Front<sup>258</sup> on the same day that the FLN broadcast a message urging the Algerian population to fight against the French colonial rule. The day after the official outbreak of the conflict Prime Minister Pierre Mendes-France announced at the National Assembly in Paris:

One does not compromise when it comes to defending the internal peace of the nation, the unity and the integrity of the Republic. The Algerian departments are part of the French Republic. They have been French for a long time and they are irrevocably French. [...] Between them and metropolitan France there can be no conceivable secession.<sup>259</sup>

The FLN conducted targeted operations of sabotage on public facilities (roads, railways, telegraph poles) and targeted assassinations of Algerians who were collaborating with

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<sup>256</sup> Journal officiel. Débats parlementaires (17 July 1953) 3505: “Pourquoi la police perd-elle son sang-froid en présence d’Algériens? [...] pourquoi cette différence de traitement?” [author’s transl].

<sup>257</sup> Horne, *Savage War of Peace* (n 5) 83.

<sup>258</sup> Ahmed BenBella, Krim Belkacem, MoustafaBen Boulaid, Rahbat Bitat, Mohammed Boudiaf, Mourad Didouche, Larbi Ben M’Hidi, Hocine Ait Ahmed, Mohammed Khider.

<sup>259</sup> Prime Minister’s speech of 12 November 1954, cited in Horne, *Savage War of Peace* (n 5) 98; Alain-Gérard Slama, *La guerre d’Algérie: Histoire d’une déchirure* (Paris: Gallimard 1996) 48–49; Pierre Miquel, *La guerre d’Algérie* (Paris: Fayard 1993) 153.

the colonial authorities or who refused to take part in the FLN activities. The Algerian nationalist movement found support from three major groups: a popular working class represented by leader Messali Hadj, an indigenous intellectual elite whose main figure was Ferhat Abbas, and the Communist Party.<sup>260</sup>

Reforms having failed to prevent the growth of a nationalist movement, the French leadership undertook to confront the FLN directly. In 1955, as the attacks intensified, the French parliament declared the first Algerian 'state of emergency'. Law n° 55-385 extended France's civil and military authority for a period of six months.<sup>261</sup> A second law was enacted on 23 April 1955, which enlarged the judicial power of the military courts.<sup>262</sup> On 20 August 1955, the killing of 123 European civilians by FLN fighters was a turning point.<sup>263</sup> France responded to the "Massacre de Philippeville" by killing 1,273 guerrillas.<sup>264</sup> In response to the Philippeville massacre, the French government prolonged the state of emergency.

The state of emergency involved the suspension of most of the guarantees of individual liberties in Algeria. It facilitated house arrests and authorised the displacement of nationalists to 'settlement camps'.<sup>265</sup> Young Muslim men were rounded up in a stadium and shot, while the villages from which the assailants came were destroyed by mortar fire. The state of emergency also enabled the army to assist the police in their operations.<sup>266</sup> Resident governor in Algeria, Robert Lacoste, ordered the guillotining of

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<sup>260</sup> John Talbott, *The War Without a Name: France in Algeria, 1954-1962* (London and Boston: Faber and Faber 1981).

<sup>261</sup> State of Emergency, Law/Loi n° 55-385 du 3 avril 1955 *instituant un état d'urgence et en déclarant l'application en Algérie*, Journal officiel de la République Française (JORF) 7 April 1955. Article 1: "The state of emergency can be declared in part or all of Metropolitan France, in Algeria and the overseas departments, in case of imminent danger resulting from grave breaches of public order, or in case of events whose nature and seriousness presents a public calamity." "L'état d'urgence peut être déclaré sur tout ou partie du territoire métropolitain, de l'Algérie, ou des départements d'outre-mer, soit en cas de péril imminent résultant d'atteintes graves à l'ordre public, soit en cas d'événements présentant, par leur nature et leur gravité, le caractère de calamité publique."

<sup>262</sup> Law/Loi n° 55-385 23 April 1955.

<sup>263</sup> Charles-Robert Ageron, 'L'insurrection du 20 août 1955 dans le Nord-Constantinois, de la résistance armée à la guerre du peuple' in Ageron, *La guerre d'Algérie et les Algériens, 1954-1962* (Paris: Armand Colin 1997) 27-50.

<sup>264</sup> Ageron 'L'insurrection du 20 août 1955' (n 28).

<sup>265</sup> Michel Cornaton, *Les Camps de Regroupement de la Guerre d'Algérie* (Paris: Editions Ouvrières 1967).

<sup>266</sup> Special Powers Act, Law n° 56-258, 16 March 1956.

FLN members convicted of acts of terrorism.<sup>267</sup> According to the FLN, the police armed forces and vigilante groups in retaliation for the attacks killed 12,000 Muslims.<sup>268</sup>

The FLN developed a complex network of political and military cells within Algeria. The formation a military wing, the National Liberation Army (ALN) took the nationalist movement into guerrilla warfare. The ALN was organised into two levels: 30,000 soldiers training and operating outside Algeria and, by 1957, an estimated 20,000 to 50,000 guerrilla fighters operating in cells within Algeria.<sup>269</sup> The ALN adopted a strategy of terrorism that included kidnapping, capturing French military personnel, raiding key military or political targets and carrying out assassinations.<sup>270</sup> On 1 November 1954, the ALN carried a series of coordinated terrorist attacks throughout Algeria marking the beginning of the war on the independence of Algeria.

### C. French Counterinsurgency Warfare: *La Guerre Révolutionnaire*

The revolutionary guerrilla went beyond what the French police and government in Algeria could handle. As the French leadership struggled to deal with the rise of an Algerian nationalist movement, the situation evolved into a war. Unlike conventional wars, the French police were not confronted by an army but by bands of guerrillas operating across the Algerian territory and benefiting from the support of the indigenous population. As a result, the French military leadership developed an original counterinsurgency strategy. *La guerre révolutionnaire* or revolutionary warfare combined military operations with political and psychological actions.<sup>271</sup> Essentially, this meant political indoctrination in democratic ideology, as well as aggressive psychological operations to counter enemy information operations, at least at the tactical level.<sup>272</sup>

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<sup>267</sup> Crenshaw Hutchinson, *Revolutionary Terrorism* (n 10) 488.

<sup>268</sup> Ageron 'L'Insurrection du 20 août 1955' (n 28 )27-50.

<sup>269</sup> George A. Kelly, *Lost Soldiers: The French Army and Empire in Crisis 1947–1962* (Cambridge: MIT Press 1965) 172.

<sup>270</sup> Armed Conflict Events Data: Algerian War of Independence 1954-1962. <http://www.onwar.com/aced/data/alpha/algeria1954.htm>

<sup>271</sup> Louis A. DiMarco, 'Losing the Moral Compass: Torture and Guerre Révolutionnaire in the Algerian War'[2006] 36(2) Parameters 67. See also Martin S. Alexander, and J.F.V. Keiger (eds) *France and the Algerian War, 1954-62: Strategy, Operations, and Diplomacy* (London: Frank Cass 2002) 38.

<sup>272</sup> Roger Trinquier, *La Guerre Moderne* (Paris: La Table Ronde 1961) 81.

## 1. Destruction of the FLN

In 1955, the French troops numbered around 100,000 and by 1956 there were approximately 400,000 French forces in Algeria. Edgar O'Ballance estimate the total of French men that served in Algeria between 1955 and 1962 to 2,000,000.<sup>273</sup> The French operations ranged from small-scale ambushes to conventional battalion operations. They involved artillery as well as air power, notably helicopter support. The French army was officially engaged in a campaign of “pacification” and was not officially considered to be waging war.<sup>274</sup> Hence, alongside the police force, special units of the army participated in police operations to maintain order. Algeria's governor, Robert Lacoste, charged General Jacques Massu, head of the 10<sup>th</sup> Paratroopers, with the task of pacifying Algeria by any means possible.<sup>275</sup>

The efforts of the French were focused first on understanding the structure of the FLN. For this reason, *renseignement* (intelligence) played a central role. The primary aim was to identify the nationalist network, and then to dismantle and destroy it. These activities were completed using a *quadrillage* (grid) system, which divided the Algerian territory into quadrants.<sup>276</sup> They also involved the creation of a *cordon sanitaire* along the Tunisian and Moroccan borders, so as to cut off external support to the Algerian insurgents.<sup>277</sup>

## 2. Political-psychological Operations

The war in Indochina had taught the French military that counterinsurgency required the defeat of not only the enemy's forces but also of its message.<sup>278</sup> Psychological operations included leaflet drops by aircraft, the use of loudspeakers in urban areas, recruitment of collaborators, counter-propaganda efforts, and general non-lethal targeting of the diplomatic and international information efforts of the insurgents.

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<sup>273</sup> Edgar O'Ballance, *The Algerian Insurrection 1954–1962* (Hamden: Archon Books 1967) 53.

<sup>274</sup> Maurice Flory, 'Algérie Algérienne et droit International' 1951 6(1), *Annuaire français de droit international* 983.

<sup>275</sup> Crenshaw Hutchinson, *Revolutionary Terrorism* (n 10) 489-90.

<sup>276</sup> Karl Goetzke, 'A Review of the Algerian War of National Liberation Using the US Army's Current Counterinsurgency Doctrine', MA dissertation (Carlisle, PA: U.S. Army War College, Carlisle Barracks 2005) 10.

<sup>277</sup> Goetzke, 'Review of the Algerian War of National Liberation' (n 42) 10.

<sup>278</sup> Antoine Argoud, *La décadence, l'imposture et la tragédie* (Paris: Fayard 1974) 121.

Essentially these operations aimed to connect the French administration with the poorer inhabitants.<sup>279</sup> In 1955, Governor-General of Algeria, Jacques Soustelle created the Special Administrative Sections (SAS) with a role to promote ‘democratic ideals’ to the Algerian youth, reform local government, set up medical services, and train local officials and police forces.<sup>280</sup> Within the communes and military districts, military personnel conducted civilian education at all levels, which was heavily laced with liberal democratic philosophy.

Linked to the *quadrillage* system, the SAS also operated population control. The French forces practised the *regroupement* or resettlement of the Algerians.<sup>281</sup> The population was moved to barracks-style camps and relocated to areas that were more accessible and controllable by the Army. From 1957 to 1961, over two million Muslims were relocated.<sup>282</sup> The control of the population through this policy of resettlement was intended to achieve two purposes. First, it sought to make the resettled population secure. The second goal was to achieve civic re-education of the individuals within the “new” villages. This policy, however, created more hatred among the population that it was designed to protect.

Another aspect of the political-psychological operations that should be mentioned was the use of torture by the French forces. Torture became an acceptable instrument in countering the insurgency, particularly by the intelligence elements within the French military. Many in the army believed that it was a necessary practice to ensure victory and it was used against an enemy that was viewed as communist and therefore an enemy of the Republic.<sup>283</sup>

The Algerian insurrection was a severe threat to the preservation of the colonial empire. France was slowly recovering from the damage left by the Second World War. At the highest level, the French government and military commanders refused to accept the insurgency for what it was, and recognise that the nation was at war.<sup>284</sup> France was officially at peace and the revolt was characterised as of a purely ‘internal’ nature. The conflict was not a war but a mere ‘police operation’.<sup>285</sup>

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<sup>279</sup> Alexander and Keiger (eds) *France and the Algerian War, 1954-62* (n 37) 5.

<sup>280</sup> DiMarco, ‘Losing the Moral Compass’ (n 37) 68.

<sup>281</sup> Kelly, *Lost Soldiers* (n 34) 188.

<sup>282</sup> Kelly, *Lost Soldiers* (n 34) 188.

<sup>283</sup> DiMarco, ‘Losing the Moral Compass’ (n 37) 71.

<sup>284</sup> Jean Charpentier, ‘La Reconnaissance du GPRA’ [1959] 5(1) *Annuaire Français de Droit International* 801.

<sup>285</sup> Flory ‘Algérie Algérienne et Droit International’ (n 40) 983.

In 1958, in Cairo, a provisional government of Algeria had been created by the FLN, the *Gouvernement Provisoire de la République Algérienne* (GPRA), which France refused to recognise.<sup>286</sup> Taken together, the implications of the refusal to admit the belligerency of the conflict or to recognise the GPRA affected the conduct of the fight against the Algerian nationalists. Excluded from any legal protection, be it domestic laws or international laws of armed conflict, the Algerian nationalists were acting in an unrecognized war.<sup>287</sup> As the following section explains, this specificity allowed torture to be repeatedly used for tactical and even operational purposes.<sup>288</sup> The legal framework discussed above, legitimated the army to respect neither the laws of the Republic nor the laws of war, which cover the treatment of prisoners of war and protection of civilians.

## II. The Thorny Issue of Torture

The Algerian war was a brutal confrontation between the French army and the Algerian nationalists. As explained above, it was characterised by the establishment of a state of exception whereby military rule was introduced alongside to the police. This section explores the prevalence of the French military's use of torture during the conflict. It underscores the integration of torture as a military practice in the counterrevolutionary strategy. It shows that torture became a standard method used by the French counterrevolutionary forces to obtain information. However, it was also one of the key components of their strategic failure. The issue of torture negated the legitimacy of the French mission and international and French opinion turned against the military.

### A. An Organized Practice

The French intelligence network relied on information garnered from interrogations involving torture by the paratroopers.<sup>289</sup> By 1957, the arbitrary arrest and detention of suspected sympathisers were widespread. Many arrests occurred through informants. The jails and prisons were filled to capacity with the limited judicial action being

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<sup>286</sup> Crenshaw Hutchinson, *Revolutionary Terrorism*, (n 10) 489-90.

<sup>287</sup> Arlette Heyman, 'Les Libertés Publiques et la Guerre d'Algérie', Doctoral Dissertation, Law (Paris: Librairie Générale de Droit et de Jurisprudence 1972) 2.

<sup>288</sup> Crenshaw Hutchinson, *Revolutionary Terrorism*, (n 10) 490.

<sup>289</sup> Mohammed Harbi, *Le F.L.N., Mirage et Réalité: Origines à la Prise de Pouvoir, 1945-1962* (Paris: Editions Jeune Afrique 1980) 199.

undertaken in a timely manner.<sup>290</sup> Additionally, as part of the pacification process, the wholesale resettlement of the population into *areas de regroupement* (grouping areas) had the consequence of creating a “prison-like” environment.

The use of torture was highly effective from a tactical perspective. As Louis DiMarco explains:

These tactics rested on five key counterinsurgency fundamentals: isolating the insurgency from support; providing local security; executing effective strike operations; establishing French political legitimacy and effective indigenous political and military forces; and establishing a robust intelligence capability.<sup>291</sup>

The French counterinsurgency relied on information. It built multiple, overlapping layers of sources of information. Hence the French built detailed networks composed of local loyal Algerians, former FLN members and paid informers, but they also used aggressive interrogation.

Interrogation methods were often harsh, involving many methods that were generally illegal under the Geneva Convention.<sup>292</sup> One document archives explicitly some of the methods used. Among these was ‘the temporary surprise abduction and the transportation by helicopter of a few inhabitants selected at random or identified as suspects with a view to interrogating them about the rebel organization established in the *douar* [rural administrative area]’; interrogations “to be utilized immediately”, which should be “as vigorous as possible”.<sup>293</sup> In another document, based on notes taken by a trainee at a military training centre, protocols of torture are detailed as follows. Torture must:

- (1) [be] clean; (2) ... not take place in the presence of young [soldiers];
- (3) ... not take place in the presence of sadists; (4) ... not [be] inflicted by an officer or a person of rank; (5) and must especially be “humane”

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<sup>290</sup> O’Ballance, *Algerian Insurrection* (n 39) 150.

<sup>291</sup> DiMarco, ‘Losing the Moral Compass’ (n 37) 68.

<sup>292</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, Article 50, 6 United States Treaties (UST) 3114, 75 United Nations Treaty Series (UNTS) 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, Article 51, 75 UNTS 85; Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, Article 130, 6 UST 3316, 75 UNTS 238; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, Article 147, 6 UST 3316, 75 UNTS 287.

<sup>293</sup> Cited in Raphaëlle Branche, *La Torture et l’Armée Pendant la Guerre d’Algérie: 1954-1962* (Paris: Gallimard 2001) 551.

that is to say, it must end as soon as the guy has talked, and mostly that it does not leave any trace. Considering which, in conclusion, you have the right to use water and electricity. This I have noted down as he [the instructing captain] spoke.<sup>294</sup>

Methods of interrogation involved beatings, water treatment such as the bathtub or the water pipe, and electric shock by *gégène* (a field telephone dynamo).<sup>295</sup> Prisoners were interrogated by specific units like the Operational Protection Detachments.<sup>296</sup> The directives recommended questioning the prisoners immediately after their capture.<sup>297</sup> Raphaëlle Branche explains that torture was always practised under the supervision of an officer of a higher rank during a session of interrogation.<sup>298</sup> She explains that most of the men performing the torture were conscripts although it was sometimes conducted by a commander.<sup>299</sup>

Torture of prisoners took place in different locations including, the Villa Sesini in the area of El Biar; an apartment building still under construction, also in a residential area of the city; a farm a few miles away from the city of Constantine; an abandoned candy factory; old wine storehouses in western Algeria; a racetrack; basements of public buildings; stadiums; schools (the most notable was École Sarouy in the Casbah of Algiers); and a Turkish bath when extra space was needed.

Secondly, torture was used as an instrument for the “re-socialisation of prisoners into obedience and, through proper psychological action, collaboration”.<sup>300</sup> The French counterinsurgency also used psychological control over the Algerian population. General Trinquier notably developed a doctrine of combat in which he emphasised that, unlike conventional warfare, revolutionary war required winning over the indigenous people.<sup>301</sup> Special administrative sections, the Sections Administratives Spécialisées (SAS), were established in each quadrant to engender French political legitimacy among

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<sup>294</sup> SHAT (Service Historique de l’Armée de Terre), 1H1369D4, Ministère des Armées ‘Terre’, No 1763-EMA/1.0, 23 April 1959, cited in Marnia Lazreg, *Torture and the Twilight of Empire: From Algiers to Baghdad* (Princeton and Oxford: Princeton University Press 2008) 114.

<sup>295</sup> Journal officiel, Assemblée National 2e séance, du 3 Février 1955, p 692, col. 2, 65

<sup>296</sup> Branche, *La torture et l’armée* (n 61) Chapters 9, 12 and 18.

<sup>297</sup> Branche, *La torture et l’armée* (n 61).

<sup>298</sup> Branche, *La torture et l’armée* (n 61).

<sup>299</sup> Branche, *La torture et l’armée* (n 61).

<sup>300</sup> Lazreg, *Torture and the Twilight of Empire* (n 62) 111.

<sup>301</sup> Argoud, *La Décadence* (n 44) 121.

the local population and to build indigenous democratic institutions.<sup>302</sup> The SAS reformed local government, set up medical services, and trained local officials and police forces.<sup>303</sup> The SAS promoted ‘democratic ideals’ to the Algerian youth. Torture in this context was therefore intended to “make people listen more than talk”.<sup>304</sup> French soldiers were sending a message to the families and villages and the greater political community to which the suspects belonged.

Units like the 10<sup>th</sup> Parachute Division developed very successful methods for using torture to gain actionable intelligence at the tactical level. The French authority’s widespread dissolution of civil law allowed the French to apply combatant status to just about anyone they detained, reducing their legal rights even more. Initially, the French military and civilian leadership tacitly approved of such measures, justifying them as a necessity of the conflict.

## B. The Status of the Conflict

France was a signatory to the Geneva Convention since 1951 yet it insisted that it was not applicable to the violence in Algerian.<sup>305</sup> Throughout the conflict, France avoided recognising the belligerency of the violence in Algeria.<sup>306</sup> As Thenault expresses it: ‘the French government deployed an impressive variety of creative legal semantics to avoid officially recognizing the conflict as a “war.”<sup>307</sup> Examples of such official terminology

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<sup>302</sup> DiMarco, ‘Losing the Moral Compass’ (n 37) 68.

<sup>303</sup> DiMarco, ‘Losing the Moral Compass’ (n 37) 68.

<sup>304</sup> Raphaëlle Branche, ‘Torture of Terrorists? Use of Torture in a “War Against Terrorism”: Justifications, Methods and Effects: The Case of France in Algeria, 1954-1962’ [2007] 89(867) *International Review of the Red Cross* 10.

<sup>305</sup> Geneva Convention Relative to the Treatment of Prisoners of War art. 1, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (entered into force Oct. 21, 1950) [hereinafter GPW]. Common Article 3, like its namesake, is common to all four Geneva Conventions. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 (entered into force Oct. 21, 1950) [hereinafter First Geneva Convention]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 (entered into force Oct. 21, 1950) [hereinafter Second Geneva Convention]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950) [hereinafter Fourth Geneva Convention]. See Eldon Van Cleef Greenberg, *Law and the Conduct of the Algerian Revolution*, 11 HARV. INT’L L.J. 37, 47 (1970).

<sup>306</sup> Similar case has been observed concerning the Dutch war in Indonesia Chris Lorenz ‘can criminal event in the past disappear in a Garbage Bin in the Present? Dutch Colonial Memory and Human rights: the case of Rawagede in Marek Tamm, *Afterlife of Events Perspectives on Mnemohistory*, Basingstoke: Palgrave Macmillan 2015) 219.

<sup>307</sup> Sylvie Thénault, *Justice et Politique en Algérie 1954–1962* [Justice and Politics in Algeria 1954–1962], 34 *Droit et société*, 575, 578 (1996).

include *opérations de maintien de l'ordre en Afrique du Nord* (order maintenance operations in North Africa).<sup>308</sup> For jurists, the Algerian violence was a rebellion and the FLN a terrorist organisation.<sup>309</sup>

There were several points of contention. A first point of contention was, therefore, the categorisation of the conflict as an armed conflict. Common Article 3 was drafted to come into effect for any 'armed conflict, not of an international character occurring in the territory of one of the High Contracting Parties'.<sup>310</sup> This article binds France to the application of minimal humanitarian principles common to of all four Conventions upon the parties' non-international armed conflict. However, there are no objective criteria that would enable to identify when an internal conflict qualifies as an armed conflict.<sup>311</sup> As historical analysis of France legal position reveals, French jurists argued that there was no international conflict and that the violence in Algeria was not governed by international law.<sup>312</sup> Draper notably explains "a few days after the attacks of November 1954, Minister of the Interior François Mitterrand wrote:

'The terrorist attacks are common law crimes. The men who commit these

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<sup>308</sup> Ibid at 578.

<sup>309</sup> See notably the legal analysis of the conflict by Maurice Flory, *Algérie Algérienne et Droit International*, 6, *Annuaire Français de Droit International* 973, 983 (1960); Jean Touscoz, *Etude de la Jurisprudence Interne Française sur les Aspects Internationaux de L'affaire d'Algérie*, 9 *Annuaire Français de Droit International* 953, 959–60 (1963).

<sup>310</sup> Katherine Draper, 'Why a War Without a Name May Need One: Policy-Based Application of International Humanitarian Law in the Algerian War' [2013] 48(3) *Texas International Law Journal* 574-603. Common Article 3 of the four Geneva Conventions provides:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions: (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples. (2) The wounded and sick shall be collected and cared for. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

<sup>311</sup> Lindsay Moir, *The Law of Internal Armed Conflict*, 34 (2002), 45.

<sup>312</sup> Flory in 'Algérie Algérienne et Droit International' (n 40) 983.

attacks against people and property are in no case to be considered as having a military nature since the antinational propaganda strives to attribute precisely this [military] characteristic to the bandits.’<sup>313</sup>

Furthermore, Draper explains that ‘domestic penal code provisions, reserved only for times of war, were never employed to prosecute FLN rebels’. Under this framework, FLN fighters were considered as part of a ‘sedition movement’ and as such were bound to domestic law related to national security and state of emergency provisions.<sup>314</sup>

The background issue was whether this was an international conflict. An international conflict is understood as violence occurring between at least two states powers.<sup>315</sup> France maintained that Algeria was part of France and further skipped away from the qualification of the conflict first by refusing to recognize the legitimacy of an Algerian government. The French legal position considered the creation of the GPRA as inconceivable. Jurist Jean Charpentier notably argued that an Algerian state could not exist as it had no distinct territorial existence.<sup>316</sup> For him, ‘the struggle for independence was not being conducted by organized troops subject to military discipline and conforming to the laws and customs of war’.<sup>317</sup> Drawing a comparison with the First World War Czech and Polish committees, he argued that at best the GPRA should be treated as a national committee.<sup>318</sup>

Considering the FLN, the French put forward the argument that the organization and the functioning of the FLN did not comply with the laws of war. The ‘struggle for independence was not being conducted by organized troops subject to military discipline and conforming to the laws and customs of war’.<sup>319</sup> Until 1958, the French legal system considered the FLN fighters to be part of a sedition movement. However, by 1959, as Draper encapsulates:

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<sup>313</sup> ‘Les attentats terroristes sont des crimes de droit commun. Les hommes qui commettent ces attentats contre les personnel et les biens ne sauraient en aucun case etre consideré comme ayant un caractere militaire alors que precisement la propaganda antinationale s’efforce de donner ce caractere aux fellaghas’, quoted in Thénault, ‘Justice et Politique en Algerie’ (n 75) 577 [English translation from Draper ‘Why a War Without a Name May Need One’ (n 310) 587].

<sup>314</sup> Loi n° 55-385 23 April 1955; Draper, ‘Why a War Without a Name May Need One’ (n 310).

<sup>315</sup> See Van Cleef Greenberg, ‘Law and the Conduct of the Algerian Revolution’ (n 73).

<sup>316</sup> Charpentier ‘La Reconnaissance du GPRA’ (n 50) 80.

<sup>317</sup> Charpentier ‘La Reconnaissance du GPRA’ (n 50) 799, 801.

<sup>318</sup> The same argument was made by Maurice Flory in ‘Algérie Algérienne et Droit International’ (n 40) 817, 838.

<sup>319</sup> Charpentier ‘La Reconnaissance du GPRA’ (n 54) 801.

[I]t was generally recognized that, despite continuing weaponry shortages, the ALN forces showed sufficient military organization to constitute at least the semblance of an army. The ALN was trained both abroad and in Algeria, had a hierarchically organized command structure, was composed of relatively standardized units and wore a distinctive sign – a red crescent and a star on the cap. One prominent contemporary legal scholar contends, though perhaps overstates, that the bulk of the ALN consisted of soldiers in uniform.<sup>304</sup>

She continues by highlighting that, the requirement of ‘occupation of a certain part of the State territory by insurgents’ was not met. Indeed, the ALN did not maintain ‘exclusive control’ over the Algerian territory.<sup>304</sup> The Algerian fighters were therefore in between the status of insurgents and terrorists.<sup>304</sup> General Salan notably commented that ‘It is well settled that the detainee must not be considered as prisoners of war. The Geneva Conventions are not applicable to them’.<sup>320</sup> Consequently, this ambiguous legal situation led to uncertainties on the application of humanitarian law and human rights to the Algerian fighters. The military leadership suggested the creation of *centres militaires d’internés* (CMI). Within these centers, the Algerian caught with weapons could be arrested and not be prosecuted.<sup>321</sup> By the end of 1958, between 9,000 and 16,000 were detained under these conditions.<sup>322</sup>

The GPRA called for the application of humanitarian law. To them, the conflict in Algeria constituted a war and the FLN was an organized movement of resistance.<sup>323</sup> In 1958, it issued the “White Paper,” in which it demanded Common Article 3 treatment “as a minimum,” and asserted that ALN forces qualified for the full protection of prisoner of war status under Article 4 of the Third Geneva Convention.<sup>324</sup> Supported by the International Committee of the Red Cross, (ICRC) it denounced the absence of due process, summary execution and the conditions of detention.<sup>325</sup>

During this period, the issue of the status of the conflict was raised in the trials of the Algerian prisoners held for charges of “terrorism”. However, the French courts did not

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<sup>320</sup> Sylvie Thénault, *Justice et Politique en Algérie 1954–1962*, *Droit et Societé*, (1996) 583.

<sup>321</sup> Sylvie Thénault, *Justice et Politique en Algérie 1954–1962*, *Droit et Societé*, (1996) 583.

<sup>322</sup> Sylvie Thénault, *Justice et politique en Algérie 1954–1962*, *Droit et Societé*, (1996) 586.

<sup>323</sup> Flory in ‘Algérie Algérienne et Droit International’ (n 40) 983.

<sup>324</sup> Eldon Van Cleef Greenberg, *Law and the Conduct of the Algerian Revolution*, 11 HARV. INT’L L.J. (1970) 56.

<sup>325</sup> Eldon Van Cleef Greenberg, *Law and the Conduct of the Algerian Revolution*, 11 HARV. INT’L L.J. (1970) 51.

directly address the status of prisoners of war. Article 4(A) sets forth various categories of persons ‘who have fallen into the power of the enemy’ and that qualify for prisoner of war status, including “members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power”.<sup>326</sup> French courts dismissed on the ground that the conflict was not categorized as an international war.<sup>327</sup> In the case of an appeal from a military tribunal conviction Zamouche, an FLN member was convicted of “criminal association” and “aiding attacks” on civilians not participating in combat.<sup>328</sup> The Court based its reasoning on the nature of his acts, labelled as terrorism. In any case, the lower court had acquitted him of all offences committed when he was in combat.<sup>329</sup> Draper’s review of court case shows the ambiguous attitude of the Court of Cassation with regard to Algerian combattants. In a sentencing against an Algerian fighter, it states to not recognise the Algerian combattants as an army.<sup>330</sup> Nevertheless, it also admits the possibility of applying the Conventions to the violence in Algeria.<sup>331</sup> Draper notably highlights a sentencing whereby the court dismissed the death penalty to a prisoner on the ground that if “the prisoner could not benefit from prisoner of war status, the tribunal had therefore not properly determined whether he could be prosecuted for his crimes”. In the case of Abdellah Berrais, a corporal of the ALN troops, the court of Cassation declared the military tribunal incompetent to interpret an international convention<sup>245</sup> — it notably stated that:

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<sup>326</sup> The Third Geneva Convention, Article 4(A) provides, in relevant part:

A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy: 1. Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.

2. Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:

(a) That of being commanded by a person responsible for his subordinates; (b) That of having a fixed distinctive sign recognizable at a distance; (c) That of carrying arms openly; (d) That of conducting their operations in accordance with the laws and customs of war. 3. Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

<sup>327</sup> Touscoz, ‘Etude de la Jurisprudence Interne Française’ (n 76) 959-960.

<sup>328</sup> Case of Zaamouche Hocine, Cour de cassation Chambre Criminelle [Cass. crim.] 19 Octobre 1961, Bull. Crim. 1961 410.

<sup>329</sup> Case of Zaamouche Hocine, Cour de cassation Chambre Criminelle [Cass. crim.] 19 Octobre 1961, Bull. Crim. 1961 410.

<sup>330</sup> Draper, ‘Why a War Without a Name May Need One’ (n 310). Case of Becetti Abdelkader, Cour de cassation [Cass. crim.], Sept. 4, 1961, Bull. Crim. 1961, No. 368.

<sup>331</sup> Draper, ‘Why a War Without a Name May Need One’ (n 310). 599

[T]he response of the military tribunal to these contentions does not permit the Court of Cassation to verify whether the said Convention was irrelevant to the facts of the case or whether an official interpretation should have been sought from the government.<sup>332</sup>

The case of Bellais and Berrais stand out as an instance where the Cour de Cassation went beyond implicit reliance on Convention-based reasoning. However, in the absence of official recognition by the government of the applicability of the prisoner of war provisions of the Convention, which would have amounted to an admission that this was an international conflict, and the military tribunals' resolute refusal to recognise such defences, these decisions by the Cour de Cassation probably had few practical implications.

### C. The controversy Over the Use of Torture

The use of torture was a reaction to a deepening crisis in which the French military, originally looking for suspect Algerians, came to see all Algerians as suspects. However, conscripts or officers who voiced their concerns were put under pressure and would face consequences. Horne notably gives the example of General Jacques Paris de la Bollardière who was sentenced to 60 days' detention after he publicly voiced his disapproval to the tactics used in Algeria.<sup>333</sup> The French military leadership developed a rhetoric vindicating the army's methods by relying on the theory of necessity.<sup>334</sup> In *Réflexions d'un prêtre sur le terrorisme urbain* (memoirs of a priest on urban terrorism) Father Louis Delarue provides a moral justification for the use of torture.<sup>335</sup> As he explains "by behaving like bandits: "there can be no hesitation in choosing the lesser of the two evils, in an effective but not sadistic interrogation".<sup>336</sup> This justification of

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<sup>332</sup> Case of Abdellah Berrais. Cour de cassation [Cass. crim.], Feb. 2, 1959, unpublished officially but reproduced in Rousseau, *Jurisprudence Française En Matière De Droit International Public: Condition Juridique Des Rebelles Algériennes Au Regard Du Droit International* 65 *Revue Générale De Droit International Public* 624 (1961)).

<sup>333</sup> Horne, *Savage War of Peace* (n 5) 203.

<sup>334</sup> Rita Maran, *Torture: The Role of Ideology in the French-Algerian War* (New York and London: Praeger Publishers 1989).

<sup>335</sup> Lazreg, *Torture and the Twilight of Empire* (n 62) 199

<sup>336</sup> Pierre Vidal-Naquet, *La torture dans la République: Essai d'histoire et de politique contemporaine (1954-1962)* (Paris: Éditions de Minuit 1972) 50-1 : 'laisser massacrer des innocents [...], il faut sans hésiter choisir le moindre: un interrogatoire sans sadisme, mais efficace'.

torture created a stir of indignation in the Metropolis.<sup>337</sup> In the press, journalists commented on the Algerian crisis by comparing it with the horror of Nazism. Several articles were published assimilating the methods used by the French army in Algeria to the Nazi repression. As a way to illustrate this, Claude Bourdet, who had been a member of the French resistance during World War II, questioned the role of the Army in Algeria and published an article entitled ‘Is here a Gestapo in Algeria?’.<sup>338</sup> In another article published later, he gave specific examples of persons who had been tortured.<sup>339</sup> However, Minister of Interior, Maurice Bourgès Manoury, dismissed these claims as untrue.<sup>340</sup> Henri Beuve-Méry, the editor of the newspaper *Le Monde*, wrote that “from now on the French must know that they don’t have the right to condemn in the same terms as ten years ago the destruction of Oradour and torture by the Gestapo”. In 1955, novelist and ex-Minister Francois Mauriac published a compelling work, in which he made serious claims about torture being used by the French police forces in Algeria.<sup>341</sup> These publications broke the code of silence maintained by the army.

Any opposition to the methods used was considered as a betrayal. These denunciations countered the attempt of the government to maintain a veil of secrecy on the methods used by the French army. Indeed, the orders given rarely mentioned torture. The only instances where the term ‘torture’ can be found in official military documents speak of its prohibition. Furthermore, it is contended that, as these practices became widespread, only one rule prevailed: these interrogation sessions and the use of torture must not leave permanent marks on the victim’s body; where this was not the case, the victim was then executed.<sup>342</sup> Secondly, archival investigations undertaken by historians reveal how the wording used in official military documents, in reality, concealed the use of torture by the army between 1955 and 1962.<sup>343</sup> Raphaëlle Branche’s thesis explains that not all of the orders were transmitted in writing. She particularly notes the importance of the oral transmission of military orders between different echelons of the military hierarchy.<sup>344</sup> Equally, the use of neutral terms avoided defining the nature of the violence that was

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<sup>337</sup> Notes from General Pedron 17 September 1956, SHAT 1 H3088/1.

<sup>338</sup> Claude Bourdet, ‘Y a-t-il une gestapo en Algérie?’, *L’Observateur*, 6 December 1951.

<sup>339</sup> Claude Bourdet, ‘Votre Gestapo en Algérie’, *L’Observateur*, 13 January 1955.

<sup>340</sup> Cited in Yves Beigbeder, *Judging War Crimes and Torture: French Justice and International Criminal Tribunals and Commissions (1940-2005)* (Leiden and Boston: Martinus Nijhoff/Brill 2006) 110.

<sup>341</sup> 15 January 1955, ‘La Question’, *l’Express*.

<sup>342</sup> Branche ‘Torture of Terrorists?’ (n 70) 10.

<sup>343</sup> Branche *La Torture et l’Armée* (n 61) 474.

<sup>344</sup> Branche, *La Torture et l’Armée pendant la Guerre d’Algérie: 1954-1962*, (n 61) 474.

perpetrated. Robert Lacoste, a one-time resident minister in Algeria, spoke of “alleged atrocities”<sup>345</sup> and General Massu, who used torture systematically during the Battle of Algiers,<sup>346</sup> recommended using the term “coercive methods”.<sup>347</sup> General Salan often referred to a “recent experiment” and recognised the beneficial lessons to be learnt from ‘*interrogatoires poussés*’ during the operations known as the Battle of Algiers.

The attitude of the government was first to reject these allegations and consider that torture was an “epiphenomenon” of the war.<sup>348</sup> In 1955, the French government sought to respond to the allegations made in the press. The French leadership tried to silence the voices denouncing the atrocities perpetrated by the French army for fear of losing the support of the French population. It adopted an attitude of denial towards the denunciations by human rights activists and victims. In an attempt to wash away the accusations and the public debates, Minister François Mitterand commissioned a report and mandated Roger Wullaume to investigate the torture allegations.<sup>349</sup> The report, published on 2 March 1955, was addressed to the Governor-general of Algeria Jacques Soustelle. Its brief was to address three points:

1. The type of (mal)treatment that occurred (*les sévices*).
2. Who had authority over the treatment of those detained (*les responsabilités*).
3. The usefulness, under certain conditions, of this maltreatment (*l'utilité dans certaines conditions des sévices*).<sup>350</sup>

In a note addressed to the Governor-General, Wullaume explained that his role was to “carry out an enquiry into the violence denounced by certain press articles, to which individuals arrested by the police services following the events of the 1<sup>st</sup> November would have fallen victim”.<sup>351</sup> Ultimately, the report confirmed the recourse to violent methods and that they were “old-established practices”.<sup>352</sup> It also confirmed that the magistrates were undemanding regarding the procedures utilised by the police in the cases brought before them.

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<sup>345</sup> Pierre Vidal-Naquet, *Les Crimes de l'Armée Française: Dossier* (Paris: Maspero 1975) 167

<sup>346</sup> Note de service 11 March 1957, SHAT 1H 3087/1.

<sup>347</sup> Lazreg, *Torture and the Twilight of Empire* (n 62) 114

<sup>348</sup> Lazreg, *Torture and the Twilight of Empire* (n 62) 3.

<sup>349</sup> Wullaume Report, 2 March 1955, Appendix 169–79.

<sup>350</sup> Wullaume Report, 2 March 1955, Appendix 169–79.

<sup>351</sup> Pierre Vidal-Naquet, *La Raison d'État* (Paris: Éditions de Minuit 1962) 57.

<sup>352</sup> Wullaume Report, 2 March 1955, Appendix, 169–79.

Nevertheless, the Wuillaume Report itself used euphemistic and oblique language to address the abuses, such as the phrase “physical maltreatment of the nature of torture” and, where it was admitted that “violent acts have been committed: some are extremely serious and amount to real torture”.<sup>353</sup> Wuillaume concluded his report by saying:

I am in a position to say that the content of press articles concerning the maltreatments exercised on individuals arrested by the police services has a basic truth: Maltreatments have been committed; certain ones are truly serious and have the character of true tortures.<sup>354</sup>

The report was sent to Prime Minister Faure and to the President of the Republic, René Coty, but no further decisions were taken. Algerian Governor General Jacques Soustelle considered that it was “inopportune” to seek those responsible for acts committed before 1 February 1955.<sup>355</sup>

On 5 April 1957, the French government created the Commission de Sauvegarde des Droits et Libertés Individuels (Commission to Safeguard Individual Rights and Liberties, CSP) to report on the abuses by the French army. The reports of the commission described the conditions of detention of prisoners. It notably reported on the deaths by asphyxiation that occurred because the ‘suspects’ were held in small and stark windowless chambers located in wine storeroom.<sup>356</sup>

General Delavignette’s report notably describes the conditions of the death of 101 Algerians on 14-15 March 1957.<sup>357</sup> The report explains that “the suspects” were locked in four wine storehouses measuring 3m or 3.5m by 3m with an air capacity of 30 m<sup>3</sup> each. The men were introduced into the space through a hole at the bottom. The report further explains that air was supposed to flow from a small opening at the top of the room. The morning after they were placed in these storehouses, 24 of the men were found dead in one storehouse and 17 in another. Survivors told of having tried in vain to summon help by making a noise. Lieutenant Curutchet, attempted to cover up the death of the Algerian suspects by hiding the corpses of Algerian prisoners. After the report by the CSP, Lieutenant Curutchet was later interrogated by the Commission and sentenced

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<sup>353</sup> Wuillaume Report, 2 March 1955, Appendix, 169–79.

<sup>354</sup> Vidal-Naquet, *Raison d'état* (n 90) 64.

<sup>355</sup> Vidal-Naquet, *Raison d'état* (n 90) 57.

<sup>356</sup> Lazreg, *Torture and the Twilight of Empire* (n 62) 52.

<sup>357</sup> Rapport du gouverneur general Delavignette, 21 July 1957 in Vidal-Naquet, *Raison d'état* (n 90). 168.

to 30 days' detention.<sup>358</sup> In another report, Fernand Grevisse explains that when he asked the people of the village of Bou Saada whether they had been "interrogé", they took "torturé" to be a synonym.<sup>359</sup>

According to Marnia Lazreg, "sex was understood to be the fundamental, most efficient way of making a combatant or suspect talk" and therefore systematized torture in Algeria logically led to the widespread sexual abuse of prisoners.<sup>360</sup> Violence specifically perpetrated against women occurred in parallel with attempts to bend Algerian women to the colonial project. Rape was another expression of the violence inherent in the colonial war. The subversion of gendered stereotypes of the Arab woman created a hysteria surrounding gender that led to sexual abuse and the rape of women as another form of unofficially sanctioned military policy.

Condemnations of torture undermined the legitimacy of the French efforts within the international community, discredited their strategic objectives, caused internal fragmentation and degradation of the ethical climate among the army and pushed many Algerians to actively support the insurgency. Despite some success, the use of torture overshadowed the successful defeat of the insurgency at the tactical level and created a vulnerability to propaganda supporting the army's efforts. France's colonial presence in Algeria was based on the myth of the French *mission civilisatrice* that aimed to position France as the nation of Enlightenment where principles of justice and reason were associated with human nature and were therefore universal.<sup>361</sup>

### III. Polarisation of the French people

This section turns to a third limb of the history of the Algerian war: the revolt of the *colons* and military subversion against the decolonisation of Algeria. The opening of

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<sup>358</sup> Rapport du gouverneur general Delavignette, 21 July 1957 in Vidal-Naquet, *Raison d'état* (n 90) 168.

<sup>359</sup> Notes of Alain Jacob on a conversation with Fernand Grevisse, member of the Commissions de Sauvegarde, 28 August 1959, in BM139 (CHEVS). The Commission de Sauvegarde was created by the Mollet government after the pressure by human rights activists and left-wing political parties. The report found that the police used "violent methods that were old-established practice" and that "in normal times they are only employed on persons against whom there is a considerable weight of evidence or guilt and for whom there are therefore no great feelings of pity".

<sup>360</sup> Lazreg, *Torture and the Twilight of Empire* (n 62)143 Le Sueur also comes to the conclusion that torture was the "logical" outcome of France's hegemonic politico-military system, see James D. Le Sueur, 'Torture and the Decolonization of French Algeria: Nationalism, "Race", and Violence in Colonial Incarceration' in Graeme Harper (ed) *Captive and Free: Colonial and Post-Colonial Incarceration* (London: Continuum 2002) 161.

<sup>361</sup> Marshall, *The French Colonial Myth* (n 10) 6. See also Naomi Schor, 'Universalism' in Lawrence D. Kritzman (ed) *The Columbia History of Twentieth-Century French Thought* (New York: Columbia University Press 2006) 344-345; Alice Conklin, *A Mission to Civilize: The Republican Idea of Empire in France and West Africa, 1895-1930* (Stanford: Stanford University Press 1997) 17-94.

negotiations by the government with the FLN was perceived as *volte-face* for the *colons*. A revolt grew out of their frustrations regarding the politics of disengagement, which was supported by some elements of the army. One important element in the picture presented here is that, in an important antecedent to the amnesty process (Chapter 4), de Gaulle established special military courts in which to prosecute subversive soldiers.

### A. Crisis of May 1958

Vexed by the lack of political leadership, the European population in Algeria, supported by some members of the army, felt that a politics of disengagement was inconceivable. In February 1958, a diplomatic failure brought the Fourth Republic into a terminal crisis. A squadron of the French army bombed the Tunisian village of Sakiet-Sidi Youssef, suspected to be the home of an FLN household.<sup>362</sup> Dozens of victims, including civilians and children, were killed in the attack. Condemnation by the international community weakened the French position and revealed the incapacity of the government of Prime Minister Felix Gaillard to deal with the Algerian crisis.<sup>363</sup> This diplomatic failure resulted in the resignation of Pierre Pflimlin as Prime Minister. It also marked the popularly acclaimed return to power of the Second World War hero, General de Gaulle.<sup>364</sup> On 1 June 1958, de Gaulle was invested as Prime Minister with the power to rule by decree for a period of six months as the state of emergency would allow it. His new position permitted him to form a coalition government and receive full power to govern without having to consult parliament during this six-month period.<sup>365</sup>

For the *colons*, Charles de Gaulle was a national hero due to his role in leading the French resistance against Nazism.<sup>366</sup> Consumed throughout his life by the idealisation of France as a great and independent power, de Gaulle himself incarnated this identity.<sup>367</sup> Invoking the traditional myth of French identity imbued with Republican values in his

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<sup>362</sup> Michael Howard Corum, *Fighting the War on Terror* (Zenith Imprint, n.d.) 172.

<sup>363</sup> Horne, *Savage War of Peace* (n 5) 231.

<sup>364</sup> Stanley and Inge Hoffmann, 'The Will to Grandeur: De Gaulle as Political Artist' [1968] 97(3) *Daedalus* 829–87.

<sup>365</sup> J.O.A.N., 1 June 1958 2576, 2592-93.

<sup>366</sup> On the political role of de Gaulle, see Jean Lacouture, *De Gaulle: The Ruler 1945-1970* (London: Harvill 1991); Anthony Hartley, *Gaullism: The Rise and Fall of a Political Movement* (London: Routledge & Kegan Paul 1972); Charles Maier and Dan White (eds), *The Thirteenth of May: The Advent of de Gaulle's Republic* (New York: Oxford University Press 1968); René Rémond, *1958: Le retour de de Gaulle* (Brussels: Éditions Complexe 1983).

<sup>367</sup> Hoffmann 'The Will to Grandeur' (n 103).

speeches, he managed to garner support from public opinion at large. For the *colons*, de Gaulle was the only one capable of restoring a Republican unity and reconstructing lost French *Grandeur*. He had the support of both the army and the European community in Algeria.

On 26 April 1958, approximately 20,000 European *colons* shouting “*L’armée au pouvoirs!*” and “*Vive de Gaulle*” marched to headquarter of the Government General in Algiers and demanded the return of Charles de Gaulle to power.<sup>368</sup> This solid mass was joined by high ranked military commanders who sent an ultimatum to French Prime Minister Felix Gaillard. General Jacques Massu, a commander of the 10<sup>th</sup> Parachute Division, was preparing a plan to overthrow the government in Paris.<sup>369</sup> After several weeks of demonstrations, President René Coty resigned and Charles de Gaulle assumed power as Prime Minister.

Shortly after his return to power, de Gaulle put forward the draft of a new constitution. On 28 September 1958 both Europeans and the Muslim population (men and women) were asked to vote in a referendum on the approval of the new constitution.<sup>370</sup> The wider objective in the minds of the drafters of the constitution of 1958 was to reshape republican legitimacy and break free from the paralysis of the Fourth Republic. It set up government techniques that would reflect the views of de Gaulle. Universal suffrage was kept as a source of power but it also provided the separation of the legislature and executive, the independence of the judiciary.<sup>371</sup>

After the institution of the Fifth Republic, de Gaulle’s priority as President was to restore the authority of the state. In a press release, he announced that he would begin the process “necessary for the establishment of a republican government capable of ensuring the unity and independence of the country”.<sup>372</sup> However, in a speech given on the 16 September 1959, de Gaulle officially recognized Algerian people’s right to self-determination, stating that:

Given all the facts in Algeria, national and international, I consider it necessary that the recourse to self-determination be proclaimed

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<sup>368</sup> CRS (Compagnies Républicaines de Sécurité)/ Republican Security Companies is the equivalent to the riot control forces of the French National Police.

<sup>369</sup> Pierre Lagaillarde, Algiers deputy and reserve airborne officer, the Generals Raoul Salan, Edmond Jouhaud, Jean Gracieux, and Jacques Massu, and by Admiral Philippe Auboyneau, commander of the Mediterranean fleet.

<sup>370</sup> Dorothy M. Pickles, ‘The Constitution of the Fifth French Republic’ [1959] 22(1) *Modern Law Review* 1-20.

<sup>371</sup> Pickles, ‘Constitution of The Fifth French Republic’ (n 109) 1.

<sup>372</sup> Dorothy M. Pickles, *The Fifth French Republic: Institutions and Politics* (London: Methuen 1962) 21.

beginning today. In the name of France and the Republic, by virtue of the power vested in me by the constitution to consult the citizens, on the condition that God may grant me life and that the people may listen to me, I commit myself to asking, on the one hand, the Algerians in their twelve departments what they definitively want to be, and, on the other, all the French people to endorse that choice.<sup>373</sup>

To the *settlers'* community, this declaration sounded like a disavowal. After this declaration, the anti-decolonisation opposition intensified. In January 1960 a week of revolt saw the *colons* ranged against the French police. The centre of Algiers was closed behind barricades; 14 policemen were killed and 123 wounded.<sup>374</sup> This event, commonly known as '*la semaine des barricades*' (the barricades week), marked the rupture of the *colons* with the French government. In January 1961, a referendum organized on the question of the recognition of the right to self-determination of the Algerian people marked the break between the *colons* and the French government.<sup>375</sup> The referendum asked French people the following question:

Do you approve the bill submitted to the French people, by the president concerning the self-determination of the Algerian population and the organization of the public powers in Algeria prior to the self-determination? [...].<sup>376</sup>

A clear majority of 75 % voted in favour of Algeria's independence.<sup>377</sup> The positive result was also a vote of confidence for de Gaulle and prompted him to open the discussion on the future of Algeria. The law in question was then voted by the

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<sup>373</sup> 'Discours sur l'Autodétermination de l'Algérie', 16 September 1959, available at <http://www.charles-de-gaulle.org/pages/1-homme/accueil/discours/le-president-de-la-cinquieme-republique-1958-1969/discours-sur-l-autodetermination-de-l-Algérie-16-septembre-1959.php>.

<sup>374</sup> On the European settler side of the barricade, six died and 26 were wounded. See Stora and Quandt, *Algeria, 1830-2000* (n 2); Horne, *Savage War of Peace* (n 5); Benjamin Stora, *La Gangrène et l'Oubli: La Mémoire de la Guerre d'Algérie* (Paris: La Découverte 1998).

<sup>375</sup> As a result of the referendum, the French Parliament enacted the Law/Loi n° 61-44 of 14 January 1961 on the right of self-determination of the Algerian people and the interim organization of public powers.

<sup>376</sup> Law/Loi n° 61-44, 14 January 1961.

[http://www.legifrance.gouv.fr/jopdf/common/jo\\_pdf.jsp?numJO=0&dateJO=19610115&numTexte=&pageDebut=00578&pageFin=](http://www.legifrance.gouv.fr/jopdf/common/jo_pdf.jsp?numJO=0&dateJO=19610115&numTexte=&pageDebut=00578&pageFin=) last visited March 2013.

<sup>377</sup> Serge Berstein, *The Republic of de Gaulle 1958-1969* (Cambridge: Cambridge University Press 1993) 53.

parliament and became Law n° 61-44 of 14 January 1961.<sup>378</sup> After the result of the referendum, the colons considered that the French people were abandoning them.

## B. The OAS

Feeling abandoned by the French government, the colons and branches of the army organised an anti-decolonisation opposition. The Organisation Armée Secrete (OAS) was created as an ultimate attempt to overthrow de Gaulle and sabotage the process of decolonization. The OAS was a coalition of French soldiers and *colons* headed by notorious soldiers who became celebrated figures in the settler community for their success against the Algerian nationalist movement.<sup>379</sup> The goal of the OAS was to resist the policy of Algerian “disengagement” conducted by the de Gaulle administration. and to construct a new “fraternal and French Algeria based on Lyautey’s work”.<sup>380</sup>

The OAS engaged in urban terrorism, borrowing the methods of the FLN. It targeted anyone inside Algeria devoted to an “Algerian Algeria”, setting off a series of major explosions and targeted assassinations in Algiers to terrify the Muslim *and* European communities both in Algeria and France.<sup>381</sup> On 1 March 1961, the Mayor of the city of Evian, Camille Blanc, was killed in an explosion set up by the OAS. Over 14,000 French troops were involved in the in the revolt. The killing of seven conscripts by the OAS led the officers to conclude that the OAS was a threat to the army itself. Overall, the numbers are disputed: it is reported that the OAS terrorist activities were responsible for killing 1,660 people and injuring approximately 5,148. On 21 April 1961, four army generals – Generals Raoul Salan, Andre Zeller, Maurice Challe and Edmons Jouhaud – attempted a putsch against President de Gaulle.<sup>382</sup> The coup failed and the officers were arrested.

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<sup>378</sup> Loi n°61-44, 14 January 1961 (n 115).

<sup>379</sup> James D. Campbell, ‘French Algeria and British Northern Ireland: Legitimacy and the Rule of Law in Low-Intensity Conflict’ 2005 85(2) *Military Review*.

<sup>380</sup> Horne, *Savage War of Peace* (n 5) 499; Stora and Quandt *Algeria, 1830-2000* (n 2) 82. Lyautey was a French Army general and colonial administrator.

<sup>381</sup> Horne, *Savage War of Peace* (n 5) 486.

<sup>382</sup> Maurice Vaïsse, *1961: Alger, le putsch* (Brussels: Éditions Complexe 1983) 55–7, 65, 93. For more detail, see Pierre Viansson-Ponté, ‘Les “méthodes” du colonel Argoud’, *Le Monde* (18 October 1974), reprinted in *Le Monde: dossiers* (note 23) 6; Argoud, *La décadence* (n 44); Jean-Hubert Levame, *Putsch. Algérie, 22 avril 1961* (Paris: Éditions Heimdal 1997); Jacques Fauvet and Jean Planchais, *La Fronde des Généraux* (Paris: Arthaud 1961).

De Gaulle reacted firmly to the military subversion by reactivating the state of emergency. On the basis of this legislation, De Gaulle authorized the internment of subversives for 15 days under orders of prefects and indefinitely by the minister of the interior. Custody (*garde à vue*) was extended from five to 15 days; two military courts were set up to try insurgents and subversive newsletters were outlawed. De Gaulle also ordered the withdrawal of pension rights and other benefits from rebellious agents. After one of the Putsch generals, Salan had been condemned to life imprisonment instead of the death penalty on the grounds of mitigating circumstances, de Gaulle reformed the judicial institutions.<sup>383</sup> By decree de Gaulle created special courts in Algeria located in Tlemcen, Tizi-Ouzou and Sétif in which to try the OAS for their criminal offences.<sup>384</sup> The Haut Tribunal Militaire (High Military Tribunal) came into existence on 27 April 1961 and the Tribunal Militaire (Military Tribunal) on 3 May 1961. These two jurisdictions had the function of hearing criminal offences perpetrated in Algeria after 19 March 1962, which could constitute a threat to the safety of the state.<sup>385</sup>

## Conclusion

The Algerian War was a particularly violent page in France's history. This chapter has sketched an outline of the essential moments and characteristics of the war. The first section focused on the colonial administration of Algeria. It showed that France strived to maintain a façade of peace and order despite the growth of an Algerian nationalist movement. The declaration of the state of emergency in 1955 enabled the French leadership to transfer de facto the police and judicial power to the military without recognising the belligerency of the conflict. The systematisation of the use of torture by the French army was not a planned project, rather it reflected the reaction to a deepening crisis in which the French military, originally looking for suspect Algerians, came to see all Algerians as suspects.

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<sup>383</sup>See the testimony of Judge Jean Touzet in Jean Touzet, 'Le tribunal de l'ordre public' [2005] 16(1) *Histoire de la justice* 281–92.

<sup>384</sup> Sylvie Thénault, 'La justice au secours de l'État: le cas particulier du tribunal de l'ordre public' [2005] 16(1) *Histoire de la justice* 247–56. On the reformation of the police and the judiciary, see J.-M. Berliere, 'Un maintien de l'ordre entre naufrage des principes démocratiques et faillite de l'État?' in S. Berstein, P. Milza et J.-F. Sirinelli (eds), *Michel Debré, Premier ministre, 1959-1962* (Paris: Presses Universitaires de France 2005) 543. On the préfets, see J. Aubert, 'L'administration du territoire' in Institut Charles de Gaulle (ed), *De Gaulle et le service de l'État: des collaborateurs du général témoignent* (Paris : Éditions Plon 1977) 281.

<sup>385</sup> Alain Noyer, *La Sureté de l'État, 1789-1965* (Paris: Librairie générale de droit et de jurisprudence 1966).

Furthermore, it has shown the dilution of the rule of law caused internal fragmentation and the degradation of the army's ethical milieu. In turn opposition from the colon community to the decolonisation of Algeria confronted the French leadership. The creation of the OAS constituted another threat to the political stability of the French regime.

If we disregard these events, it is not possible for us to understand why the question of amnesty came to be such a relevant issue in the aftermath of the conflict. The amnesty was a relevant element in the consolidation of the newly born Fifth Republic. Nor can we understand why, even today, different actors – victims, human rights NGOs, journalists, academics – continue to promote the deployment of strategies designed to deliver the truth about the past or accomplish justice for the victims.

## Chapter 4:

### **The amnesty process: transition and the rehabilitation of ex-combatants (1962-1982)**

This chapter analyses the process of implementation of amnesty following the official end of the Algerian conflict with the Evian Accords in March 1962. This chapter follows the evolution the amnesty debate as it developed from 1962 to 1982. It argues that President de Gaulle employed amnesties to consolidate his power. The Algerian past was freighted with memories that could bring further tensions and divisions. The amnesty was considered a political tool to facilitate the transition from colonisation and to reinstate social cohesion. This chapter describes the amnesty process from its advent in 1962, looking in particular at the political discourse surrounding it. This historical exploration opens a space to contextualise the reasoning of by the French leadership and how amnesty operated as an important element in the political construction of the French Republic after the decolonisation.

The ‘Algerian amnesties’ are based on the long republican tradition of clemency, which amnesty measures aimed for. The principal role of amnesty was to ensure peace with Algerian combatants. President de Gaulle also used amnesty to solidify the structure of the newly established Fifth Republic. The amnesty was used at several junctures after the conflict and during the phase of political reconstruction. The amnesty process first started in 1962 at the same time as the Evian Accords and was finalised in 1968. As well as the two initial amnesties, three further amnesty laws were introduced, extending its scope in 1964 1966 and 1968. Many of the individuals who benefited from amnesty were not prosecuted or convicted for their alleged actions. In this way, the amnesties constituted a shield against prosecution. Furthermore, the 1968 amnesty process sought to satisfy the *colons* that had been repatriated to France after the war and embedded a strong symbolic meaning. Granting amnesty to French soldiers imprisoned for acts of subversion was an important step towards national cohesion. While these measures covered larger groups of individuals, there has been little space for the victims to enter the debate on the amnesty. A first reason explaining this is the structure of the presidential regime. Indeed, the initial 1962 amnesties were implemented by presidential decree and were not debated in parliament. Second, at the beginning of the amnesty process, victims’ groups were not organised and there was no structured social movement to support claims made by lawyers and human rights activists against the

grant of amnesty to those who perpetrated torture. This context is instructive in understanding the absence of a clear opposition movement and, later on, how grievances emerged through the efforts of historians (see Chapter 7).

Inspired by literature on post-conflict amnesty, this chapter demonstrates the role of amnesty in the political transformation of France following the Algerian War. It unpacks the debates on amnesty within the broader discourse of national cohesion and political reconstruction. Along with this process, antagonist and competing approaches towards the legitimacy of the French operations in Algeria emerged. It does so by first exploring the legislative steps needed in the progressive process of implementing amnesty. France's history of granting criminal amnesty enacted in relation to the events in Algeria reveals the multi-layered role played by amnesty to manage a past conflict. Amnesty played an important role to appease tensions and acted as an incentive for the members of the OAS to give up violence. The amnesties were at the centre of the politics of national reconciliation.

## **I. Amnesty in the Aftermath of the Algerian War: Genesis and Initial Scope**

After the cease-fire on 19 March 1962, the decolonisation process deployed more like a political transformation rather than a clean-cut transition. The amnesty formed part of this political transformation and was sought to facilitate peace. The amnesty was initially incorporated in the peace agreement signed on 18 March 1962. It was subsequently implemented by two executive decrees. As the content of the Evian agreements reveals, the end of the conflict did not mean that all ties between France and Algeria would be terminated.

### **A. Negotiating Peace: The Evian Agreements 19 March 1962**

The peace process started informally as early as 1957 when French and Algerian representatives met to discuss the modality of the right of self-determination and the future of Algeria and France without Algeria. In late 1957, scenes of fraternization

between Europeans and Muslims were carefully orchestrated.<sup>386</sup> Algerian women were dramatically burning their veils in a celebration of the colonial myth of assimilation.<sup>387</sup> It however, took five years before peace was signed with the Algerian nationalists. An initial reason for this delay is found in the French refusal to admit the Provisional Government of the Algerian Republic (GPRA) as a legitimate entity to negotiate the fate of the Algerian people. As explained in Chapter 3, France's diplomatic position was to consider the FLN a terrorist organisation. Seventeen countries gave *de jure* recognition to the GPRA;<sup>388</sup> however, the French government did not attach any legal significance to these recognitions. For the French leadership, the international support of the GPRA was a political move by the Soviet-bloc states and the member countries of the non-aligned movement. Secondly, France was undergoing a deep internal crisis. The revolt of the army and the *colons* made it clear that cohesion between the settlers and the Algerian indigenous after the withdrawal of France was not possible.

During this period, Algeria was placed under the authority of a provisional Executive. A committee of the Algerian Affairs headed by the French President of the Republic was created to review of the application of the provisions of the agreements.<sup>389</sup> The transitional government executive was composed of nine members: three were French and nine were Algerians, of whom four were not members of the FLN. The transitional government was established pending the result to the referendum on the independence of Algeria.

On 8 January 1961 a referendum was held on recognition of the right of self-determination of the Algerian people:

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<sup>386</sup> Bruce D. Marshall, *The French Colonial Myth and Constitution-Making in the Fourth Republic* (New Haven: Yale University Press 1973) 234.

<sup>387</sup> Marshall, *French Colonial Myth* (n 1) 234.

<sup>388</sup> See hereafter for the list of States recognizing the GPRA in 1959: Iraq, the United Arab Republic, Libya, Yemen, Morocco, Tunisia, Saudi Arabia, Jordan, Sudan, Indonesia, China, North Vietnam, North Korea, Outer Mongolia, Ghana, and Guinea. See in particular Maurice Flory, *Algérie algérienne et droit international*, [1959] 6(1) *Annuaire Français de Droit International* 839-840.

<sup>389</sup> Decret 13 Février 1960 JORF 14 Février 1960 1450. The committee of the Algerian affairs took decisions related to Algerian affairs that were not taken in the Council of Ministers. For more explanation of the role of the Committee, see Maurice Faivre. *Les archives inédites de la politique Algérienne: 1958-1962* (Paris: Editions L'Harmattan 2000) 27.

Do you approve the bill submitted to the French people by the president concerning the self-determination of the Algerian population and the organization of the public powers in Algeria prior to self-determination?<sup>390</sup>

The positive vote in the referendum prompted de Gaulle to further the idea of decolonisation. Indeed, in his speeches, before the referendum, de Gaulle had opened the possibility of decolonization in terms of fraternal relations, emphasising that the country was largely ‘pacified’.<sup>391</sup>

Nonetheless, President de Gaulle asked that a ceasefire agreement be reached before engaging in any discussions.<sup>392</sup> Hence the peace negotiations initially began informally. French representatives, Louis Joxe, Bruno de Leusse and the personal *envoyé* of General de Gaulle, Georges Pompidou met secretly with the state secretary of the foreign ministry of the GPRA, Saad Dahlab, and two other Algerian representatives, Ahmed Boumendjel and Tayeb Boulharouf in France. A first meeting was organised in Neuchatel on 5 March 1961. From these first discussions, one can trace the deep divergences that would reoccur along the negotiation process. During this secret meeting, the GPRA and the French conceded that maintaining a form of cooperation was a necessity. The negotiators struggled on the question of citizenship of the Europeans living in Algeria and the status of the Sahara emerged as an issue. The Algerian representatives wanted total independence and territorial integrity, including the Sahara and its rich resources. The French government added several gestures of goodwill in an attempt to ease the tense climate of the truce: 6,000 prisoners were released; Ben Bella and other figures of the Algerian Revolution were granted better conditions of detention, and the FLN was engaged to guarantee the security of the *colons*. Nonetheless, these talks were inconclusive and further talks in 1961 also ended in stalemate. However, by 19 February 1962, a measure of general agreement was reached, and a preliminary set of agreements, known as the Les Roussets Agreements, was signed. The following month, in the meetings at Evian, 7-18 March, the final version was achieved and signed: a cease-fire came into effect the following day.

The General Declaration of the Evian Accords begins:

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<sup>390</sup> [Author’s translation.] As a result of the referendum the French parliament enacted Loi n°61-44 du 14 janvier 1961 concernant L’auto-determination des populations algériennes et l’organisation des pouvoirs publics en Algérie avant l’autodetermination.

<sup>391</sup> Evans, *Algeria: France’s Undeclared War* (Oxford: Oxford University Press 2011) 261-2.

<sup>392</sup> Maurice Flory, ‘La fin de la souveraineté française en Algérie’ [1962] 8 *Annuaire français de droit international* 921.

The French people by the referendum of 8 January 1961 recognised the right of the Algerian people to choose, through a vote by direct and universal suffrage on their political destiny in relation to the French Republic.<sup>393</sup>

On 8 April 1962, Charles de Gaulle organised a second referendum on the Algerian question, asking the people to approve the Evian Accords, which included Algerian independence.<sup>394</sup> The referendum was held in the French mainland and the overseas departments, with a significant ‘yes’ outcome (91%).<sup>395</sup> It still remained to put the question of independence to the Algerian people themselves: on 1 July another referendum was held in which they were asked ‘Do you want Algeria to become an independent state, cooperating with France, according to the conditions defined by the declaration of 19 March?’<sup>396</sup> The Algerian people voted in favour of the independence of Algeria with an overwhelming majority (99 %). De Gaulle formally recognised the independence of Algeria on 3 July 1962.

Although facilitating Algerian independence and decolonisation, the Evian Accords puts in place a specific system in order to not break ties with Algeria entirely. For instance, Title B provides that:

Algeria shall guarantee the interests of France and the rights acquired by individuals and legal entities under the conditions established by

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<sup>393</sup> See Musamirapamwe, O. N., ‘The Evian Agreements on Algeria and the Lancaster Agreements on Zimbabwe: a Comparative Analysis’, *Georgia Journal of International and Comparative Law*, 1982, pp. 153-170 ‘Le peuple français a, par le référendum du 8 janvier 1961, reconnu aux Algériens le droit de choisir, par voie d’une consultation au suffrage direct et universel, leur destin politique par rapport à la République française.’

Accords d’Évian, Déclarations Gouvernementales du 19 Mars 1962 Relative à l’Algérie, JOFR 20 mars 1962 3019. Available at:

[legifrance.gouv.fr/jopdf/common/jo\\_pdf.jsp?numJO=0&dateJO=19620320&pageDebut=03019&pageFin=&pageCourante=03019](http://legifrance.gouv.fr/jopdf/common/jo_pdf.jsp?numJO=0&dateJO=19620320&pageDebut=03019&pageFin=&pageCourante=03019) [last visited March 2014]

<sup>394</sup> Décret n° 62-310 du 20 Mars 1962, décidant de soumettre un projet de loi au référendum; proclamation du Conseil constitutionnel du 13 Avril 1962. ‘Approuvez-vous le projet de loi soumis au peuple français par le président de la République et concernant les accords à établir et les mesures à prendre au sujet de l’Algérie sur la base des déclarations gouvernementales du 19 mars 1962. [author’s translation]. Available at:

[legifrance.gouv.fr/affichTexte.do?jsessionid=4830C65033A071E4421FC35A666C6F61.tpdjo16v\\_2?cidTexte=JORFTEXT000000496969&categorieLien=id](http://legifrance.gouv.fr/affichTexte.do?jsessionid=4830C65033A071E4421FC35A666C6F61.tpdjo16v_2?cidTexte=JORFTEXT000000496969&categorieLien=id) [last accessed March 2013]

<sup>395</sup> Neophytos Loizides, ‘Referendums in Peace Processes’ (2009).

Available at [http://works.bepress.com/neophytos\\_loizides/22/](http://works.bepress.com/neophytos_loizides/22/). [last [visited november 2012] 24

<sup>396</sup> Décret n° 62-310 du 20 Mars 1962, Décidant De Soumettre Un Projet De Loi Au Référendum ; Proclamation Du Conseil Constitutionnel Du 13 Avril 1962. ‘Approuvez-vous le projet de loi soumis au peuple français par le président de la République et concernant les accords à établir et les mesures à prendre au sujet de l’Algérie sur la base des déclarations gouvernementales du 19 mars 1962 ?

the present Declarations. In exchange, France will grant Algeria technical and cultural assistance and will contribute preferential financial aid for its economic and social development.<sup>397</sup>

It also secures a monopoly of mining rights in petroleum hydrocarbons for France:

French interests will be assured, in particular, through the exercise, in accordance with the rules of the Sahara Petroleum Code as it exists at present of rights attaching to mining entitlements.<sup>398</sup>

Authors have noted the *sui generis* nature of the agreements. Guy Pervillé notably explains that the Evian Agreements is better to be understood as a ‘contractual decolonisation’.<sup>399</sup> The provisions of the Evian Agreements reflect a ‘delicate system of counterbalancing obligations between Algeria and France’.<sup>400</sup>

The Evian Accords and the referendum of independence did not meet universal approval. The prospect of the end of the colonial empire inspired opposed visions of France’s political future. Senator Bernard Lafay condemned France’s policy and considered that the negotiation with the Algerian nationalists was a capitulation.<sup>401</sup> Further, de Gaulle’s opponents claimed that he was exercising executive power at the expense of the democratic functioning of its institutions.<sup>402</sup> The unusual procedure adopted to ratify the agreements through referendums did not follow the traditional procedure of Article 89 of the Constitution, which requires the approval of both houses of Parliament before submitting a bill to referendum.<sup>403</sup> Instead, de Gaulle had invoked

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<sup>397</sup> Accord d’Évian, Chapter II(B) ‘Cooperation between France and Algeria’. English translation from John A. S. Grenville, *The Major International Treaties of the Twentieth Century: A History and Guide with Texts* (London and New York: Routledge 2001) 675.

<sup>398</sup> Declaration of Principles on Cooperation for the Exploitation of the Wealth of the Saharan Subsoil, See also ‘Exchange of Letters’, 19 March 1962, France-Algeria, 507 United Nations Treaty Series 65.

<sup>399</sup> René Gallissot (ed), *Les accords d’Évian: En conjoncture et en longue durée* (Paris: Karthala 1997) 139.

<sup>400</sup> William I. Zartman, North African Foreign Policy in Carl L. Brown. *State and Society in Independent North Africa* (Washington: Middle East Institute 1966) 60.

<sup>401</sup> Phillip C. Naylor, *France and Algeria: A History of Decolonization and Transformation* (Gainesville: University Press of Florida 2000) 37.

<sup>402</sup> Gacon, *L’Amnistie* (n 3) 256.

<sup>403</sup> Constitution of 4 October 1958, Article 89: ‘The President of the Republic, on a proposal by the Prime Minister, and Members of Parliament alike shall have the right to initiate amendment of the Constitution. A government or a Member’s bill to amend the Constitution shall be passed by the two assemblies in identical terms. The amendment shall have effect after approval by referendum. However, a government bill to amend the Constitution shall not be submitted to referendum where the President of the Republic decides to submit it to Parliament convened in Congress; the government bill to amend the Constitution shall then be approved only if it is adopted by a three-fifths majority of the votes cast. The Bureau of the Congress shall be that of the National Assembly. No amendment procedure shall be commenced or

Article 11 of the Constitution, which allows the simple use of referenda ‘the organisation of the public authorities.’<sup>404</sup> By this procedure, de Gaulle had managed to bypass parliamentary opposition. After the 1962 referendum, the President of the Republic passed the Law of 13 April 1962 allowing him to conclude the Accords and, until a new government was formed in Algeria, to issue ordinances and decrees of the Council of Ministers needed to implement ‘all the arrangements as stated by the governmental declarations of the 19 mars 1962’.<sup>405</sup> In other words, this allowed the president to legislate without the express consent of parliament. For Senator Gil Paulian, the law implied more than a mere application of the Evian agreements: it also extended ‘the most extreme, most complete and the most exorbitant delegation of power [of France] history’ to the executive’.<sup>406</sup> Indeed this power had already been included in the 1962 referendum itself, whose second clause, by which the President would be granted full legislative powers to decree any measures that the executive deemed necessary to implement the Agreements.<sup>407</sup>

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continued where the integrity of the territory is jeopardized. The republican form of government shall not be the object of an amendment.’ Available at:

[conseil-constitutionnel.fr/conseil-constitutionnel/root/bank\\_mm/anglais/constitution\\_anglais.pdf](http://conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/constitution_anglais.pdf) [last accessed March 2013]

<sup>404</sup> Constitution of 4 October 1958, Article 11: ‘The President of the Republic may, on a proposal from the Government when Parliament is in session or on a joint motion of the two assemblies, published in either case in the *Journal officiel*, submit to a referendum any government bill which deals with the organization of the public authorities, or with reforms relating to the economic or social policy of the Nation and to the public services contributing thereto, or which provides for authorization to ratify a treaty that, although not contrary to the Constitution, would affect the functioning of the institutions. Where the referendum is held in response to a proposal by the Government, the latter shall make a statement before each assembly which shall be followed by a debate. Where the referendum decides in favour of the government bill, the President of the Republic shall promulgate it within fifteen days following the proclamation of the results of the vote.’ Available at:

[conseil-constitutionnel.fr/conseil-constitutionnel/root/bank\\_mm/anglais/constitution\\_anglais.pdf](http://conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/constitution_anglais.pdf) [last accessed March 2013]

<sup>405</sup> Loi n° 62-421 du 13 Avril 1962 concernant les accords à établir et les mesures à prendre au sujet de l’Algérie sur la base des Déclarations gouvernementales du 19 Mars 1962 JORF du 14 avril 1962 3843. Available at:

[legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000509045](http://legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000509045) [last accessed March 2013]

<sup>406</sup> Sénateur Gil Paulian: ‘Proposition de loi [n 205] tendant à modifier la loi n 62-421 du 13 Avril 1962’, as cited in Todd Shepard, *The Invention of Decolonisation: The Algerian War and the Remaking of France* (Ithaca and London: Cornell University Press, 2008) 95. See also Jean-François Dobbela, ‘Référendum et droit à l’autodétermination’ [1996] 77 *Pouvoirs* 54; Hugues Beringer, ‘Les consultations d’autodétermination sous la V<sup>e</sup> République: le droit à l’épreuve des faits’ [1997] 1 *Revue juridique et politique d’indépendance et coopération* 15-36.

<sup>407</sup> Shepard, *The Invention of Decolonization: The Algerian War and the Remaking of France* (n 237). 95; see also in particular a tract published by the OAS challenging the legality of the process in Pierre Mellier, *La Guerre d’Algérie à travers les tracts de l’OAS* (Paris: Editions Publibook 2012) 251.

## B. Restoration of Order: The Tribunal of Public Order and the Military Court of Justice:

The Accords symbolized a diplomatic turn in the historical conjuncture of the colonial and post-colonial period.<sup>408</sup> However, the signature of the Evian Accords did not end violence. The progressive withdrawal of the French troops and the dismantling of the OAS organization after independence put the *colons* France in a vulnerable position. Algerian mobs started attacking them despite the fact that their safety formed part of the agreements negotiated at Evian. It is reported that illegal French police forces as known as the *barbouzes* and legal police forces known as Mission C transmitted to the FLN a list of people suspected to be members of the OAS. In July 1962, in the Algerian city of Oran, seven *Katibas* (companies) of FLN fighters entered the city and killed *colons* on sight. 2,788 died in this attack, while 7,541 were wounded and 875 disappeared. France was held responsible for these killings. Exposed to the retaliation of the Algerians, the *colons* and the Algerians who collaborated with the French, the *Harkis* had to be repatriated in France.

The French efforts concentrated on dismantling the OAS threat. Chapter 3 has described the creation of the High Military Tribunal, which after the independence referendum was retained under the title Military Court of Justice. A special court was created to deal with the issues that could threaten the reestablishment of public order, with the OAS particularly in mind. Despite its brief existence, the Tribunal of Public Order (TOP) was the symbolic representation of the continuing authority of the state during the transitional period. The primary role of the TOP was to ensure stability in a territory that was still struggling with containing violence. The institution of the TOP played a key role in protecting the process of conflict resolution.

The decree creating the TOP relied on the special powers granted to the government of Guy Mollet in 1955.<sup>409</sup> Article 1 of the decree instituting the TOP provides that the tribunal is competent to hear crimes and infraction perpetrated after the cease-fire, which pose a threat to peace, reconciliation between the different communities as well as the

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<sup>408</sup> Michel Lesage, *Les Procédures de Conclusion des Accords Internationaux de la France sous la Ve République* [1962] 8(1) *Annuaire Français de Droit International* 873-888.

<sup>409</sup> Jean Touzet, 'Le Tribunal de L'Ordre Public' [2005] 16(1) *Histoire de la Justice* 281-92; see also Sylvie Thénault, *La Justice au Secours de l'État: le Cas Particulier du Tribunal de L'Ordre Public* [2005] 16(1) *Histoire de la Justice* 247-56.

free exercise of self-determination or to the authority of the public powers.<sup>410</sup> In the files of the chambers of Tizi- Ouzou (one of the three regional seats of the TOP), out of 88 cases, only 13 involved Algerians, of which three involved acts of terrorism linked to the FLN.<sup>411</sup> This ‘justice of exception’ judged 1,081 soldiers and 156 police officers and over 3,000 police agents. 938 sentences were pronounced; pensions were withdrawn from 1,108 military personnel and 1,637 civil servants and nine judges in Algeria. It also banned twelve newsletters for inciting to violence or rebellion against the French state.<sup>412</sup>

Meanwhile, the High Military Tribunal (HMT) and Military Tribunal (MT) (described in Chapter 3), were still in existence or, rather, the HMT had been reconstituted under the title the Military Court of Justice (MCJ).<sup>413</sup> The HMT had notably sentenced the OAS putsch generals, Maurice Challe<sup>414</sup> and Andre Zeller<sup>415</sup> to 15 years’ imprisonment for treason. Jouhaud<sup>416</sup> and Salan<sup>417</sup> who at first had escaped were sentenced, respectively, to the death penalty and life imprisonment. However, the legitimacy of the MCJ was challenged in a case brought before the Conseil d’État (Council of State) on 19 October 1962 by Canal, a dissident French officer belonging to the OAS. Five months after its creation, MCJ was deemed incompatible with Article 34 of the French constitution.<sup>418</sup> In this case, the Council had to decide the validity of the ordinance issued pursuant to the Law of 13 April 1962, which had brought the MCJ into existence. Canal had been tried and condemned to death penalty. The Council pronounced on the unusual constitutional practice by which de Gaulle had bypassed parliament and Article 34 of the

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<sup>410</sup> Decret N° 62-327 du 22 Mars 1962 Portant Amnistie des Infractions Commises au Titre de L’insurrection Algérienne, JORF 23 Mars 1962 3143.

Article 1: ‘[ ... ] les crimes et délits commis en Algérie postérieurement au 19 mars 1962 et susceptibles de porter atteinte au rétablissement de la paix publique, à la concorde entre les communautés, au libre exercice de l’autodétermination ou à l’autorité des pouvoirs publics’ [author’s translation]. Available at:

[legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000673799&categorieLien=id](http://legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000673799&categorieLien=id) [last accessed March 2013]

<sup>411</sup> Touzet, ‘Le Tribunal de L’ordre Public’ [2005] 16(1) Histoire De La Justice 281–92.

<sup>412</sup> Martin Harrison, ‘The French Experience of Exceptional Powers: 1961’ [1963] Journal of Politics 143.

<sup>413</sup> Ordonnance N° 62-618 du 1 Juin 1962 Instituant une Cour Militaire de Justice, JORF Du 2 Juin 1962 5316. Available at:

[legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000517822](http://legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000517822)

<sup>414</sup> HMT 29-31 May 1961.

<sup>415</sup> HMT, 29-31 May 1961.

<sup>416</sup> HMT, 11- 13 April 1962.

<sup>417</sup> HMT, 15-23 May 1962.

<sup>418</sup> Conseil d’Etat 19 octobre 1962.

Constitution and determined the illegality of the military court. However, the judgment was later nullified by the enactment of the Law of 15 January 1963, conferring full force of law upon decrees passed pursuant to the Law of 13 April 1962.<sup>419</sup> An official statement of the Council of Ministers declared that the Conseil d'Etat had 'exceeded its jurisdiction as a court of Law'.<sup>420</sup> The government reaction reflected the tensions that existed between the General and the Council.

In short, torn between a pragmatic approach and considerations of justice, France made efforts to transit out from the conflict by utilising the 'justice of exception'.<sup>421</sup> In this unique historical relationship, the main concern of de Gaulle was to preserve the unity of the French nation and prosecute the men who threatened the stability of the Republic even at the expense of the democratic functioning of its institutions.<sup>422</sup>

### C. The Amnesty Clause(s) in the Evian Agreements

In parallel to the prosecution of the OAS, de Gaulle was concerned by the rehabilitation of the French soldiers who fought for the preservation of France sovereignty and moving on from the Algerian conflict. The amnesty clause in the Evian Accords reflected this willingness to redefine France and Algeria's historical relationship on the ground of cooperation. Hence, alongside measures concerning the continuity of an economic cooperation, the Accords declared that amnesty would be granted to prisoners who were still detained for war-related offences. The preamble situates the amnesties in the context of the promotion of peace and reconciliation between the two people:

'In order to facilitate the exercise of self-determination by the Algerian population [...], an amnesty is declared for all offences committed before 20 March 1962 with the aim of participating in or providing direct or indirect aid to the Algerian rebellion. An amnesty is also declared for offences committed before 20 March 1962 in the

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<sup>419</sup>Lionel Neville Brown, John S. Bell and Jean-Michel Galabert. *French Administrative Law* (Oxford: Oxford University Press 1998) 57.

<sup>420</sup>Roland Drago, 'Some Recent Reforms of the French Conseil d'Etat' [1 October 1964] 13(4) *The International and Comparative Law Quarterly* 1282–1299.

<sup>421</sup>Brown, Bell and Galabert, *French Administrative Law* (n 44) 57.

<sup>422</sup>Gacon, *L'Amnistie* (n 3) 256.

context of operations directed against the Algerian rebellion for the purpose of restoring order.<sup>423</sup>

The amnesty was incorporated as a substantive provision of the Evian Accord. Chapter I, Clause K states, in very broad terms, which can benefit from the amnesty:

‘An amnesty will be proclaimed immediately and detained persons will be released’.<sup>424</sup>

Chapter II (II) (1) of provides that:

No one shall be subject to police or legal measures, to disciplinary sanctions or to any discrimination on account of opinions expressed at the time of events that occurred in Algeria before the day of the self-determination vote; Acts committed at the time of these same events before the day of the cease-fire proclamation.<sup>425</sup>

The amnesty clause in the Evian agreements was designed to cover both civilians and soldiers who had participated in the war and was unconditional. The release of prisoners was a key part of the negotiation of the cease-fire.

## **II. Implementation of the Amnesty and Extension to the OAS (1962-1968)**

The previous section has demonstrated how amnesty formed part of a peace process with Algeria. After exploring the political context of the end of the war, this section turns to the circumstances that led to the enactment of full amnesty in 1968. Before the general amnesty, President Charles de Gaulle took the helm of debate on amnesty and was anxious to maintain control over who would benefit from it.

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<sup>423</sup>Accords d'Évian, ‘Préambule’: En vue de permettre la mise en oeuvre de l’auto-détermination des populations algériennes [...] sont amnistiés toutes infractions commises avant le 20 mars 1962 en vue de participer ou d’apporter une aide directe ou indirecte A l’insurrection algérienne. Sont amnistiées les infractions commises dans le cadre des opérations de maintien de l’ordre dirigés contre l’insurrection Algérienne avant le 20 mars 1962 [English translation from Grenville, *Major International Treaties* (n 10) 649].

<sup>424</sup> Chapter I (K) Accords d’Évian: ‘l’amnistie sera immédiatement proclamée. Les personnes détenue sont libérées’ [English translation from Grenville *Major International Treaties* (n 10) 675].

<sup>425</sup>Accords D’Évian, Chapter II (II)(1): ‘Nul ne pourra faire l’objet de mesures de police ou de justice, de sanctions disciplinaires ou d’une discrimination quelconque en raison: d’opinions émises à l’occasion des événements survenus en Algérie avant le jour du scrutin d’autodétermination; d’actes commis à l’occasion des mêmes événements avant le jour de la proclamation du cessez-le-feu. Aucun Algérien ne pourra être contraint de quitter le territoire algérien ni empêché d’en sortir’ [English translation from Grenville, *Major International Treaties* (n 10) 676].

## A. Decrees Implementing the Amnesty Clause in the Evian Accords

The amnesty clause negotiated at Evian was rapidly implemented in France by two executive decrees on 22 March 1962. The first decree, Decree n° 62-327 of 22 March 1962, grants amnesty to all of those who participated in, or helped the Algerian insurrection.<sup>426</sup> The wording of this first decree invoked the Law of 14 January 1961 on the self-determination of the Algerian people.

In order to facilitate the exercise of self-determination by the Algerian population, an amnesty is declared for all offences committed before 20 March 1962 with the aim of participating in or providing direct or indirect aid to the Algerian insurrection.<sup>427</sup>

The decree grants amnesty to those Algerians who had participated in or ‘ provided direct or indirect support to the Algerian insurrection, before 20 March 1962’. The decree was complemented by ordinances granting amnesty to French Muslims in the French<sup>428</sup> and other French territories.

The second decree implementing the amnesty was Decree n° 62-328 of 22 March 1962, concerned the French military and police who had fought against the FLN combatants. It grants amnesty for the ‘acts committed during “public order operations’ directed against the Algerian insurrection.<sup>429</sup> Article 1 of the decree states that:

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<sup>426</sup> Décret n° 62-327 du 22 mars 1962 (n 23).

<sup>427</sup> Décret n° 62-327 du 22 mars 1962 (n 23) Article 1: ‘En vue de permettre la mise en œuvre de l’autodétermination des populations algériennes prévue par la loi du 14 janvier 1961, sont amnistiées: – toute infractions commises avant le 20 mars 1962 en vue de participer ou d’apporter une aide directe ou indirecte à l’insurrection algérienne, ainsi que les infractions connexes ; – toutes infractions commises avant le 30 octobre 1954 dans le cadre d’entreprises tendant à modifier le régime politique de l’Algérie; – les tentatives ou complicités de ces mêmes infractions.’ [author’s translation]

<sup>428</sup> Ordonnance n° 62-427 du 14 avril 1962, rendant applicable sur l’ensemble du territoire de la République le décret no 62-327 du 22 mars 1962 portant amnistie des infractions commises au titre de l’insurrection Algérienne. Available at:

[legifrance.gouv.fr/jo\\_pdf.do?cidTexte=JPDF1504196200003892&categorieLien=id](http://legifrance.gouv.fr/jo_pdf.do?cidTexte=JPDF1504196200003892&categorieLien=id)

<sup>429</sup> Décret n° 62-328 du 22 mars 1962 portant amnistie des faits commis dans le cadre des opérations de maintien de l’ordre dirigées contre l’insurrection Algérienne JORF 23 March 23 1962 3144. Available at:

[http://www.legifrance.gouv.fr/jopdf/common/jo\\_pdf.jsp?numJO=0&dateJO=19620323&numTexte=03144&pageDebut=03144&pageFin=](http://www.legifrance.gouv.fr/jopdf/common/jo_pdf.jsp?numJO=0&dateJO=19620323&numTexte=03144&pageDebut=03144&pageFin=) [last accessed March 2013]

The infractions perpetrated during the operation to maintain order against the Algerian insurrection before the 20 March 1962 are amnestied.<sup>430</sup>

The amnesties applied to pending criminal proceedings, provided for the remission of sentences of those already convicted and prevented any future proceedings. Although presented as balancing the first decree, however, it has been claimed that, unlike the first decree, the provisions of Decree n° 62-328 of 22 March 1962 was not negotiated at Evian and as such was not part of the agreements negotiated with the Algerian representatives.<sup>431</sup> Notably, the second decree blocks any judicial attempts to prosecute the officers who engaged in acts of torture. It concerns the police officers and military who were prosecuted or sentenced for all crimes and offences perpetrated in the fight against the Algerian nationalists.

These amnesties (and ordinances) produced strong reactions, particularly from the Communist Party, who denounced the ‘treacherous attitude’ of the French government for not including French citizens who had collaborated with Algerian nationalists. A campaign was organized to demand the release of members of the Jeanson Network, the ‘porteurs de valises’, Europeans who helped the FLN in the Metropole; a number of them had been tried and sentenced in France. This campaign was supported by the Algerian by government (who formally asked the French government to grant amnesty to French citizens who had participated in the liberation movement).<sup>432</sup> However the Jeanson network was considered to be a ‘Franco-French’ affair, it did not benefit from the amnesty of the Evian Accords.<sup>433</sup>

Speaking of the second amnesty, in 1962, lawyer Robert Badinter voiced this opposition in an opinion piece published in the newspaper *L'Express*:

[A] nation is responsible for each crime committed in its name [...] It cannot save itself if it has not recognised the act as its own because,

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<sup>430</sup> Décret n°62-328 du 22 mars 1962 (n 42). Article 1: [...] sont amnistées les infractions commises dans le cadre des opérations de maintien de l'ordre dirigées contre l'insurrection algérienne avant le 20 mars 1962.

<sup>431</sup> Guy Pervillé, ‘Trente ans après: Réflexions sur les accords d'Évian’ [1992] 70(296) *Revue française d'histoire d'outre-mer* 367.

<sup>432</sup> On the stance of the Communist Party during the Algerian War, see Jean Jacques Becker, ‘L'intérêt bien compris du Parti communiste française’ in Jean-Pierre Rioux and Jean-François Sirinelli (eds), *La Guerre d'Algérie et les intellectuels français* (Brussels: Editions Complexe 1991) 235-244.

<sup>433</sup> Malek Redha, *L'Algérie à Évian: Histoire des négociations secrètes 1956-1962* (Paris: Editions Le Seuil 1995) 236-237. The said law was passed only in 1962 and in 1966, but three out of the 15 condemned were still in prison while other members were in exile.

for nations as for men, there is no choice but to be the accomplice of the executioner or one's own judge.<sup>434</sup>

President of the Bar Association René William Thorp published an article in *Le Monde* expanding on Badinter's argument.<sup>435</sup> He contended that the infractions amnestied were not facts that could be justified as a common casualty of the war. For Thorp, the acts perpetrated in the name of the nation entail the wider responsibility of society and covering over these crimes by the amnesty would be detrimental to France in the long term.<sup>436</sup>

As with the referenda, there were disputes about constitutionality and the democratic process. The French procedure generally provides that amnesty can be enacted through the legislative process to the benefit of a group of people (Article 34 of the 1958 Constitution). Amnesty may also be granted by a presidential decree. However, the implementation of amnesty by decree permitted by these terms could potentially constitute an obstacle to peace.<sup>437</sup> Constitutionalist Jean Touscoz commented at the time that parliament had been deliberately excluded from the process of application of the agreements.<sup>438</sup> The implementation of the amnesty by decree was a means for de Gaulle to bypass the debates in parliament on the legitimacy of such measures. He notably wanted to avoid the opposition left-wing parties, especially the communists, to amnestying soldiers who had perpetrated torture.

## B. 1964-1966: Amnesty Legislation and Presidential Pardons

As a result of these debates, the next amnesty was passed by parliament in 1964. It sought to conceal the criminal offences perpetrated by the *colons* defending their interests. Article 1 of the Law of 23 December 1964 amnesties:

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<sup>434</sup> Robert Badinter, 'Détournement d'Amnistie', *L'Express* (Paris 10 May 1962): '[...] une nation est engagée par chaque crimes commis en son nom [...] Elle ne peut se sauver qu'autant qu'elle n'a pas reconnu cet acte comme le sien car pour les nations comme pour les hommes il n'est pas d'autre choix que d'être le complice du bourreau ou son juge' [author's translation].

<sup>435</sup> René William Thorp, 'L'amnistie Des Gardiens De L'Ordre', *Le Monde* (Paris, 21 June 1962).

<sup>436</sup> Thorp, 'L'Amnistie des Gardiens De l'Ordre' (n 48).

<sup>437</sup> William G Andrews, *Presidential Government in Gaullist France: A Study of Executive-Legislative Relations, 1958-1974* (Albany: State University of New York Press 1974) 134.

<sup>438</sup> Jean Touscoz, 'Les Accords Franco-Algériens' [1962] *Revue de l'Action Populaire* 559; Charles Rousseau, 'Chronique des Faits Internationaux' [1963] *Revue Générale du Droit Internationale Public* 119

[...]all the infractions perpetrated in Algeria before 20 March 1962 in retaliation for the *excess* of the Algerian insurrection, under the condition that they [the infractions] are not related to attempts to prevent the State from acting or participation in an attempt to take over the authority of the State and replace it with an unlawful authority.<sup>439</sup>

Article 4 extended the scope of amnesty to the OAS members convicted for acts perpetrated between the signature of the Evian Accords and Algerian independence. However, this was subject to presidential discretion and restricted by two conditions: the sentence was less than fifteen years and – excluding the putsch generals –they must not play a high-level role in any enterprise attempting to prevent the State from acting or to take over the authority of the State and replace it with an unlawful authority.<sup>440</sup> The law specifically distinguishes a legitimate use of violence in self-defence from the acts of subversion such as terrorist attacks perpetrated against the French authority in Algeria.

The 1964 law was passed in a time of crisis for the Gaullists. However, this amnesty was still considered insufficient by a majority of the opposition. Two years later, the National Assembly adopted the Law of 17 June 1966, which extended the scope of the amnesty even further. Article 1 provides that amnesty shall be granted to individuals sentenced for crimes or offences directly connected to the events in Algeria, as well as ‘crimes or offences directed against the authority of the State’.<sup>441</sup> The granting of

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<sup>439</sup> Loi n° 64-1269 du 23 Décembre 1964 Portant Amnistie Et Autorisant La Dispence De Certaines Incapacités Et Déchéances, JORF 24 Décembre 1964 11499. Article 1: [...] sont amnisties de plein droit toutes les infractions commises en Algérie avant le 20 mars 1962 en réplique aux excès de l’insurrection algérienne, à la condition qu’elles soient sans rapport avec un entreprise tendant à empêcher l’exercice de l’autorité de l’Etat ou à substituer à cette autorité une autorité illégale. [author’s translation, emphasis added.] Available at:

[legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000875632](http://legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000875632)

<sup>440</sup> Loi n° 64-1269 du 23 Décembre 1964 (n 52). Article 4: Le Président de la République peut admettre par décret au bénéfice de l’amnistie, les personnes condamnées définitivement pour crimes ou délits commis avant le 3 juillet 1962 en Algérie et en relation directe avec les événements d’Algérie. Sont exclus du bénéfice du présent article : 1° Les condamnées à une peine privative de liberté égale ou supérieure à quinze années, compte tenu des mesures de grâce; 2° Les condamnés qui ont assumé un rôle déterminant d’organisation ou de commandement dans une entreprise tendant à empêcher l’exercice de l’autorité de l’État ou à substituer à cette autorité une autorité illégale [author’s translation].

<sup>441</sup> Loi n° 66-396 du 17 juin 1966 portant amnistie d’infractions contre la sûreté de l’État ou commises en relation avec les événements d’Algérie, JORF 18 juin 1966 4915. Article 1: [...] sont amnisties de plein droit les condamnations définitives pour crimes ou délits commis en relation directe avec les événements d’Algérie ainsi que pour crimes ou délits constituant une entreprise individuelle ou collective tendant à empêcher l’exercice de l’autorité de l’Etat ou à substituer à cette autorité une autorité illégale, ou commis en relation directe avec une telle entreprise [...] [author’s translation]. Available at :

[legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000504433](http://legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000504433)

amnesty concerns three types of individuals: 1) authors of crimes or offences sentenced to a fine or; 2) authors of crimes or offences sentenced to a suspended prison sentence (d'une peine d'emprisonnement avec sursis; (3) authors of crimes or offences released before the promulgation of the present law.<sup>442</sup>

Article 2 provides that, for crimes committed before the 3 July 1962, amnesty would be given to those sentenced to less than ten years' imprisonment.<sup>443</sup> Prisoners sentenced for more than ten years had to ask for a presidential pardon. Amnesty was also permitted for those who left the army to return to France. Article 3, covering all offences committed between 1 November 1954 and 3 July 1962 by the police seeking to re-establish order or acting against attempts to impede or overthrow the state'.<sup>444</sup> Essentially, the 1966 law amnestied the crimes and misdemeanours perpetrated by members of police forces in France during their time in Algeria, including crimes of desertion. It provided that those who were already free or sentenced to less than ten years' imprisonment for acts committed before the 3 July 1962 would benefit from its application immediately. Article 5 gave the amnesty a potentially an extended scope: it granted the President of the Republic the power to make further decrees.<sup>445</sup> The amnesties were designed to encourage the surrender of the insurgent groups and as a tool to pressure those who did not want to come forward. Indeed, de Gaulle used this latitude to free and amnesty 86 individuals convicted of crimes. It was used to free the 'celebrities of the war': General Zeller, for example, was set free on Bastille Day, 14 July 1966 and General Jouhaud received a Christmas amnesty on 25 December 1966. Salan was the last of the four generals of the coup to be released.

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<sup>442</sup> Loi n° 66-396 du 17 juin 1966 (n 54). Article 1: [...] si les auteurs de ces infractions ont été punis d'une peine d'amende avec ou sans sursis ou d'une peine d'emprisonnement avec sursis, assortie ou non d'une amende, ou si, condamnés à une peine privative de liberté, ils ont été libérés avant la date de promulgation de la présente loi [author's translation].

<sup>443</sup> Loi n° 66-396 du 17 juin 1966 (n 54). Article 2: Sont admises de plein droit au bénéfice de l'amnistie les personnes condamnées définitivement, compte tenu des mesures de grâce, soit à une peine d'amende, soit à une peine privative de liberté n'excédant pas dix années, assortie ou non d'une peine d'amende, pour crimes ou délits commis avant le 3 juillet 1962 en Algérie et en relation directe avec les événements d'Algérie, qui étaient âgées de moins de vingt et un ans au temps de l'action et n'ont assumé aucun rôle déterminant d'organisation ou de commandement dans une entreprise tendant à empêcher l'exercice de l'autorité de l'Etat ou à substituer à cette autorité une autorité illégale.

<sup>444</sup> Loi n° 66-396 du 17 juin 1966 (n 54). Article 3: sont amnisties de plein droit les infractions commises entre le 1<sup>er</sup> novembre 1954 et le 3 juillet 1962 dans le cadre d'opération de police administrative ou judiciaire, du rétablissement de l'ordre ou de la lutte contre les entreprises tendant à empêcher l'exercice de l'autorité de l'Etat ou à substituer à cette autorité une autorité illégale.

<sup>445</sup> Loi n° 66-396 du 17 Juin 1966 (n 54). Article 5: Le Président de la République peut admettre par décret au bénéfice de l'amnistie les personnes qui sont ou seront condamnées définitivement pour crimes ou délits commis avant la promulgation de la présente loi et en relation directe avec les événements d'Algérie ou constituant une entreprise individuelle ou collective tendant à empêcher l'exercice de l'autorité de l'Etat ou à substituer à cette autorité une autorité illégale, ou en relation directe avec une telle entreprise.

The 1966 amnesty law also provides for the rehabilitation of offenders. Article 12 states that:

The grant of amnesty shall result, without ever giving rise to restitution, in the remission of all the principal, accessory and supplementary penalties, including preventive detention and all consequential legal incapacities or disqualifications. It restores to the offender the benefit of a stay of enforcement, which could have been granted to him at the time of an earlier conviction.<sup>446</sup>

By way of ‘amnesia’, Article 15 (as had the earlier decrees and laws) provides as follows:

Any person having learnt, in the exercise of his duties, of criminal convictions ... erased by the amnesty, shall be prohibited from referring to them in any form whatsoever or from allowing any indication of them to remain in any document. This prohibition does not, however, apply to the original versions of judgments and judicial decisions.<sup>447</sup>

Alongside the amnesty legislation, Article 17 of the Constitution of 1958 invested the president with the power to grant individual pardons. The constitution of 1958 instituted a presidential regime, which gives the president complete freedom in the matter of pardons. The presidential pardon subscribed to a republican tradition of clemency and reincorporation of certain individuals. The grant of individual pardons has operated at different stages of France’s post-conflict process of reconstruction. De Gaulle exercised this right in a limited fashion, granting his *grace* only to French prisoners who had not participated in the attempted coup of April 1961. In December 1964, 173 former OAS

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<sup>446</sup> Loi n° 66-396 du 17 Juin 1966 (n 54). Article 12. L’amnistie n’entraîne pas la réintégration dans les fonctions, emplois, professions, grades, offices publics ou ministériels. En aucun cas elle ne donne lieu à reconstitution de carrière. Elle entraîne la réintégration dans les divers droits à pension, à compter de la date de promulgation de la présente loi en ce qui concerne l’amnistie de droit, et à compter du jour où l’intéressé est admis à son bénéfice en ce qui concerne l’amnistie par mesure individuelle. L’amnistie ne confère pas la réintégration dans l’ordre de la Légion d’honneur, dans l’ordre de la Libération, ni dans le droit au port de la médaille militaire. Toutefois, la réintégration peut être prononcée, pour chaque cas individuellement, à la demande du garde des sceaux, ministre de la justice, et, le cas échéant, du ministre intéressé, par décret du Président de la République, pris sur la proposition du grand chancelier compétent, après avis conforme du conseil de l’ordre.

<sup>447</sup> Loi n° 66-396 du 17 juin 1966 (n 54). Article 15: Il est interdit à toute personne en ayant eu connaissance dans l’exercice de ses fonctions, de rappeler sous quelque forme que ce soit ou de laisser subsister dans tout document quelconque, les condamnations pénales, les sanctions disciplinaires ou professionnelles et les déchéances effacées par l’amnistie. Les minutes des jugements, arrêts et décisions échappent toutefois à cette interdiction.

members were granted pardon via presidential decree as a Christmas Eve gesture. Overall, 1,196 persons were freed by presidential decree. The ‘Gaullean’ exercise of pardon highlighted the distinction between the grant of amnesty and the grant of pardon. Measures of pardon were granted to individuals already convicted and had the effect that they no longer had to serve their sentence. Hence those who benefited from a pardon did not see their condemnation erased from the records. At the same time, the presidential grant of pardon with its symbolic associations with the monarchical *jura regalia* to forgive was a political tool for de Gaulle that let him display his authority and the supreme power of the president.

### C. The 1968 Amnesty Law

By March 1968, mobilisation in favour of the rehabilitation of French ex-combatants had grown stronger. De Gaulle’s power faced another crisis during the student uprising of May 1968. This student revolt was an opportunity for different political groups to attack de Gaulle and weaken his power. Hence, although the movement was led by left-wing parties, The Association Nationale des Français d’Afrique du Nord d’Outre mer et leurs amis (ANFANOMA), a *pieds noir* association, compared the student revolt to repatriates’ anger and the crisis of May 1958. The Far Right targeted de Gaulle’s failure to advance the modernization of France. In an attempt to short-circuit these criticisms and attract the support of the *ex-colons*, de Gaulle agreed to amnesty for the remaining OAS officers still imprisoned and sought to secure the coming election by multiple symbolic gestures.<sup>448</sup> Hence de Gaulle visited OAS General Jacques Massu in his prison cell. This exchange between the two men was described as a ‘concordat’ by the press.<sup>449</sup> The goal was to heal the wounds left by the Algerian war in order to be able to deal with the social claims of May 1968.<sup>450</sup> ‘

July 1968 saw scope extended to constitute a general amnesty. Article 1 of the Law of 31, July 1968, provides that:

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<sup>448</sup> Jean Louis Tixier Vignacour, *Des Républiques, Des Justices Et Des Hommes* (Paris: Albin Michel 1976).

<sup>449</sup> Tixier Vignacour, *Des Républiques* (n 61).

<sup>450</sup> René Capitant, Garde Des Sceaux, 1ere Séance Du 23 Juillet 1968, *Journal Officiel*, Debats Parlementaires (Assemblée Nationale) 24 Juillet 1968 2469.

All crimes committed in connection with the events in Algeria are amnestied by law.<sup>451</sup>

Article 1 further specifies that ‘crimes’ committed by military personnel serving in Algeria during the period covered in the first paragraph are deemed to have been committed in connection with the events in Algeria’. Articles 3 and 4 of the law lay down the effects of the amnesty.<sup>452</sup> Article 3 provides that the amnesty extends to disciplinary or professional sanctions (subject to the conditions laid down in Articles 6 to 8 of the Law of 17 June 1966 on the granting of amnesty in respect of offences against the security of the State or committed in connection with the events in Algeria). Article 4 extends the pension rights as accorded by the Law of June 1977 (Article 9 to 16) to all those now covered by the 1968 law.

Essentially, the 1968 law broadened the scope of the beneficiaries of amnesty such that it now included the OAS officers, including those involved in the attempted coup. Raoul Salan and Edmond Jouhan, who had been sentenced, respectively, to life imprisonment and to death, were hence released, as well as Pierre Fenoglio, who had murdered the mayor of Evian. De Gaulle’s amnesty Law of 31 July 1968 released former OAS members in a bid for electoral success. It put a final seal to the darkest phases of the Algerian War.

Overall, 2,466 individuals benefited from the direct application of the different amnesty decrees and laws enacted from 1962 to 1968. Throughout this phase of implementation, the issue of amnesty under the ‘regime of de Gaulle’ was discussed under three political themes. First, it was framed as a way to reciprocate the amnesty clause included in the Evian Accords, which was restricted to Algerian combatants: an executive amnesty decree was extended to the French combatants as a reciprocal response. Secondly, amnesty contributed to validating de Gaulle’s political legitimacy and showed his commitment to restoring national unity. For the most radical deputies, it was the French government that was illegitimate, while the campaign to maintain French Algeria had been legitimate.<sup>453</sup>

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<sup>451</sup> Loi n° 68-697 Du 31 Juillet 1968 Portant Amnistie (Algérie), JORF 2 Août 1968 7521. Article 1: ‘Sont amnistiées de plein droit toutes les infractions commises en relation avec les événements d’Algérie.

Sont réputée commises en relation avec les événements d’Algérie toutes les infractions commises par des militaires servant en Algérie pendant la période couverte par le premier alinéa [paragraph] du présent article. Available at:

<https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000693181>

<sup>452</sup> Loi n° 68-697 du 31 Juillet 1968 (n 65) Articles 3 and 4.

<sup>453</sup> Gacon, *L’Amnistie* (n 3) 272.

Thirdly, amnesties were granted as a reward for the ‘patriotic commitment’ of the French soldiers in trying to keep Algeria French. However, the individuals who had attempted to prevent the decolonisation of Algeria had not benefited from the amnesty of Decree 62-328 of 22 March 1962. Jurist Henri Mazeau wrote an opinion piece in the newspaper *Carrefour*, drawing his argument from the traditional role of amnesty in the aftermath of French crisis. He argued, given that the French government had in the past freed those on the side of FLN and, earlier, Nazi collaborators, ‘would it not be only justice to apply the same measure to those [OAS terrorists] who did no other crime but to continue the struggle?’<sup>454</sup> The argument was that the violence was an ‘excessive’ expression of a form of patriotism. It was the OAS’s attachment to the idea of France as a sovereign power that had led them to attempt to sabotage what they deemed to be a betrayal to the ideal of France as a civilising mission.<sup>455</sup> The combat undertaken to preserve *l’Algérie Française* had a particular appeal to conservative political groups. A right-wing party, Progrès et Démocratie Moderne, claimed that the OAS could not be considered a criminal entity and that their actions should instead be likened to the French Resistance in World War II led by de Gaulle himself during the occupation years.<sup>456</sup> With this rationale, the OAS could only be held accountable for having *excessively* attempted to defend France in Algeria. Hence these demands for amnesty centred around acknowledging the ‘selflessness’ of the military and recognizing the ‘patriotic’ commitment of those who had fought against France.<sup>457</sup> Denouncing the double standards of the de Gaulle policy, with the French government freeing those on the side of FLN, and the earlier Nazi collaborators, they had demanded that it should also liberate those Frenchmen whose only crime was ‘patriotism’ and the ‘wish to continue the fight’ to keep Algeria French.<sup>458</sup> For these groups, the rehabilitation of the OAS, and their struggle to maintain Algeria as part of France epitomised an ideal of the French nation and Catholicism under-layered by an anti-Communist sentiment.

The amnesty process was also characterised by the involvement of collective groups representing the interests of the veterans and the repatriated *colons*. From 1963, this

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<sup>454</sup> Henri Mazeaud, ‘L’Amnistie Nécessaire’ *Carrefour* (Paris, 12 June 1963).

<sup>455</sup> Gacon, *L’amnistie* (n 3) 286 for an extensive depiction of the political debate on the amnesty; Gilles Manceron with Hassan Remaoun, *D’une Rive À L’autre: La Guerre d’Algérie. De La Mémoire À L’histoire De La Guerre d’Algérie* (Paris: Éditions Syros 1993).

<sup>456</sup> Francis Palermo, 3e Séance, 22 Mai 1968, *Journal Officiel Débats Parlementaire* (Assemblée Nationale) 23 Mai 1968 2058.

<sup>457</sup> Gacon, *L’amnistie* (n 3) 263-266.

<sup>458</sup> Michel De Saint Pierre, *Plaidoyer Pour L’Amnistie* (Paris: L’Esprit Nouveau 1963).

movement became more structured. Different organisations representing repatriates lobbied for the amnesty among them, Fédérations d'anciens combattants (UNC-AFN, UNACFCI, UFAC, UCCTAM), the FNACA (Federation national des anciens combattants d'Algerie, Maroc, Tunisie) represented the interest of veterans in Morocco, Algeria and Tunisia independently of the state.<sup>459</sup>

### III. 1974-1982: Amnesty as an instrument for France's political reconstruction

#### A. The Repatriation of The *Pieds Noirs*

After Algeria became independent, 90% of the Europeans living in Algeria, approximately 650,000 people, were repatriated to France.<sup>460</sup> The repatriation of the *colons* was considered a threat to the economic stability of France. The *pieds noirs* were confronted with housing and employment issues, which affected their integration into French society.<sup>461</sup> The repatriates lived their return in France as a forced 'exile'. Images of families with suitcases epitomised the *pieds noirs* as refugees. As one Gaullist deputy urged, 'it is necessary for those who returned, with pain in their souls, with bitterness on their lips, who are somewhat maladroit because they have suffered, to be welcomed like distressed members of the same family'.<sup>462</sup> The following section explores how the debate on the amnesty shifted from the issue of forgiveness to a symbol of reparation.

#### B. Compensation of the *Pieds Noirs*

In theory, the property rights acquired by the European settlers throughout the period of colonisation were secure despite the modality of their acquisition being illegal. Article 12 of the Evian Accords provides that:

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<sup>460</sup> For a historical presentation of the different populations concerned by this exodus see Dominique Maison, 'La Population De l'Algérie' [1973] 28(6) Population 1079-1107.

<sup>461</sup> Jennifer Hunt, 'The Impact Of The 1962 Repatriates From Algeria On The French Labor Market' [1992] 45(3) Industrial And Labor Relations Review 556-572; see also Pierre Baillet, 'Les Francais d'Algérie en France' [29 March 1976] 16 Notes et Etudes Documentaires 4275-427.

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Algeria will ensure without any discrimination the free and peaceful enjoyment of patrimonial rights acquired on its territory before self-determination. No one will be deprived of these rights without fair compensation previously determined.<sup>463</sup>

While this provision had been negotiated by both parties, the Algerian state began to reclaim French assets and, especially, to nationalise agricultural and industrial possessions.

The *pieds noirs* set up several associations to formulate demands for compensation from the French state. William Cohen counted 275 different organisations in France representing the repatriates from the colonies.<sup>464</sup> Among them, three organisations, FNACA, ANFANOMA and the *Rassemblement et coordination unitaire des rapatriés et spoliés* (RECOURS), brought together the demands of the repatriated and campaigned for indemnification for the loss of property as a result of decolonisation. These associations worked obliquely, putting electoral pressures on French political affairs. Although they constituted only 2% of the French population, they had a great regional impact, notably in the South of France, where they constituted a significant electoral group.<sup>465</sup> In cities such as Avignon, Montpellier, Sète, Toulon and Marseilles, the *pieds noirs* constituted 10% of the population.

During the presidential election of 1969, the repatriates' pressure groups and organisations expressed their grievances to the main candidates. The newly elected Gaullist president Georges Pompidou began to put together a compensation law. A year later, on 3 June 1970, draft legislation was presented to parliament. But even though the legislation was formally declared 'of immediate importance' by a *déclaration d'urgence* on 12 June, the parliamentary debates quickly dismissed the project. The text of the legislation was unanimously criticised in the National Assembly. By March 1968, mobilisation in favour of the rehabilitation of French ex-combatants had grown stronger. De Gaulle's power faced another crisis during the student uprising of May 1968. This student revolt was an opportunity for different political groups to attack de Gaulle and weaken his power. Hence, although the movement was led by left wing parties, The Association Nationale des Français d'Afrique du Nord d'Outre mer et leurs amis (ANFANOMA), a *pieds noir* association, compared the student revolt to repatriates'

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<sup>463</sup> Accords d'Évian, Article 12.

<sup>464</sup> See <http://www.fnaca.org>.

<sup>465</sup> Emmanuelle Comtat, 'La Question Du Vote Pied-Noir' [2006] 24(1) Pôle Sud 75–88.

anger and the crisis of May 1958. The Far Right targeted de Gaulle's failure to advance the modernisation of France. In an attempt to short circuit these criticisms and attract the support of the *ex-colons*, de Gaulle agreed to amnesty for the remaining OAS officers still imprisoned and sought to secure the coming election by multiple symbolic gestures.<sup>466</sup> Hence de Gaulle visited OAS General Jacques Massu in his prison cell. This exchange between the two men was described as a 'concordat' by the press.<sup>467</sup> The goal was to heal the wounds left by the Algerian war in order to be able to deal with the social claims of May 1968.<sup>468</sup> ‘

July 1968 saw scope extended to constitute a general amnesty. Article 1 of the Law of 31 July 1968 provides that:

All crimes committed in connection with the events in Algeria are  
amnestied by law.<sup>469</sup>

Article 1 further specifies that 'crimes' committed by military personnel serving in Algeria during the period covered in the first paragraph are deemed to have been committed in connection with the events in Algeria'. Articles 3 and 4 of the law lay down the effects of the amnesty.<sup>470</sup> Article 3 provides that the amnesty extends to disciplinary or professional sanctions (subject to the conditions laid down in Articles 6 to 8 of the Law of 17 June 1966 on the granting of amnesty in respect of offences against the security of the State or committed in connection with the events in Algeria). Article 4 extends the pension rights as accorded by the Law of June 1977 (Article 9 to 16) to all those now covered by the 1968 law.

Essentially, the 1968 law broadened the scope of the beneficiaries of amnesty such that it now included the OAS officers, including those involved in the attempted coup. Raoul Salan and Edmond Jouhan, who had been sentenced, respectively, to life imprisonment and to death, were hence released, as well as Pierre Fenoglio, who had murdered the

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<sup>466</sup> Jean Louis Tixier Vignacour, *Des Républiques, Des Justices Et Des Hommes* (Paris: Albin Michel 1976).

<sup>467</sup> Tixier Vignacour, *Des Républiques* (n 61).

<sup>468</sup> René Capitant, *Garde Des Sceaux*, 1ere Séance Du 23 Juillet 1968, *Journal Officiel*, Debats Parlementaires (Assemblée Nationale) 24 Juillet 1968 2469.

<sup>469</sup> Loi N° 68-697 Du 31 Juillet 1968 Portant Amnistie (Algérie), JORF 2 Août 1968 7521. Article 1: 'Sont amnistiées de plein droit toutes les infractions commises en relation avec les événements d'Algérie.

Sont réputée commises en relation avec les événements d'Algérie toutes les infractions commises par des militaires servant en Algérie pendant la période couverte par le premier alinéa [paragraph] du présent article. Available at:

<https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000693181>

<sup>470</sup> Loi n° 68-697 du 31 Juillet 1968 (n 65) Articles 3 and 4.

mayor of Evian. De Gaulle's amnesty Law of 31 July 1968 released former OAS members in a bid for electoral success. It put a final seal to the darkest phases of the Algerian War.

Overall, 2,466 individuals benefited from the direct application of the different amnesty decrees and laws enacted from 1962 to 1968. Throughout this phase of implementation, the issue of amnesty under the 'regime of de Gaulle' was discussed under three political themes. First, it was framed as a way to reciprocate the amnesty clause included in the Evian Accords, which was restricted to Algerian combatants: an executive amnesty decree was extended to the French combatants as a reciprocal response. Secondly, amnesty contributed to validating de Gaulle's political legitimacy and showed his commitment to restoring national unity. For the most radical deputies, it was the French government that was illegitimate, while the campaign to maintain French Algeria had been legitimate.<sup>471</sup>

Thirdly, amnesties were granted as a reward for the 'patriotic commitment' of the French soldiers in trying to keep Algeria French. However, the individuals who had attempted to prevent the decolonisation of Algeria had not benefited from the amnesty of Decree 62-328 of 22 March 1962. Jurist Henri Mazeau wrote an opinion piece in the newspaper *Carrefour*, drawing his argument from the traditional role of amnesty in the aftermath of French crisis. He argued, given that the French government had in the past freed those on the side of FLN and, earlier, Nazi collaborators, 'would it not be only justice to apply the same measure to those [OAS terrorists] who did no other crime but to continue the struggle?'<sup>472</sup> The argument was that the violence was an 'excessive' expression of a form of patriotism. It was the OAS's attachment to the idea of France as a sovereign power that had led them to attempt to sabotage what they deemed to be a betrayal to the ideal of France as a civilising mission.<sup>473</sup> The combat undertaken to preserve *l'Algérie Française* had a particular appeal to conservative political groups. A right-wing party, Progrès et Démocratie Moderne, claimed that the OAS could not be considered a criminal entity, and that their actions should instead be likened to the French Resistance in World War II led by de Gaulle himself during the occupation

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<sup>471</sup> Gacon, *L'amnistie* (n 3) 272.

<sup>472</sup> Henri Mazeaud, 'L'amnistie Necessaire' *Carrefour* (Paris, 12 June 1963).

<sup>473</sup> Gacon, *L'amnistie* (n 3) 286 for an extensive depiction of the political debate on the amnesty; Gilles Manceron with Hassan Remaoun, *D'une Rive À L'autre: La Guerre d'Algérie. De La Mémoire À L'histoire De La Guerre d'Algérie* (Paris: Éditions Syros 1993).

years.<sup>474</sup> With this rationale, the OAS could only be held accountable for having *excessively* attempted to defend France in Algeria. Hence these demands for amnesty centred around acknowledging the ‘selflessness’ of the military and recognizing the ‘patriotic’ commitment of those who had fought against France.<sup>475</sup> Denouncing the double standards of the de Gaulle policy, with the French government freeing those on the side of FLN, and the earlier Nazi collaborators, they had demanded that it should also liberate those Frenchmen whose only crime was ‘patriotism’ and the ‘wish to continue the fight’ to keep Algeria French.<sup>476</sup> For these groups, the rehabilitation of the OAS, and their struggle to maintain Algeria as part of France, epitomised an ideal of the French nation and Catholicism under-layered by an anti-Communist sentiment.

The amnesty process was also characterised by the involvement of collective groups representing the interests of the veterans and the repatriated *colons*. From 1963, this movement became more structured. Different organisations representing repatriates lobbied for the amnesty among them, Fédérations d’anciens combattants (UNC-AFN, UNACFCI, UFAC, UCCTAM), the FNACA (Federation national des anciens combattants d’Algerie, Maroc, Tunisie) represented the interest of veterans in Morocco, Algeria and Tunisia independently of the state.<sup>477</sup>

## I. 1974-1982: Amnesty as an instrument for France’s political reconstruction

### A. The Repatriation of The *Pieds Noirs*

After Algeria became independent, 90% of the Europeans living in Algeria, approximately 650,000 people, were repatriated to France.<sup>478</sup> The repatriation of the *colons* was considered a threat to the economic stability of France. The *pieds noirs* were confronted with housing and employment issues, which affected their integration into

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<sup>475</sup> Gacon, *L’amnistie* (n 3) 263-266.

<sup>476</sup> Michel De Saint Pierre, *Plaidoyer Pour L’amnistie* (Paris: L’Esprit Nouveau 1963).

<sup>477</sup> See the official website of the repatriated *colons*: <http://www.fnaca.org/>.

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impact, notably in the South of France, where they constituted a significant electoral group.<sup>483</sup> In cities such as Avignon, Montpellier, Sète, Toulon and Marseilles, the *pieds noirs* constituted 10% of the population.

During the presidential election of 1969, the repatriates' pressure groups and organisations expressed their grievances to the main candidates. The newly elected Gaullist president Georges Pompidou began to put together a compensation law. A year later, on 3 June 1970, draft legislation was presented to parliament. But even though the legislation was formally declared 'of immediate importance' by a *déclaration d'urgence* on 12 June, the parliamentary debates quickly dismissed the project. The text of the legislation was unanimously criticised in the National Assembly. It was rejected by the Senate on its second reading and it was only because the majority party agreed to support the government that it became law on 30 June amidst howls of protest from the public gallery. Even before it was officially published in the *Journal Officiel* on 15 July, it was already being dismissed as obsolete. The proposed legislation made it impossible to determine exactly what compensation meant as a policy of reintegration.

The bill had proposed to amend Article 4 of the amnesty Law of 31 July 1968, which provided the repatriated with an indemnity between 52,000 and 200,000 francs.<sup>484</sup> But for the *pieds noirs* and the veterans, this measure was insufficient. The 1968 amnesty law had added the idea of reparations to the grant of criminal immunity. It granted the military and civil servants the benefit of retirement pensions. The text also provided symbolic reparation with the restitution of military honours (decorations). Hence during the parliamentary elections of 1978, several Gaullist MPs emphasised the symbolic aspect of the compensation of the repatriated.<sup>485</sup>

In 1974, President Valéry Giscard-d'Estaing announced the first new amnesty of the Algerian War since de Gaulle's death in 1970. The Law of 16 July 1974 was a post-election gesture by which newly elected president thanked the *pieds noirs* for their support in the community.<sup>486</sup> He declared: 'We must enhance our efforts of solidarity

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<sup>486</sup> Loi n°74-643 du 16 juillet 1974 portant amnistie, JORF 17 juillet 7445. Available at: [legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000333537](http://legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000333537) [last visited May 2014]

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This largely 'symbolic reparation' restored military decorations and legal fees to those convicted of crimes committed in relation to the Algerian war.<sup>488</sup> Chapter IV of the 1974 law concerns the 'effect of the amnesty on the offences committed in relation to the Algerian events and the war in Indochina'.<sup>489</sup> Passed by parliament on the 16 July 1974, it considered, for the first time, the moral aspect of the amnesty. The law enabled the reintegration of 800 soldiers, 800 police officers and 400 civil servants who had been removed from their positions between 1961 and 1962 due to acts related to the April 1961 putsch. The law on indemnification was amended in January 1978, with an increase from the initial indemnity of 52,000 (852 Euros) to 200,000 francs (3277 euros).<sup>490</sup> It also restored their decorations such as the *Légion d'honneur*.

### C. The Courrière Law: Grant of Pensions to the Veterans

In the 1980s, the debates on reparations and symbols of reintegration focused on the status of ex-soldiers. Socialist President François Mitterrand sought to continue the project of rehabilitation and to alleviate the remaining tensions. Significantly, he addressed the issue of the *pièdes noirs* and the veterans by framing it in terms of 'national reconciliation' and demanded that the French people 'have more perspective on their responsibility for one another in times of civil crisis'.<sup>491</sup>

The first law, passed on 4 August 1981, revised the reference to the criminal offences committed in Algeria with the new formulation of 'criminal offences in relation of the defence of the rights and interests of the overseas French'.<sup>492</sup> A year and a half after

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<sup>488</sup> Loi n°74-643 du 16 juillet 1974 (n 82).

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<sup>491</sup> Gacon, *L'Amnistie* (n 3) 309.

<sup>492</sup> Loi N° 81-736 du 4 Août 1981 Portant Amnistie, JORF 5 Août 1981 2138.

Article 2: Sont amnistiées, quelle qu'ait été la juridiction compétente, les infractions suivantes, lorsqu'elles ont été commises antérieurement au 22 mai 1981 [...].

Mitterrand's election, Prime Minister Pierre Mouroy presented parliament with a proposed bill related to some of the consequences of the Algerian War focused on the process of rehabilitation of the colonial administration. The French Parliament approved the financial rehabilitation of civil servants, military officers convicted for acts of subversion.<sup>493</sup> The so-called Courrière Law was enacted, which retroactively reinstated the payment of pensions to all military and public officials who served during the Algerian war.<sup>494</sup> 2,000 to 3,000 individuals benefited from this law and it had a great political impact. It also reintegrated the OAS generals into the *corps de reserve* (reserve corps) of the army. The law benefited two putschist generals who were still alive at the time of its enactment, Raoul Salan and Edmond Jouhaud, as well as six other generals who had participated in the activities of the OAS.

The aftermath of the independence of Algeria saw a complex dynamic of internal social conflict between different actors in the conflict. The war had deeply scarred French society and marked a significant divide between contested narratives over the actions of the French troops in Algeria. Such gestures have been perceived as strategic political moves carefully orchestrated before or post elections. The process of reparations for the repatriated and veterans reflects a transition 'from a political and material recognition to a normative interpretation of the past'.<sup>495</sup>

Since the 1960s, symbolic manifestations commemorating the Algerian war of decolonisation in France have evolved in a sporadic fashion. Memory groups have gathered to create their own process of recognition in which ideal myths of the French colonial enterprise are promoted. As the next chapter shows, from the 1990s onwards, France's politics of memory underwent a significant shift. The issue of memory regarding the Algerian war opened up debates about French identity and what it means to be French in the aftermath of the colonial age. Failure to address the roots of the

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Article 2 (11): Délits commis en relation avec la défense des droits et intérêts des Français rapatriés d'outre-mer.

Available at:

[legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000517004&categorieLien=id](http://legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000517004&categorieLien=id) [ last visited May 2014]

<sup>493</sup> Amendement N° 13, 3e Séance du 21 Octobre 1982, *Journal Officiel*, Débats Parlementaires (Assemblée Nationale) 22 October 1982 6138 And 6141.

<sup>494</sup> Loi N° 82-4 du 6 Janvier 1982, Relative A L'aménagement Des Prêts De Réinstallation Qui S's'inscrit Dans Le Cadre De L'indemnisation Des Rapatriés, JORF 7 Janvier 1982 195 Available at:

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<sup>495</sup> Henry Rousso, 'History of Memory, Policies of the Past: What for?' in Konrad H. Jarausch and Thomas Lindenberger, *Conflicted Memories Europeanizing Contemporary Histories* (New York: Berghahn Books 2007) 31-32.

violence in the Algerian War resulted in the fragmentation of memories and the risk of manipulating memory. The next chapter further explores the issue of memory and examines how the Algerian past is enshrined in national rituals of commemoration.

The Senate on its second reading rejected it and it was only because the majority party agreed to support the government that it became law on 30 June amidst howls of protest from the public gallery. Even before it was officially published in the *Journal Officiel* on 15 July, it was already being dismissed as obsolete. The proposed legislation made it impossible to determine exactly what compensation meant as a policy of reintegration.

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Since the 1960s, symbolic manifestations commemorating the Algerian war of decolonisation in France have evolved in a sporadic fashion. Memory groups have gathered to create their own process of recognition in which ideal myths of the French colonial enterprise are promoted. As the next chapter shows, from the 1990s onwards, France’s politics of memory underwent a significant shift. The issue of memory regarding the Algerian war opened up debates about French identity and what it means to be French in the aftermath of the colonial age. Failure to address the roots of the violence in the Algerian War resulted in the fragmentation of memories and the risk of manipulating memory. The next chapter further explores the issue of memory and examines how the Algerian past is enshrined in national rituals of commemoration.

## Conclusion

This chapter has provided a contextual analysis to understand the process of implementation of amnesty and the evolution of its scope of application. De Gaulle’s concern to restore national cohesion turned the granting of amnesty into a politically staged process. In the first phase of the debate on amnesty laws, the issues centred on the release of political prisoners, civil and military. As the debate on the amnesty grew, de

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<sup>506</sup> Loi n° 82-4 du 6 Janvier 1982, Relative A L’aménagement Des Prêts De Réinstallation Qui S’s’inscrivent Dans Le Cadre De L’indemnisation Des Rapatriés, JORF 7 Janvier 1982 195 Available at:

[legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000704433](http://legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000704433) [last visited April 2013]

<sup>507</sup> Henry Rousso, ‘History of Memory, Policies of the Past: What for?’ in Konrad H. Jarausch and Thomas Lindenberger, *Conflicted Memories Europeanizing Contemporary Histories* (New York: Berghahn Books 2007) 31-32.

Gaule introduced three further laws to deal with the fate of the OAS members in 1964, 1966 and 1968. The internal divisions over the issue of decolonization of Algeria necessitated a reassertion of the unity of the nation. These debates culminated in the introduction of the 1968 law and the full grant of amnesty to all French citizen who had participated in the conflict. From 1972, the amnesty debate shifted into a more symbolic, yet also material, dimension. The deployment of amnesty as a political tool was completed in combination with a process of compensation of the veterans, civil personnel and the repatriated *colons*.

The use of amnesties for the rehabilitation of former combatants has sometimes been seen as a way to secure redemption from the past. Stéphane Gacon explains that recourse to amnesties has historically sought to re-integrate those who might have been 'excluded' and hence as a means to restore national cohesion.<sup>508</sup> This was notably the case after the violence of 1870-1871 and the Paris Commune when amnesty was used as a symbol of national cohesion. In the case of the Algerian war, the rehabilitation of the OAS members went a step further, as their demands shifted towards the recognition of their patriotic commitment. They desired recognition that their actions were a demonstration of their strong commitment to France. Considering themselves to be the forgotten of the Republic, *les oubliés de la République*,<sup>509</sup> the French presence in Algeria had not been criminal but was rather a demonstration of patriotism.<sup>510</sup>

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<sup>508</sup> Gacon, *L'amnistie* (n 3) 353-354.

<sup>509</sup> Benjamin Stora, *La Gangrène Et L'oubli: La Mémoire De La Guerre d'Algérie* (Paris: La Découverte 1991).

<sup>510</sup> Gacon, *L'amnistie* (n 3) 263-266.

## **Chapter 5 : Judicial Capacity of the French Courts to Prosecute War Crimes and the amnesty following the Algerian war**

This chapter explores further the implementation of the amnesty and examines how the amnesty influenced the French judges in their interpretation and application of criminal law. It is particularly interested in exploring the application of the amnesty to alleged crimes against humanity and war crimes perpetrated in Algeria by the French army. This chapter seeks to highlight the challenges confronted by victims urging the prosecution of French soldiers who perpetrated torture or attempting other sorts of legal action in the courts. One of the principal challenges facing victims seeking recognition and reparation is to counter the constraint that the Algerian amnesties impose on the possibility of investigating crimes perpetrated during the Algerian war.

The cases of alleged war crimes and crimes against humanity perpetrated in Algeria did not emerge immediately. Rather, the years following the end of the war were marked by the silence of victims and the resolute will of the French state to move on. However, in the 1980s, the prosecutions of Nazi criminals opened up an important opportunity for Algerian victims to make claims against prominent French officers. Indeed, the ‘Vichy trials’ were a decisive moment in France and led to important developments in criminal accountability for war crimes and crimes against humanity. The prosecution of Klaus Barbie was the culmination of the efforts of many individuals to bring to justice this Nazi officer on the run. His prosecution was only made possible by the French judges’ to take very wide stance on the law on crimes against humanity. Yet as it will be explored below the French definition of crimes against humanity is restricted to acts perpetrated during World War II. Despite the revision of French criminal code in 1994 the prosecution and investigation of acts perpetrated during the Algerian war remain impossible. In 2001 the Algerian war controversy was reactivated when Paul Aussaresses a retired general who served in Algeria notably revived the controversy over the responsibility of the French state in perpetrating alleged crimes against humanity by admitting having perpetrated torture on Algerians. Despite the detailed

depiction of the acts perpetrated, the judges dismissed the demand to prosecute on the basis that the alleged acts were covered by the amnesty.

Through the exploration of the Aussaresses affair, this chapter analyses the French legal position on acts of torture perpetrated during the Algerian war. It seeks to answer two distinct questions. First, what prevents acts reported by victims (or even perpetrators) from being classified as crimes against humanity? Second, how do judges justify applying the amnesties to acts that could allegedly be constitutive of crimes against humanity? This chapter argues that amnesty acts as a ‘constraining norm’ on the basis of which judges have interpreted the law on crimes against humanity and war crimes. As the following analysis of the French jurisprudence demonstrates, the amnesties do not deny that crimes may have been perpetrated. Instead, judicial reasoning leads to an ambiguous situation: whereby the restrictive definition of crimes against humanity creates a ‘legal contradiction’ in which amnesty covers acts of torture and bars the possibility of prosecution.

After introducing the context of the debate on torture during the Algerian war, this chapter explores how the amnesty has influenced the application of criminal law. Next, it examines the strategies used to circumvent this influence and reach a recognition of accountability.

## I. The Aussaresses Affair: Torture and the French Army

*‘I quickly became convinced that those circumstances explained and justified their methods. As surprising as it may appear, the use of this kind of violence which is unacceptable under normal circumstances, could become inevitable in a situation that clearly defies every rule.’*

Paul Aussaresses, *The Battle of the Casbah*<sup>511</sup>

The quote above refers to the use of torture during the Algerian war by Paul Aussaresses, a retired member of the 10<sup>th</sup> Parachute Division. Aussaresses was a famous figure of the French army. Deputy to General Massu in the 10<sup>th</sup> Parachute Division, the ‘paras’, Aussaresses had participated in the Battle of Algiers. He holds the Resistance Medal for his action with the Free French Forces in World War II. During the Algerian war, he acted as counterintelligence officer and paratrooper. In his book *Services Spéciaux, Algérie 1955-1962*, published in 2001, Aussaresses gives an account of the

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<sup>511</sup> Paul Aussaresses, *Services Spéciaux: Algérie, 1955–1957* (Paris: Éditions Perrin 2001), English version translated by Robert L. Miller as *The Battle of the Casbah: Terrorism and Counter-Terrorism in Algeria, 1955-1957* (New York: Enigma Books 2002) 17.

Algerian war and the practices undertaken by the French army. He notably described how he had recourse to the torture of Algerian prisoners and acknowledged for the first time that he had murdered two Algerian liberation leaders, whose deaths had until then been described officially as suicides. They were Ali Boumendjel and Larbi Ben M'Hidi. In 2001, whose sister announced in Algiers that she intended to take legal action against General Aussaresses.

This section examines the impact of the emergence of historical accounts on past crimes on legal proceedings. It explores this question through the analysis of the proceedings following Aussaresses' account and contextualises it with regard to the contemporary debate on the legacy of the Colonial past it triggered. This section also seeks to locate Aussaresses' disclosures in the French legal context. It highlights the historical significance of this revelation decades after the end of the conflict.

Aussaresses' book holds a historical significance for the construction of the official narrative on the Algerian War for three main reasons.

Firstly, the book has the value of a testimony from a direct actor of the conflict. For decades, silence has characterized the telling of the Algerian war (see Chapter 7 for further details). The publication of Aussaresses' account addressed one of the most disturbing taboos of the war, namely the use of torture by the French army. In his book, Aussaresses provides evidence that the French army used torture against the Algerian population and that these acts were known by the French leadership. Aussaresses describes the holding of torture sessions in secret locations, such as villas, wine caves, or Turkish baths, and by specific military units. Notably, Aussaresses admits that in 1957 torture and murder were an integral part of France's war policy. He boasts that the torture methods employed were not covered by the conventions of war, that he had given his subordinates orders to kill and had personally liquidated 24 FLN members, telling *Le Monde*, 'I do not regret it'.<sup>512</sup> Paul Aussaresses borrows the same arguments used to rationalize the granting of 'special powers' to the French military in Algeria in March 1956 in the first place. Indeed, he spoke of the need to fight the terrorism of the Algerian independence fighters, at all costs and by all means. The policemen were

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<sup>512</sup> Florence Beaugé, 'Les Aveux du Général Aussaresses': 'Je me suis résolu à la torture', *Le Monde* (Paris, 4 December 2013). Available at:

[lemonde.fr/disparitions/article/2013/12/04/les-aveux-du-general-aussaresses-je-me-suis-resolu-a-la-torture\\_3524992\\_3382.html#TZ6DJFRlohZEdM7.99](http://lemonde.fr/disparitions/article/2013/12/04/les-aveux-du-general-aussaresses-je-me-suis-resolu-a-la-torture_3524992_3382.html#TZ6DJFRlohZEdM7.99) [last visited May 2015]

neither torturers nor monsters but ordinary men devoted to their country. Further, he continues, ‘I consider I did my difficult duty of a soldier implicated in a difficult mission’.<sup>513</sup> The tone, coupled with the absence of remorse or regret, added to the controversial nature of Aussaresses account and expressions of revulsion in French public opinion.

Secondly, the publication of the book brought out the responsibility of the judiciary during the Algerian war. He describes how torture became part of the counter-insurgency strategy of France and implicates the structure of the judicial functions during the conflict. The participation of the judiciary during the war was first facilitated by the particularities of the structure of the courts. Algeria formed part of the French territory and was divided in three departments: Oran, Constantine and Algiers. During the war, courts of law were functioning under the same framework as the one in the Metropole. The presidency of the courts was strictly reserved for the French (*Français de souche*) and only rarely would an Algerian Muslim hold a high position in a court of law. Unlike the metropolitan jurisdictions, judges were appointed on the basis of their race. Secondly the state of emergency shared the judicial power between civil judges and elected judges and the military. The Cour de Cassation, which was located in the Metropole, could also be used to hear cases concerning the detention of prisoners and abuses. This particular legal framework made it possible to for French military operations to bypass legal limits without departing from formal constitutional rule. Until 1960, civil (i.e. non-military) judges were in charge of *délits* (minor crimes), and the military judges of crimes proper. As such, ordinary courts were in charge of thousands of matters while the military courts were dealing with hundreds of cases each month. In 1960, *procureurs militaires* (military prosecutors) were introduced to ease the task of the judges.<sup>514</sup> Further, judges would investigate and prosecute on behalf of the military. Since the end of the war, there were few attempts to prosecute French soldiers. Historian Raphaëlle Branche explains that evidence of torture being perpetrated was difficult to present.<sup>515</sup> In most instances, the victims could only describe their suffering as they could not present a doctor’s report. If they were able to provide information about the units that arrested them, or bring witnesses, they would have to fear reprisals.

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<sup>513</sup> Aussaresses, *Services Spéciaux* (n 476) 15.

<sup>514</sup> See Report on the Activity of Military Prosecutors, Rapport sur l’Activité des Procureurs Militaires, 7 June 1962, Centre des Archives Contemporaines (CAC), 980518, art 2.

<sup>515</sup> Raphaëlle Branche and Sylvie Thénault, ‘L’Impossible Procès de la Torture Pendant la Guerre d’Algérie’ in Marc Olivier Baruch and Vincent Duclert (eds), *Procès et Politique. Justice, Politique et République: de l’Affaire Dreyfus à la Guerre d’Algérie* (Brussels: IHTP-CNRS 1999).

Furthermore, witnesses could only testify to hearing screams and the condition of detainees after being interrogated. Even after the war, the atmosphere was not more favourable to legal action. Indeed, as Chapter 4 explained, amnesty was granted to all French soldiers despite the crimes they could have committed. The amnesties were the response to the demands to rehabilitate the French soldiers and were used as a political tool to appease the tension and settle accounts on the Algerian war. Essentially, amnesty legitimated a system of impunity for perpetrators of torture and gave them immunity against prosecution. Consequently, those who called for the prosecution of the French soldiers were seen as sabotaging this collective will to forget the past. Ultimately this muted them into silence. Section II of this chapter explores in more detail the political context that discouraged support for victims in their attempts to have prosecutions brought against French soldiers. In a *Note de service* (memorandum), General Massu wrote that he was satisfied by the jurisprudence of the Cour de Cassation, which was to him ‘quite liberal’. Closer examination of the jurisprudence of the courts reveals that the judges adopted a wide approach to interpreting facts that would incriminate the military. As the Argane decision illustrates, prisoners could be held in custody indefinitely.<sup>516</sup> The Cour de Cassation ruled that investigation by the military prosecutor started the day the individual was presented to him. The court also rejected the demand to recognize detention in *centres de triage* (internment camps) as custody, which was governed by strict procedural rules. In the Boucetta case, the court declined to look into the justification (motifs) for extending the interrogation of a suspect.<sup>517</sup> In two judgments in August and November 1959, the Cour de Cassation refused to examine lower courts’ judgments based on confessions allegedly obtained by torture, on the grounds that torture was a ‘political problem’. In January 1962, a tribunal acquitted three army officers who had allegedly tortured to death an Algerian woman. In addition, the verdicts and sentences rendered by the military courts were soft. In May 1960, the Military Tribunal of Bordeaux discharged six members of a raiding party accused of homicide and grievous bodily harm of Algerian suspects. In December 1961, three police officers were sentenced to pay a fine for torturing Algerians held in custody. In September 1958, 1,315 ‘crimes’ were instructed and 816 ‘*délits*’ for acts perpetrated in

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<sup>516</sup> Cour de Cassation, Chambre Criminelle (Cass. crim.) 19 Septembre 1960 (Argane).

<sup>517</sup> Sylvie Thénault, *Une Drôle De Justice: Les Magistrats dans la Guerre d’Algérie* (Paris: Découverte 2001) 53.

connection with the events in Algeria.<sup>518</sup> On the other hand, the numerous attempts to prosecute the practices of the French army were dismissed with a *non-lieux* (dismissal) or minor sentences.<sup>519</sup> In 1957, a group of lawyers and human rights activists made great efforts in denouncing the inhuman treatment of Algerian detainees. As they succeeded in to publicising cases of injustice and alert public opinion, the Mollet government created the Commission to Safeguard Individual Rights and Liberties (*Commission de Sauvegarde des Droits et Libertés Individuelles*), an independent body given the responsibility of reporting on human rights infractions by the military. The Commission was made up of 12 highly accredited individuals with varied political horizons – but without real power. Several of its members, who had gathered overwhelming evidence of torture, resigned in September 1957 to protest a situation that made them the hostages of a government that was a party to the repression.

Thirdly, it created an opportunity to revise the Algerian war. When Paul Aussaresses published *Services Spéciaux* in 2001 the French public already knew that the French army had resorted to torture during the Algerian war. Since the beginning of the conflict, human rights activists had alerted public opinion to the French practices in Algeria. Frequently, army veterans would speak to the press about their past action, admitting to torture. General Jacques Massu, a leader of the paratroopers, had made important and controversial revelations about torture in the 1970s. However, the amnesty decrees and laws enacted at the end of the war prevented any possibility of investigating and prosecuting acts of torture by the French army. Article 1 of the amnesty Law of 31 July 1968 states that:

All crimes committed in connection with the events in Algeria are amnestied by law. Crimes committed by military personnel serving in Algeria during the period covered in the first paragraph of this Article are deemed to have been committed in connection with the events in Algeria.<sup>520</sup>

After the publication of Aussaresses' book, the official reactions reflected the ambivalence of the French state to the practices of the French army during the war.

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<sup>518</sup> Thénault, *Drôle de Justice* (n 8). This series of cases is also described in Pierre Vidal-Naquet, *Mémoires: la brisure et l'attente, 1930-1955*, Volume 1 (Paris: Editions Seuil/ La Découverte 1998).

<sup>519</sup> Vidal-Naquet, *Mémoires* (n 9) 24-30.

<sup>520</sup> Loi n° 68-697 Du 31 Juillet 1968 Portant Amnistie (Algerie) JORF Du 2 Août 1968 7521, Article 1.

While the descriptions in Aussaresses' book prompted condemnation, the French government refused to endorse these crimes and yet rejected calls for a formal apology over France's use of torture during the Algerian war of independence. In a television interview, French President Jacques Chirac said that he would do nothing to detract from the honour of those French soldiers who had fought in the conflict.<sup>521</sup> Nevertheless, in a symbolic gesture, President Chirac withdrew General Aussaresses' status and medal as Commander of the Légion d'honneur. But, again, this gesture was marked by ambiguity. It was not clear whether it was the torture that was repudiated or, rather, as many have commented, that Aussaresses was dishonoured for having broken the silence on torture. For journalist Alain Genestar the attitude of the French government seemed to suggest that the reason why Aussaresses had provoked a stir of indignation was because he publicly announced what French society had taken so long to hear. Lacking a clear condemnation, the Aussaresses affair provoked the question whether it was not revulsion at the torture that triggered the government's indignation, but rather its revelation.<sup>522</sup>

Following the book's publication, a grouping of human rights organizations, the *Mouvement contre le Racisme et pour l'Amitié entre les Peuples* (MRAP), pressed for charges against Aussaresses for crimes against humanity. The *Association des Chrétiens pour l'Abolition de la Torture* (ACAT) and the *Ligue des Droits de l'Homme* (LDH) launched constitutional law proceedings as civil petitioners (*partie civile*) seeking to require the prosecutor to indict Aussaresses for crimes against humanity. In a parallel action the public prosecutor filed charges against Aussaresses and his publishers for condoning war crimes (*apologie de crimes de guerre*), in which LDH joined as *partie civile*.

After two years of court proceedings, in 2003 the Cour de Cassation upheld the decision of the lower courts to dismiss the demand for prosecution of crimes against humanity.<sup>523</sup> However, in the other case (*apologie de crime*), the judges of the Cour de Cassation upheld the sentencing of Paul Aussaresses to a fine 7,500 euros for justifying the use of

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<sup>521</sup> 'Algeria: Chirac Rejects 'Torture Apology'', BBC News, 15 December 2000. Available at: [news.bbc.co.uk/1/hi/world/europe/1071504.stm](http://news.bbc.co.uk/1/hi/world/europe/1071504.stm) [last accessed January 2011]

<sup>522</sup> Alain Genestar, 'Torture, La Fin De La Quarantaine', *Paris Match* (Paris, 17 May 2001) 45: 'De quoi s'indigne-t-on? Des aveux du vieux général Aussaresses sur la torture en Algérie. Ou de l'exhibition publique de ces crimes. Est-ce la torture qui révolte ou sa révélations qui scandalise?'

<sup>523</sup> Cass. Crim. Arret de 17 Juin 2003 n° 02-83.986 (Aussaresses ), J.C.P Bull. 122, 465-469. Confirming the Ruling of Tthe Chambre De L'instruction De La Cour D'appel De Paris Du 12 Avril 2002. Available At:

[Legifrance.Gouv.Fr/Affichjurijudi.Do?Oldaction=Rechjurijudi&Idtexte=JURITEXT000007069262&Fastreqid=242167361&Fastpos=1](http://Legifrance.Gouv.Fr/Affichjurijudi.Do?Oldaction=Rechjurijudi&Idtexte=JURITEXT000007069262&Fastreqid=242167361&Fastpos=1)

torture as legitimate.<sup>524</sup> His publishers, Olivier Orban and Xavier Bartillat, directors of Éditions Perrin and its parent company Éditions Plon, were fined 15,000 euros each.<sup>525</sup> On appeal to the Cour de Cassation, this was confirmed.

The offence of *apologie de crimes de guerre* (condoning of war crimes) is attached to French anti-hate speech law.<sup>526</sup> The indictment relied on Article 24 of 1881 Law of the Press;<sup>527</sup> *apologie de crime* also has a possible criminal law element<sup>528</sup> and is broadly seen as associated with incitement to:

racial discrimination, hatred, or violence on the basis of one's origin or membership (or non-membership) in an ethnic, national, racial, or religious group. A criminal code provision likewise makes it an offence to engage in similar conduct via private communication.<sup>529</sup>

Earlier, in a high court (Tribunale de grande instance) judgment, the offence of *apologie des crimes guerre* was defined as 'discourse which justifies war crimes in a way that incites the reader to consider such crime as justified and erases the moral reprobation attached to this crime under the law'.<sup>530</sup>

The condoning of war crimes constitutes an offence because it indirectly incites others to perpetrate similar crimes. As the Cour de Cassation affirmed:

[F]reedom of speech must be exercised within limits established by law, in particular, the rules that prohibit the condoning of war crimes,

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<sup>524</sup> Tribunal De Grande Instance (TGI) 25 Janvier 2002, Paris, 17e Ch. (Ligue Des Droits De l'Homme Et Autres C/ Aussaresses Et Orban).

<sup>525</sup> Cass. Crim. Arret De 7 Decembre 2004 (Orban And Bertillat) N° 03-82.832. Available At: [Legifrance.Gouv.Fr/Affichjurijudi.Do?Idtexte=JURITEXT000007070089&Datetexte=](http://legifrance.gouv.fr/Affichjurijudi.Do?Idtexte=JURITEXT000007070089&Datetexte=)

<sup>526</sup> Damien Roets, 'L'apologie Des Crimes De Guerre Commis En Algérie, Hors Du Champ De Protection de la Convention Européenne des Droits de L'homme' [2005] 20 Recueil Dalloz Sirey 1342.

<sup>527</sup> Loi Du 29 Juillet 1881 Sur La Liberté De La Presse, Article 24. Available At:

[Legifrance.Gouv.Fr/Affichtextearticle.Do?Idarticle=LEGIARTI000006419715&Cidtexte=LEGITEXT00006070722](http://legifrance.gouv.fr/Affichtextearticle.Do?Idarticle=LEGIARTI000006419715&Cidtexte=LEGITEXT00006070722)

<sup>528</sup> Code Pénal Article 435.

<sup>529</sup> <http://www.legal-project.org/issues/european-hate-speech-laws>

<sup>530</sup> TGI (Ligue des Droits de l'Homme et autres c/ Aussaresses et Orban) (n 485): 'L'apologie s'entend du discours qui présente un crime de guerre de telle sorte que le lecteur est incité à porter sur ce crime un jugement de valeur favorable effaçant la réprobation morale qui, de par la loi s'attache à ce crime. Elle est incriminée en ce qu'elle constitue une provocation indirecte à commettre de semblables crimes.' Available at:

[legipresse.com/011-41424-Constitution-du-delit-d-apologie-de-crimes-de-guerre-par-le-recit-et-la-justification-de-tortures-pendant-la-guerre-d-Algerie.html](http://legipresse.com/011-41424-Constitution-du-delit-d-apologie-de-crimes-de-guerre-par-le-recit-et-la-justification-de-tortures-pendant-la-guerre-d-Algerie.html)

and, beyond its testimonial value, this book, as was rightly ruled by the tribunal includes a condoning of war crimes.<sup>531</sup>

In his defence, Aussaresses had sought to explain that the position taken in the book was that torture was justified in combatting the terrorism of the Algerian independence fighters, at all costs and by all means.<sup>532</sup> During the proceedings Maître Leclerc probed his stance about torture: ‘Do you confirm that your only regret is to not have been able to make this man talk?’ ‘Yes’, responded Aussaresses. To which Maître Leclerc pursued: ‘I would have appreciated it if you would have given me a different answer.’ The court noted that ‘while the [Aussaresses] had claimed to be aware that this had been a “difficult task”, he had nonetheless not repudiated his past’.<sup>533</sup> On the contrary, he explained that he had “acted out of his duty as a paratrooper and that, while he had had no choice in the matter, he expressed the hope that young army officers would never have to do what he had been obliged to do for his country in Algeria”.<sup>534</sup> Hence Aussaresses was condemned because he provided a justification for his actions and showed no remorse or regret.

However, the Aussaresses affair holds deeper implications. Indeed, his defence of the use of torture borrows the same arguments used to rationalize the granting of “special powers” to the French military in Algeria in March 1956 in the first place. As the above exchange shows, Aussaresses maintained that he was ‘acting in accordance with the mission he was assigned’.<sup>535</sup> Aussaresses made it clear that he did not seek to distance himself from the acts he had committed.

The publishers, in their turn, were held liable for the dissemination of words deemed to be inciting hatred.<sup>536</sup> The reasoning of the judges in the high court highlighted a short *avertissement* (warning) that the directors did not take any distance vis-à-vis the text. ‘It presents Aussaresses as a “living legend”; the directors glorify the general and describe

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<sup>531</sup> Cass. crim. (Aussaresses) (n 14): ‘[...] la liberté d’expression doit s’exercer dans le cadre des limites fixées par la loi, notamment dans le respect des dispositions qui interdisent l’apologie de crimes de guerre; qu’au-delà du témoignage, le livre comporte, comme l’a jugé à juste titre le tribunal, une apologie de crimes de guerre’ [author’s translation].

<sup>532</sup> Aussaresses, *Services Spéciaux* (n 476) 15.

<sup>533</sup> ECtHR *Orban and Others v France*, 15 January 2009, Appl no. 20985/05

<sup>534</sup> ECtHR *Orban and Others v France*, 15 January 2009, Appl no. 20985/05

<sup>535</sup> ECtHR *Orban and Others v France*, 15 January 2009, Appl no. 20985/05

<sup>536</sup> ‘Aussaresses’ [2002] *Diplomatie Juridique*, 25 January 2002. Available at: [diplomatiejudiciaire.com/France/Aussaresses](http://diplomatiejudiciaire.com/France/Aussaresses).

his experience as “the most painful mission”,<sup>537</sup> announcing the book as a unique direct testimony which contributes to explaining the ‘deep complexity of an era which still inhabits our present’.<sup>538</sup>

In 2007, Aouissou’s publishers, Olivier Orban and Xavier de Bartillat, raised the issue of the memoirs as a matter of freedom of speech in front of the European Court of Human Rights (ECtHR). The ECtHR found that France had violated Article 10 (Freedom of expression) of the European Convention on Human Rights.<sup>539</sup> It found that the action of sanctioning the publishers for having participated in the dissemination of the testimony of a third person concerning events belonging to the past of a particular nation had significantly hindered the public discussion of a matter of public interest. (See Chapter 6 for further analysis.)

The Aouissou trial resuscitated a public debate on torture and the role of the French state in rendering it permissible. The question arises as to why Aouissou’s testimony took on such a prominent place in the public debate? It was not the first time that a veteran had described the brutality of the conflict and the centrality of torture in the French operations. However, unlike past testimony, Aouissou’s book was published in a political time more favourable to discussion and debate on such practices. The official recognition of the war in 1999 and the greater access to archives left no more doubt about the brutality, extent and systematic use of torture in Algeria.<sup>540</sup>

## II. Influence of the Amnesty on the Interpretation of the French Provisions on Crimes Against Humanity

This section examines the reasoning of the decision of 17 June 2003 to reject the demand to prosecute the acts perpetrated by Aouissou.<sup>541</sup> It shows how the application of the French amnesty provisions on crimes against humanity cannot be applied to colonial wars in general and the Algerian war in particular. It analyses the

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<sup>537</sup> Quoted in TGI (Ligue des Droits de l’Homme et autres c/ Aouissou et Orban) (n 485): ‘la mission la plus douloureuse’ [author’s translation].

<sup>538</sup> Quoted in TGI Ligue des Droits de l’Homme et autres c/ Aouissou et Orban) (n 485) : ‘contribue à faire comprendre la terrible complexité d’une époque qui continue d’habiter notre présent’[author’s translation].

<sup>539</sup> ECtHR *Orban and Others v France*, 15 January 2009, Appl no. 20985/05.

<sup>540</sup> See notably Raphaëlle Branche, *La Torture et l’Armée Pendant la Guerre d’Algérie: 1954-1962* (Paris: Gallimard 2001).

<sup>541</sup> Cass. crim. (Aouissou) (n 476).

trajectory of French provisions on crimes against humanity as they were variously interpreted in French jurisprudence to exclude acts perpetrated during the colonial war. This case is particularly useful to examine as it demonstrates the rationale of the applicability of the amnesty after the recognition of the war, which occurred in 1999.

### A. Non Prosecution on the Basis of French Provision on Crimes Against Humanity

In the *Aussaresses* case of 17 June 2003, the civil petitioners sought to rely on two international law sources prohibiting crimes against humanity: Article 6 (c) of the Nuremberg Charter and international customary law. With respect to the first, the judges of the Cour de Cassation first found that the 1964 French law, which prescribes that crimes against humanity are not subject to any statute of limitations, could not be applied to crimes committed outside the context of the World War II. Secondly, it found that international customary law could not be used to make up for the absence of domestic law prohibiting acts of torture perpetrated by the French army during the Algerian war. The court refused to extend the application of these provisions. Instead, the judges restated the ‘minimal reading’ of the definition of crimes against humanity as it was found in its previous French jurisprudence.

A first prong of the argumentation of the judges relied on the restrictive interpretation of French provisions on crimes against humanity. The judges considered that these only covered crimes perpetrated on behalf of the Axis powers during the Second World War. French provisions on crimes against humanity refer to the list of crimes identified as crimes against humanity in the Charter of the International Military Tribunal. Article 6 of the Nuremberg Charter constitutes the cornerstone of French provisions on the definition of crimes against humanity. It provides that:

The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes [...] ; (a) crimes against peace: [...]; (b) war crimes: [...] ; (c) crimes against humanity: namely, murder, extermination, enslavement, deportation and other inhumane acts

committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

The French legal definition of crimes against humanity mirrors the definition in IMT Article 6 (c), adopting many of its terms:

Deportation, enslavement, or massive and systematic summary executions, kidnapping of persons followed by their disappearance, torture or inhuman acts, inspired by political, philosophical, racial or religious reasons, and organized according to a concerted plan against a group within the civilian population.<sup>542</sup>

Then, on 26 December 1964, the French Parliament enacted a law providing that crimes against humanity were not subject to any statute of limitation. As such, it introduced the concept of imprescriptibility of crimes against humanity into French law.<sup>543</sup> However, this was itself narrowly defined in respect to international law. As the Dalloz commentary on the French Criminal Code notes:

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<sup>542</sup> Code Pénal Article 212-1: 'La déportation, la réduction en esclavage ou la pratique massive et systématique d'exécutions sommaires, d'enlèvements de personnes suivis de leur disparition, de la torture ou d'actes inhumains, inspirées par des motifs politiques, philosophiques, raciaux ou religieux et organisées en exécution d'un plan concerté à l'encontre d'un groupe de population civile [...]'. Available at:

[legifrance.gouv.fr/affichCodeArticle.do;jsessionid=ADEB1A74FC474237CCE70D26FDAC5907.tpdila10v\\_1?idArticle=LEGIARTI000006417534&cidTexte=LEGITEXT000006070719&categorieLien=id&dateTexte=20040806](http://legifrance.gouv.fr/affichCodeArticle.do;jsessionid=ADEB1A74FC474237CCE70D26FDAC5907.tpdila10v_1?idArticle=LEGIARTI000006417534&cidTexte=LEGITEXT000006070719&categorieLien=id&dateTexte=20040806)

<sup>543</sup> Loi N°64-1326 Du 26 Décembre 1964 les crimes contre l'humanité, tels qu'ils sont définis par la résolution des nations unies du 13 février 1946, prenant acte de la définition des crimes contre l'humanité, telle qu'elle figure dans la charte du tribunal international du 8 août 1945, sont imprescriptibles par leur nature. JORF 29 décembre 1964 11788. Available at:

<https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000684761&categorieLien=id>  
[last visited June 2013]

Article 1 (article unique): Les crimes contre l'humanité, tels qu'ils sont définis par la résolution des Nations Unies du 13 février 1946, prenant acte de la définition des crimes contre l'humanité, telle qu'elle figure dans la charte du tribunal international du 8 août 1945, sont imprescriptibles par leur nature. Loi n° 64-1326 du 26 décembre 1964 tendant à constater l'imprescriptibilité des crimes contre l'humanité, JORF du 29 décembre 1964 11788 ('Crimes against humanity, as defined by the resolution of the United Nations of 13 February 1946, taking legal cognizance of the definition of crimes against humanity, as it figures in the Charter of the International Tribunal of 8 August 1945, are imprescriptible by their nature'). It consists of simply one article, Article 1: 'Les crimes contre l'humanité, tels qu'ils sont définis par la résolution des Nations Unies du 13 février 1946, prenant acte de la définition des crimes contre l'humanité, telle qu'elle figure dans la charte du tribunal international du 8 août 1945, sont imprescriptibles par leur nature.' Available at:

Crimes against humanity [...] are, ‘by nature’, not subject to a statute of limitations. [...] Their imprescriptibility is inferred as much from general principles of law recognized by the assembly of nations as from the statute of the International Military Tribunal appended to the London Charter of 8 August 1945; the [French national] law of December **26**, 1964, limited itself to confirming that this imprescriptibility already was acquired, in internal law, **by** the effect of the international texts to which France had adhered.<sup>544</sup>

An earlier decision (1 April 1993) the Court de Cassation stated that:

No constitutional principle, nor any principle of international law, allows an affirmation according to which a category of offences would be, by nature, removed from the power of amnesty of the national legislator. The legislator may modulate the range and modalities of each law of amnesty. He can choose to erase not only venial offences [...] but also the gravest offences, such as crimes, and even crimes against humanity [...]. The principle of imprescriptibility of these crimes constituting an exceptional derogation to the rules of ordinary procedures must be interpreted restrictively.<sup>545</sup>

A closer analysis of French provisions on crimes against humanity permits two observations. The first one is that its scope of application is limited to individuals who have acted on behalf of the Axis. Secondly, it is not clear whether the ‘jurisdiction of the Tribunal’ refers to territorial jurisdiction (crimes committed in the Axis countries) or personal jurisdiction (individual acting on the behalf of Axis countries).<sup>546</sup> In her commentary on the Aussaresses decision, Lelieur-Fischer asks, further, whether the term ‘jurisdiction’ ‘should be taken in a material sense and, by requiring that the crime against humanity be committed “in execution of or in connection with any crime within the jurisdiction of the Tribunal”, did the drafters of the Charter have in mind crimes against peace as defined in paragraph (a) and war crimes as defined in paragraph (b)?

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<sup>544</sup> As cited and discussed in Vivian G. Curran, ‘Politicizing the Crime Against Humanity: The French Example’ [2003] 78 *Notre Dame Law Review* 686-7.

<sup>545</sup> As quoted in Yves Beigbeder, *Judging War Crimes and Torture: French Justice and International Criminal Tribunals and Commissions (1940-2005)* (Leiden and Boston: Martinus Nijhoff 2006) 10.

<sup>546</sup> Juliette Lelieur-Fischer, ‘Prosecuting the Crimes against Humanity Committed During the Algerian War: An Impossible Endeavour?: The 2003 Decision of the French Court of Cassation in Aussaresses’ [2004] 2(1) *Journal of International Criminal Justice* 239.

Elements of answers to these questions may be found in the jurisprudential application of the French provisions on crimes against humanity. In the *Barbie* judgement, the Cour de Cassation defined the contours of application of IMT Article 6 (c) in terms of the existence of a ‘hegemonic political ideology’:

[I]nhumane acts and persecutions committed in a systematic manner, in the name of a state practising a hegemonic political ideology [...] committed in a systematic fashion not only on the basis of membership in a particular racial or religious group, but also against those who oppose this policy, regardless of the nature of their opposition.<sup>547</sup>

However, in the 1990s this definition underwent a substantive change with the *Touvier* decision. Shortly after the *Barbie* decision, the French court was confronted with the limitation of its own reasoning with the prosecution of Paul Touvier, a Frenchman who had collaborated with the Nazi Regime and worked for the *Milice*<sup>548</sup> during the Vichy period. The lower court initially dismissed the charges against Touvier on a variety of grounds, notably that the acts in question did not meet the judicial requirement of the definition of crimes against humanity, in particular (following *Barbie*), the requirement of that they be carried out in the name of a state practising a ‘hegemonic political ideology’.<sup>549</sup>

Reviewed by the Cour de Cassation, the judges ruled that the authors or accomplices of crimes against humanity are punishable only if they acted on behalf of an Axis country.<sup>550</sup> It was on the basis of this interpretation that, in a later case concerning acts perpetrated in Indochina, the *Boudarel* case, the judges dismissed the demand of application for crimes perpetrated outside the context of World War II.<sup>551</sup> They

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<sup>547</sup> Cass. Crim. 20 decembre 1985 Bull. Crim. 1985 n°407 (*Barbie*): ‘Les actes inhumains et les persécutions qui, on au nom d’un état pratiquant une politique d’hégémonie ideologique ont été commis d’une façon systématique non seulement contre les personnes en raison de leur appartenance à une collectivité raciale ou religieuse, mais aussi contre les adversaires de cette politique, quelle que soit la forme de leur opposition’ (at 1053) [author’s translation].

<sup>548</sup> The *Milice* was a Gestapo-like paramilitary organization created by the Vichy regime.

<sup>549</sup> Leila Sadat Wexler, ‘The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again’ [1994] 32(2) Columbia Journal of Transnational Law 350.

<sup>550</sup> Cass. Crim. 27 novembre 1992, Bull. crim. n° 394: ‘[...] les auteurs ou complices de crimes contre l’humanité ne sont punis que s’ils ont agi pour le compte d’un pays européen de l’Axe’ [author’s translation].

<sup>551</sup> Cass. Crim. 1 avril 1993, n° 92-82.273, Bull. crim., n°143 (*Boudarel*). Available at:

[legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007065738&dateTexte](http://legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007065738&dateTexte) [last visited March 2014]

considered that the provisions of the Law of 26 December 1964 and the Nuremberg Charter were only applicable for crimes perpetrated on behalf of Axis countries.<sup>552</sup> It ruled that:

[T]he provisions of the 1964 law and of the Charter of the International Military tribunal at Nuremberg [...] only cover acts committed on behalf of European Axis countries; [...] and therefore, the acts denounced by the civil petitioners, committed after the Second World War, cannot be characterized as crimes against humanity within the meaning of these provisions.<sup>553</sup>

As such, the judges of the supreme court in the Boudarel case narrowed the interpretation even further, in abandoning the element of ‘hegemonic political ideology’ while retaining that the crimes must have been perpetrated on the behalf of Axis countries.

The retroactive recognition of crimes against humanity by the judges in the Barbie trial should have had the effect of integrating the crimes perpetrated during the Algerian war into the scope of prosecution of crimes against humanity. However, the restrictive interpretation of the definition of crimes against humanity in Touvier undid this potential. It has been explained as the outcome of a *stratégie politique juridique* (political-legal strategy) to avoid dealing with the political question of the legacy of the Vichy regime.<sup>554</sup> By this move, the judges pre-empted having to answer the factual question whether the Vichy regime practised a hegemonic political ideology. As was commented in the press: ‘dans la chaîne des responsabilités, le maillon de la France de Vichy a-t-il sauté, l’argumentation juridique se focalisant plus commodément sur la seule Allemagne nazie’.<sup>555</sup> The Touvier decision created a legal fiction whereby crimes perpetrated by French people on behalf of France cannot be prosecuted under the

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<sup>552</sup> Cass. crim. 1 avril 1993 (Boudarel) (n 38): ‘[L]es dispositions de la loi du 26 décembre 1964, et du statut du Tribunal international de Nuremberg [...] ne concernent que les faits commis pour le compte des pays européens de l’Axe [...] qu’ainsi, les faits dénoncés par les parties civiles, postérieurs à la seconde guerre mondiale, n’étaient pas susceptibles de recevoir la qualification de crimes contre l’humanité au sens des textes précités’ [author’s translation].

<sup>553</sup> Cass. Crim. 1 avril 1993 (Boudarel) (n 38): ‘[L]es dispositions de la loi du 26 décembre 1964, et du statut du Tribunal militaire international de Nuremberg [...] ne concernent que les faits commis pour le compte des pays européens de l’Axe [...] qu’ainsi, les faits dénoncés par les parties civiles, postérieurs à la seconde guerre mondiale, n’étaient pas susceptibles de recevoir la qualification de crimes contre l’humanité au sens des textes précités.’

<sup>554</sup> See in particular Olivier Cayla, ‘La Qualification. Ouverture: la Qualification ou la Vérité du Droit’, [1993] 18 *Droits*, revue française de théorie juridique, 9-10.

<sup>555</sup> Roger Koering-Joulin and Pierre Wachsmann, ‘Hégémonie Idéologique’, *Le Monde* (Paris, 19 December 1992) 2.

provisions of crimes against humanity. Vichy was not France; therefore Vichy was not a state practising a hegemonic political ideology.

In 1994 the Criminal Code was revised, making crimes against humanity part of French national law. Specifically, Article 213-4 states:

The perpetrator or the accomplice to a felony under the present title [crimes against humanity] is not exonerated from his responsibility on the sole basis that he performed an act prescribed or authorized by statutory or regulatory provisions, or an act ordered by legitimate authority.<sup>556</sup>

However, this provision is applicable only to crimes perpetrated after 1 November 1994 and as a result could not be applied in the Aussaresses case. Taken together with Touvier, this juridical configuration led to the question of the impunity of authors of crimes perpetrated outside the context of World War II and before 1 November 1994. Based on this interpretation, subsequent attempts to investigate and prosecute acts perpetrated during the Algerian War were dismissed.<sup>557</sup>

The second prong of the reasoning of the judges of the Cour de Cassation in the Aussaresses case held that international customary law could not make up for the absence of domestic prohibition.

[C]'est tout aussi vainement que la partie civile invoque une 'coutume internationale' qui ne peut pas pallier l'absence de convention pour créer *ab initio* une incrimination pénale, sachant qu'au demeurant, si tel était le cas, cette coutume, à supposer reconnue de manière universelle, ne pourrait avoir pour effet que d'imposer des obligations aux États qui se sentent liés par elle, sans pour autant avoir d'autre effet contraignant, dans un corpus de droit interne; qu'il importe donc de rechercher si les faits poursuivis sont et étaient susceptibles d'incrimination et de sanction en droit pénal français.<sup>558</sup>

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<sup>556</sup> Code Pénal Article 213-4: 'L'auteur ou le complice d'un crime visé par le present titre ne peut être exonéré de sa responsabilité du seul fait qu'il a accompli un acte prescrit ou autoris par des dispositions législatives ou reglementaires ou un acte commandé par l'autorité legitime.'

<sup>557</sup> See, for example, Cass. crim. 30 mai 2000, Bull. Crim. 2000 n°99-84024 (Papon).

<sup>558</sup> Cass. crim. (Aussaresses) (n 14).

The judges' interpretation made it a matter of French law independent of international law.<sup>559</sup> The international law prohibition on amnesty covering crimes against humanity finds a timid echo in the French jurisprudence. While Article 212-1 of the new code removed the requirement of a nexus between the perpetrator and a European Axis powers, however, these provisions cannot be applied to crimes perpetrated before 1994.<sup>560</sup> Strictly applied in *Aussaresses*, many commentators were surprised by this interpretation. In other circumstances, the court had upheld the prosecution of individuals despite the absence of domestic prohibition and on the basis of the existence of an international customary law.

## B. Application of the Amnesty Laws

The contemporary application of the amnesty comes as a result of the reasoning explored above. Despite the fact that the Geneva Conventions bound France since 1951, the acts of torture perpetrated in Algeria were not considered as crimes against humanity under French law and as a result, the French judge can apply the amnesty to the acts described in the book by Paul Aussaresses.

In 1968, an action was lodged in the supreme administrative court, the Conseil d'État, against the second amnesty decree implementing the Evian Accords, on the ground of 'excess of powers'. The action was brought in relation to the disappearance of Maurice Audin, young French communist.<sup>561</sup> Maurice Audin was a student of mathematics arrested on 11 June 1957 by the French paratroopers. He was questioned about his relationship with two members of the Algerian Communist Party whom the Army suspected of terrorist activity. When, after several days he failed to return home, family and friends made inquiries about him. On 21 June 1957, the military authorities reported that he had escaped their custody and made his way to Tunisia. Mme Audin lodged a complaint of homicide by an unknown person with an examining magistrate on 4 July. The Court of Cassation made *une ordonnance de non-lieu* and dismissed the case for insufficient charges.<sup>562</sup>

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<sup>559</sup> Jean-Francois Roulot, 'Note: un état peut-il amnistier des actes constitutifs de crimes internationaux' [4 July 2001] 27 *La Semaine Juridique* 1329.

<sup>560</sup> Yann Jurovics, 'Crimes de guerre, crimes contre l'humanité', [sept 2003] 410 *Juris-Classeurs P, Droit International, Fascicule*.

<sup>561</sup> Pierre Vidal Naquet, *L'affaire Audin, 1957-1978* (Paris: Minuit 1989) 169.

<sup>562</sup> Cass. Crim. 22 Décembre 1966, no 66-93052. Available at:

Barbie's defence lawyer Jacques Vergès, developing his *strategie de rupture* (defence of diversion), called to the bar one witness, a 50-year-old man named Eddine Lakdar-Toumi. Vergès goal was to prove that France had been inconsistent in applying the laws regarding crimes against humanity. Lakdar-Toumi's father was killed after being arrested by French Army officers during the Algerian war. Yet charges of crimes against humanity for his father's death were dismissed, on the grounds that amnesty had been granted in 1962 for Algerian war crimes. As such Vergès' argument was that, if charges of crimes against humanity committed in Algeria can be dismissed, so should similar charges against Barbie. This argument was countered by a lawyer for civil plaintiffs in the case who said Lakdar-Toumi's suit had been dismissed not because of the amnesty but because it was unclear whether his father had been killed by French forces or by rebel groups who suspected him of having betrayed secrets. Furthermore, the court rejected this argument and considered that the Algerian war jurisprudence could not apply to crimes perpetrated during World War II:

[T]he provisions of these documents [the two statutory orders of 22 March 1962 and the statute of 31 July 1968] are general and absolute; they make clear that the amnesty which they promulgate applies to all transgressions without reserve or distinction as to their nature, their legal quality, or their degree of seriousness, so long as their authors shall have acted within the particular circumstances defined by the law; that the documents referred to above apply in particular to those transgressions which have been called crimes against humanity which are common law crimes, committed under particular circumstances and for reasons which are specified in the texts which define them.

In 1993, in the case of Boudarel, the Supreme Court rejected the application of the principle of imprescriptibility or temporal limitation of acts perpetrated in relation to the Vietnamese 'insurrection'.<sup>563</sup> Therefore it ruled that the amnesty could be applied:

[...] the appealed decision is not to be overruled insofar as the Court of Cassation can ascertain that the acts allegedly committed by Georges Boudarel, irrespective of the ordinary prohibitions they may fall under, would necessarily be included in the scope of application of Article 30 of the law granting amnesty for any

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<sup>563</sup> Article 30, amnesty law n° 66-396, 17 June 1966.

crimes committed in relation to events pursuant to the Vietnamese insurrection.<sup>564</sup>

In 2003 in *Aussaresses*, the judges were much more explicit in their reasoning. They upheld the application of the amnesty Law of 31 July 1968 on the basis that the acts allegedly perpetrated could not be prosecuted as crimes against humanity. A *contrario* reading of this decision shows that if the acts had been recognized as crimes against humanity, the amnesty would not be applicable. The international law obligation to prosecute crimes against humanity is explicitly referred in the 1994 French penal code provisions on crimes against humanity. However, the court rejected this possibility and relied on the fact that the acts referred to in *Aussaresses*' book were committed before the entry into force of the 1994 new penal code. While they could potentially be prosecuted under other criminal law, by the same token they were covered by the amnesty.

In a decision of 23 December 2002, the Tribunal de Grande Instance of Montpellier rendered a judgment that went towards the opposite direction when it ruled that:

Whatever the legitimacy of such an amnesty [the Mauritanian amnesty of 14 June 1993] in the context of local attempts to foster reconciliation, such a law can only have application upon the territory of the State in question, and cannot be held to stand in the way of the application of international law in third-party states. The law has, as a result, no bearing on the public authority for the application of the law in France.<sup>565</sup>

That decision, which passed with relatively little comment, is important even though it relates primarily to the (non) effect of amnesty on third-party states and does not bear directly upon on restricting the effects of amnesty within the specific territory itself.<sup>566</sup>

Had the crimes revealed by General *Aussaresses* not been perpetrated during the war of decolonization, it would have been possible to prosecute him in two ways: first by using the provisions of the new penal code, thus considering the crimes as crimes against humanity or, second, by referring to an international basis for prosecution.

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<sup>564</sup> Cass. crim. 1 avril 1993 (Boudarel) (n 38).

<sup>565</sup> Case of Ely Ould Dah, Montpellier Assize Court (Court of Appeal) (France) Indictment and Partial Dismissal n°99-14445 (2001).

<sup>566</sup> Code Pénal, Articles 133-9 to 11.

The twist and turns of French jurisprudence on the definition of crimes against humanity provides a vivid illustration of the challenges of investigating and prosecuting offences related to past crimes. In the Aoussresses case, the Court of Cassation developed a discursive approach whereby it avoided addressing the issue of amnesties and instead focused on the nature of the violations. In respect to the subsequent case, on other charges, Damocles Network issued a statement remarking that the decision to uphold the conviction of Paul Aoussresses and his publishers on the ground of the Law of the Press was, to say the least, at odds with France's commitment to the international duty to prosecute war crimes and crimes against humanity. The prosecutions undertaken in France against remaining Nazi criminals were an important jurisprudential contribution to contouring the provisions on crimes against humanity. The trials of Klaus Barbie and Paul Touvier, and Maurice Papon (see Chapter 7), potentially made it possible to resolve crucial issues in relation to the incorporation of crimes against humanity in French criminal law. The revolution of the IMT, in addition to establishing the shape of the definition of crimes against humanity, also allowed the recognition that particularly grave crimes are not committed by abstract entities but by men.<sup>567</sup> Through trials that relive a piece of a bigger 'trauma', other pieces of the war were revived, as Kaplan explains, and such 'abreaction' produces a catharsis and can provide a cure.<sup>568</sup> However, between the origin of the crimes and the Barbie trial, France lived many other traumas. The Aoussresses case highlights the challenges to investigating and prosecuting past crimes. Up to this day, it is not possible to prosecute acts of torture perpetrated by the French army during the Algerian war under the French legal provisions on crimes against humanity. These cases raise the question of the potential of courts to deal with demands of prosecution of past offences.

The 17 June 2003 decision on Aoussresses also shows that the amnesty laws not only give immunity against prosecution, and hence attribution of individual responsibility, but also removes acts from being classified as criminal. The amnesty's principal effect is to extinguish the legal punishment of crimes or offences perpetrated in connection with the Algerian war before 1962.

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<sup>567</sup> Eduardo Greppi, 'The evolution of individual criminal responsibility under international law' [1999] 835 *International Review of the Red Cross*. Available at:

<http://www.icrc.org/eng/resources/documents/misc/57jq2x.htm> [last visited November 2011].

<sup>568</sup> Alice Y. Kaplan, 'On Alain Finkielkraut's "Remembering in Vain": The Klaus Barbie Trial and Crimes against Humanity' [1992] 19(1) *Critical Inquiry* 70-86.

### III. Contemporary Challenges of Investigating and Prosecuting Historical Crimes

This section argues that the potential for courts to escape the influence of the amnesty in order to deal with past crimes is affected by the phenomenon of the ‘politicisation of crimes’. The critical challenge for the courts is to find a balance between the formal limitations of juridical proceedings and the expectations of a public eager to achieve a form of *truth* about the past.

#### A. Attempt to Prosecute Acts of Torture after 1994

One of the principal challenges for the judges investigating crimes covered by the amnesty is to manage the public expectation of recognition of collective responsibility. Liberal legalism privileges individual autonomy and individual responsibility. As the famous Nuremberg maxim posits, crimes are committed by individuals and not by abstract entities. The issue of individual criminal responsibility for crimes amounting to war crimes and crimes against humanity nonetheless raises the question of the role of the state apparatus.

The fieldwork conducted for this research sought to interview some of the individuals who have attempted to prosecute past perpetrators. While none of these attempts succeeded in the conviction of French soldiers, they did nonetheless manage to influence the collective discourse on the recognition that torture was indeed perpetrated and the responsibility of the French army. The case of Mohammed Garne provides an example of an attempt to have crimes of torture adjudicated after the passing of the 1994 law. He challenged the amnesty and sought to confront the judges’ past position on the basis of the recognition of the rape of his mother by French soldiers. During the research interview, he explained how he gathered evidence proving that his mother was raped by French soldiers during her detention and how she had then been repeatedly tortured. Investigating his family history, he had discovered that his mother was arrested by the French military and held in a camp in Kenchela. It was during her detention at this camp that Mohammed Garne was conceived as a result of rape.<sup>569</sup>

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<sup>569</sup> See Mohamed Garne’s homepage. Available at: [garnemohamed.org/lecombatcontinue.html](http://garnemohamed.org/lecombatcontinue.html).

The testimony of Mohammed Garne highlights the difficulty for victims of torture in pressing charges for acts of torture perpetrated during the Algerian war. He reports how difficult it was for him to find out exactly what has happened to his mother. His story took him to Algeria where his mother had been tortured. It was a complex task of finding information and access documents, which would enable him to know where his mother was. When he was researching about his mother in Algeria, people would not speak freely about her ordeal. As he explains, the war and torture was still a vivid wound in Algeria and people would not easily talk about it. Moreover, where rape is still seen as a taboo, it was difficult to bring people to talk about what had happened to his mother. Seeking to know the truth about his mother took Garne on a long investigative journey between France and Algeria which lasted more than 20 years. For years, he attempted to gain access to these archives and find which detention centres his mother had been held in, the name of the guards who were detaining her and the doctor who examined her. He wrote to different ministers asking for exceptional authorisation to bypass the statute of limitation preventing access to the archives. All these attempts were in vain. Equally, as he explains, he received little support from local associations: when he tried to contact a veteran and victims' association, they were unresponsive to his requests. Garne's efforts to gather evidence reflect the lack of a structured system that could respond to the demands of victims to make a claim of justice. As Mohammed Garne stresses, their interest did not lie in condemning an individual but condemning a whole system of injustice occurring during the colonial period.<sup>570</sup>

In another research interview, Josette Audin explained that her attempt to prosecute those who had killed her husband was met with hostility from some veterans. At the time her case was gaining media exposure, she was receiving letters threatening her if she went further.<sup>571</sup>

As such, victims can be rapidly discouraged from engaging in a long and exhausting legal process for which the outcome is by no means guaranteed. While, for Josette Audin and Lakdar-Toumi, the court dismissed their demands, Garne succeeded in having his case heard. The long judicial battle of the Garne affair started in Algeria in the 1980s and ended before a minor court, the *Cour Regionale des Pensions Militaires* (Regional Court of Military Pensions). The verdict of the court recognized the links between the severe conditions of her detention and her pregnancy. It also recognized the

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<sup>570</sup> Research interview, Mohammed Garne (Paris, March 2013).

<sup>571</sup> Research interview, Josette Audin (Paris, January 2013).

causal link between her treatment by the soldiers and Mohammed Garne's disability.<sup>572</sup> The court awarded him a three-year partial invalidity pension for his 'suffering as a foetus', connected to acts of torture committed by French soldiers involving his mother.<sup>573</sup> As a result of the proceedings, he was also awarded compensation amounting to a pension of 400 euros per month for three years and a free travel card.

Unlike the other cases, Garne's lawyer did not seek to bring criminal charges (based on prosecuting unknown offenders). Instead, the focus of his case was the recognition of Garne's disability. The fact that the disability was due to the act of torture perpetrated on his mother when she was pregnant was incidental to the case. Furthermore, requesting reparation in before the Cour Regional des Pensions Militaire raised less of a political stake. As Garne's lawyer explained, his strategy was to find some way to reach the French judge.<sup>574</sup> However, this strategy also had a number of limitations. First, it did not provide a forum to raise the issue of the validity of the amnesty. Second, as in previous instances, the judges did not discuss all the facts but focused on Garne's disability. No witness was called testify about torture nor were those who could have been responsible for Garne's suffering be contacted. Third, it is debatable as to whether this strategy can satisfy the victims. The time and means engaged in the long judicial proceedings trivialized the suffering of his mother.<sup>575</sup> Mohammed Garne explains that ultimately his goal was to confront the French state with the crimes specifically perpetrated against women during the war. He expressed his disappointment with the judgement of the Cour des pensions, explaining that ultimately justice for him would mean that France officially recognizes its responsibility for the suffering endured by his mother and its responsibility for the 'painful silence' imposed by the amnesty law.<sup>576</sup> In 2006, he attempted to appeal his case before the Conseil d'État, the supreme administrative court, to challenge the amnesty Law of July 1968. However, his demand was rejected.<sup>577</sup> The Conseil d'État commented that it was 'conscious of the fact that no material form of compensation could repair the odious colonial crimes'.<sup>578</sup> The Garne decision remains a unique case up to this day. It is the only instance of reparation to a victim of the war. It

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<sup>572</sup> Cour d'appel de Paris (Cour regionale des pensions), 22 November 2001. 00/50028, Répertoire Général (Garne decision).

<sup>573</sup> Cour regionale des pensions (Garne Decision) (n 60).

<sup>574</sup> Research interview with Garne's lawyer Serge Halimi (Paris, October 2012)

<sup>575</sup> Research interview, Mohammed Garne (Paris, March 2013)

<sup>576</sup> Research interview, Mohammed Garne (Paris, March 2013)

<sup>577</sup> Decision of 28 of June 2006, Conseil d'État.

<sup>578</sup> Decision of 28 of June 2006, Conseil d'État.

has not enabled others to break through France's non-recognition of crimes against humanity perpetrated during the war. At the same time, the condemnation of Aussaresses and his publishers on the ground of Article 24 of the Law of the Press did enable some sort of conviction despite the bar imposed by the criminal amnesty. It also constituted a form of recognition of the crimes against humanity perpetrated by the French army.<sup>579</sup>

The attempt to expose the responsibility of the French army was also very much present in the Aussaresses proceedings. By pressing charges against Aussaresses and his publishers for crimes against humanity the *Mouvement contre le Racisme et pour l'Amitié entre les Peuples* (MRAP), the *Association des Chrétiens pour l'Abolition de la Torture* (ACAT) and the *Ligue des Droits de l'Homme* (LDH) also sought to also engage a debate on the responsibility of the French state in accepting and covering acts of torture. The crimes of Paul Aussaresses are part of a wider system of oppression. Indeed, international crimes such as crimes against humanity, including genocide, and other violations of humanitarian law hold the presumption that individuals were able to commit these crimes through the support of state apparatus.<sup>580</sup>

So-called administrative crimes involve several layers of agents in the planning and execution of the crime. In de-personified administrations several people in various levels make decisions. Aussaresses makes it quite clear that he was acting under the direct orders of his immediate superior (General Massu), who, in turn, was acting under the direct orders of the French Government, which included Francois Mitterand (Interior Minister). 'No French army officer would have engaged in torture or any other kind of violence against the enemy had it not been approved and even encouraged by higher up, meaning superior officers and cabinet ministers'.<sup>581</sup> He notably writes that 'draconian measures were authorized for wiping out the rebellion'.<sup>582</sup> 'Ordinary police and judicial measures were ineffective against urban terrorism, so it was demanded of the

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<sup>579</sup> TGI (Ligue des Droits de l'Homme et autres c/ Aussaresses et Orban) (n 485) .

<sup>580</sup> Gerry Simpson, *Law, War and Crime* (Polity Press 2007) 67; Richard Ashby Wilson, 'Judging History: The Historical Record of the International Criminal Tribunal for the Former Yugoslavia', [2005] 27(3) *Human Rights Quarterly* 2.

<sup>581</sup> Aussaresses, *Services Spéciaux* (n 476) 163.

<sup>582</sup> Aussaresses, *Services Spéciaux* (n 476)163 'Des instructions drastiques furent données pour écraser la rébellion...' [author's translation].

parachutists to substitute such measures as they judged needed.<sup>583</sup> He confirmed the participation of state institutions in the war effort and that the army was given free hand to carry out their operations. During the war, the dilution of the rule of law in the state of war resulted in a situation whereby civil justice contributed to the actions of the military justice: the primary mission of the justice system during the Algerian war was to facilitate the actions of the military. Indeed, the non-recognition of the belligerency status of the conflict allowed Algerian nationalists to be considered outlaws, i.e. criminals.

With the development of individual accountability, the ‘just following orders’ defence finds little justification. However, it has been argued that crimes that take place under explicit instructions from the authorities should be conceptualized in the context of the policy process that gave rise to them. Herbert Kelman explains that for individuals to engage in these acts, it requires the existence of an environment in which such acts are implicitly sponsored, expected, or at least tolerated by the authorities.<sup>584</sup>

As a way to conclude this section, it may be said that recourse to criminal law to challenge the amnesty inevitably led to disappointing results. Not only is the judicial process long and potentially exhausting for the claimants, but the verdicts achieved tend to trivialize the suffering of victims. Further, where criminal responsibility and punishment focus on the individuals, it displaces public attention from the general to the particular, and in the process, the broader political issues surrounding the war have been lost sight of. For its part, the French government defended the Aussaresses verdict for of war crimes (*apologie de crimes de guerre*) on the basis that it contributed to the goals of justice, peace and the pre-eminence of law, all fundamental values of the European Convention on Human Rights.

## B. The Risk of ‘Politicization’ of the Trial

Legal proceedings ‘produce’ various symbolic messages. When crimes perpetrated by an individual are part of a wider political criminality, there is a risk of turning a trial into a ‘show trial’. As Klaus Gunther expresses it, ‘legal attribution focuses on the individual

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<sup>583</sup> Aussaresses, *Services Spéciaux* (n 476) 164: ‘[...] ‘comme on ne pouvait éradiquer le terrorisme urbain par les voies policières et judiciaires ordinaires, on demandait aux parachutistes de se substituer tant aux policiers qu’aux juges’ [author’s translation].

<sup>584</sup> Herbert C. Kelman, ‘The Policy Context of International Crimes’ in André Nollkaemper and Harmen van der Wilt (eds), *System Criminality in International Law* (Cambridge: Cambridge University Press 2009) 27-29.

person and abstracts from the circumstances of the situation, especially if these are seen as rather remote from the concrete illegal act in question'.<sup>585</sup> Criminal proceedings concerning crimes committed in the past raise the complex question of the relationship between law and history. The rendition of justice is charged with the task of actively re-imposing norms into spaces in which rule-based legality has been either radically evacuated or perverted.<sup>586</sup> Trials on crimes against humanity open a forum to investigate and verify narratives located at the margins or even outside collective memory.

Unlike the Vichy prosecutions, the adjudication of crimes perpetrated during the Algerian conflict did not allow historians to play a role in the recognition of the past. Osiel stressed "the interpretation of history before domestic tribunals has proved to be a politically delicate matter".<sup>587</sup> The use of trials to fix the attribution of guilt depends on the judges' interpretation of the law and the juridical 'qualification'<sup>588</sup> – legal classification<sup>589</sup> – of the facts of past events. By establishing facts in an authoritative way, the past becomes rationalized. But the production of a historiographical interpretation of past events through legal proceedings may lead to oversimplification or even in some cases distortion. Henry Rousso explains that the risk to the historiographical interpretation of past events is that it is not adapted to the contingencies pertaining to rules of juridical proceedings (this is explored further in Chapter 6). To him, historical trials 'should remain open for revision.'<sup>590</sup> By its very nature, the interpretation of history in courts is contingent to both a restrictive procedure and the 'ultimate goal' that of reaching a verdict.<sup>591</sup> He notably provides the example of a 'distortion of truth' in the trial of Paul Touvier. In this example, judging Touvier required adjusting the concept of crimes against humanity. Touvier was

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<sup>585</sup> Klaus Günther, 'The Criminal Law of "Guilt" as Subject of a Politics of Remembrance in Democracies' in Emiliós Christodoulidis and Scott Veitch (eds) *Lethe's Law: Justice, Law and Ethics in Reconciliation* (Oxford and Portland: Hart Publishing 2001) 6.

<sup>586</sup> Lawrence Douglas, 'The Didactic Trial: Filtering History and Memory into the Courtroom' [2006] *European Review*, 14, 513-522. See Lawrence Douglas (2001) *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (New Haven: Yale University Press 2001).

<sup>587</sup> Osiel, *Mass Atrocity* (n 85).

<sup>588</sup> Olivier Cayla, 'La qualification. Ouverture : la qualification ou la vérité du droit' [1993] 18 *Droits*, 9-10.

<sup>589</sup> 'Qualification: legal classification; characterisation, definition (of an offence) [...]' F.H.S. Bridge, *The Council of Europe French-English Legal Dictionary* (Strasbourg: Council of Europe Publishing 1994).

<sup>590</sup> Henry Rousso, 'L'expertise des historiens dans les procès pour crimes contre l'humanité' in Denis Salas and Jean-Paul Jean, *Barbie, Touvier, Papon: des procès pour la Mémoire* (Paris: Editions Autrement 2002) 62.

<sup>591</sup> Henry Rousso, 'L'expertise des historiens dans les procès pour crimes contre l'humanité' in Denis Salas and Jean-Paul Jean, *Barbie, Touvier, Papon: des procès pour la Mémoire* (Paris: Editions Autrement 2002) 62.

declared on the basis of which he acted on behalf of the Nazis in the massacre of seven Jewish hostages at Rillieux. Nevertheless, for many historians, Touvier, in fact, acted as an official of the Vichy regime.

During the debates, the definition of the responsibility of the French government of the time was of a great concern. In the appeal proceedings, prosecutor Pierre Truche relied on the Nuremberg definition and highlighted that a distinction could be made between:

[...] the Resistance fighter who knew of the consequences of an arrest to his physical well being [...] and who courageously accepted the dangers being incurred [...]. On the other hand, there is a two-year old Jewish child like the one who was deported August 11 on the last train, who does not really know what it means to be Jewish.<sup>592</sup>

But for the Cour de Cassation this distinction was irrelevant. The judgments in *Barbie*, followed by *Touvier*, expanded the definition of victims of crimes against humanity to include the ‘adversaries of a politics of ideological hegemony in whose name inhuman acts and persecutions were committed’. Besides, attempts to elevate the rendition of Justice as a political ‘moment’ are not always successful because of the procedural limitation of trials in establishing a historical judgment.<sup>593</sup> Demands for revealing the practice of torture reflected the expectation that a legal decision would ensue. However, it is not only that the French amnesty laws prevent criminal prosecutions but the possibility of recognizing the acts themselves as crimes against humanity has also been ruled out. Pursuing a different route of recognition, the Garne decision was presented in the press as a ‘victory’ and it could have opened up a strong jurisprudence on reparation for the crimes imputable to the French army committed in Algeria.

Trials dealing with particularly serious offences offer a didactic potential. The recognition of a right to access information by the European Court of Human Rights in the Aussaresses proceedings (see also Chapter 6) relies on the freedom of publishers to publish historical accounts. Historical crimes bridge the gap between constructed narratives on the past and historical facts. The condemnation of criminals for past acts can provide important historical lessons, even despite the ultimate verdicts of the court. The publicity around the Vichy trials contradicted the myth of a French nation united

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<sup>592</sup> Cited by Pierre Merindol, *Barbie, Le Procès* (Paris: Laffont 1987)14.

<sup>593</sup> Brownyn A. Leebaw, *Judging State-Sponsored Violence, Imagining Political Change* (Cambridge: Cambridge University Press 2011) 40.

behind the French resistance.<sup>594</sup> In the press, the Touvier trials were covered as the ‘trial of the Vichy government’ and thereby the judgment was seen as a history lesson. It has been argued that it permitted the establishment of the Vichy government itself to be seen as ‘illegitimate’ and that the Fourth and Fifth Republics considered themselves as not responsible for the previous regime’s oppressive policies, refusing to apologise for Vichy’s crimes.<sup>595</sup> This claim regarding the historical impact of the Touvier trial provides a version of history that contradicts the official claim made by Charles de Gaulle: namely that Vichy was a pawn of Germany and was carried out with the complicity of a few men.<sup>596</sup> Prime Minister Pierre Mauroy openly spoke about the pedagogic value of a trial which would ‘enable French justice to do its work, and [...] honour the memory of that time of grieving and struggle by which France preserved her honour’.<sup>597</sup> In the words of Emmanuel Le Roy Ladurie, the trial of Klaus Barbie provided France with ‘‘an enormous national psychodrama; a psychotherapy on a nationwide scale’.<sup>598</sup> For Henry Rousso, the launch of proceedings on crimes against humanity for past conflict reflects a European trend.

However, such a conclusion cannot always be inferred from the judgment itself. Certainly, the lessons of Vichy were to be observed in the debates that accompanied the trials, with increasing interest in this period of French history. The ruling skirted around the issue of the attribution of crimes to the Vichy government.<sup>599</sup> It was, as the public prosecutor stated, ‘the trial of a man and not of a regime’. Alice Kaplan commented that the Vichy trials were an ‘abreaction’ to the trauma of the Vichy regime.<sup>600</sup> The prosecution of Klaus Barbie and Paul Touvier were possible because of the synergy between the activism of the judges and the judicial reforms undertaken by the French government.

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<sup>594</sup> Dominique Rousseau, ‘Vichy a-t-il existé?’ in Maurice Olender (ed) *Juger sous Vichy/ Le Genre Humain* (Paris: Le Seuil 1994) 103.

<sup>595</sup> From De Gaulle to Mitterrand Presidency, no official responsibility for the mistreatment of Jews during World War II was recognized.

<sup>596</sup> Rousseau, ‘Vichy a-t-il existé?’ (n 79) 103.

<sup>597</sup> Quoted in Henry Rousso, *The Vichy Syndrome: History and Memory in France since 1944* translated by Arthur Goldhammer (Cambridge: Harvard University Press 1991), 201.

<sup>598</sup> Quoted in Rousso, *Vichy Syndrome* (n 595) 210.

<sup>599</sup> Jacques Francillon, ‘Livre deuxième: Des Crimes et Délits contre les Personnes’, in Gabriel Roujou De Boubée, Jacques Francillon, Yves Mayaud, *Code Pénal Commenté* (Paris: Dalloz Sirey 1996) 111.

<sup>600</sup> Alice Y. Kaplan, ‘On Alain Finkielkraut’s ‘Remembering in Vain’: The Klaus Barbie Trial and Crimes against Humanity’ [1992] 19(1) *Critical Inquiry*.

The process of adjudication of crimes illuminates the significance of the state's response to past crimes.<sup>601</sup> As Curran explains, French jurist Patrick Maistre du Chambon 'refers to the 'social appeasement' involved in statutes of limitation in French law and underscores the potential of legal proceedings to affect substantive law.'<sup>602</sup> As such, the purpose of statutes of limitation is to sanction the 'prosecutorial inertia' of courts.

With regard to the Algerian war, the army's acts against the Algerian insurrection form part of a "burning national debate that the judges clearly have not wanted to enter".<sup>603</sup> During the Barbie trial, Barbie's defence lawyer Jacques Vergès attempted to challenge France's self-image.<sup>604</sup> He called an Algerian victim to testify on the perpetration of crimes by the French in Algeria and he portrayed the actions of the French government as a colonial force comparable to the German regime. He sought to contest the indictment of Barbie by confronting the French judges with the amnesty covering the crimes that were committed in Algeria.<sup>605</sup> He first challenged the judges on the definition of crimes against humanity.<sup>606</sup> Then Vergès addressed the question of the amnesty in those terms:

I am not against the amnesty, but I would admit its legitimacy under the condition that we renounce a statute of limitations to prosecute crimes against humanity. Similarly, if I am for the renunciation of the statute of limitation it is on the condition that we renounce the amnesty.<sup>607</sup>

Vergès considered that his approach was a 'strike at the heart of France's polished image'.<sup>608</sup> He posed the question whether the French colonial project was about wanting to bring enlightenment to the world or was it about legitimating power and domination?<sup>609</sup> His goal was to use public interest in the Barbie trial as a reminder that,

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<sup>601</sup> Curran, 'Politicizing the Crime Against Humanity' (n 31).

<sup>602</sup> Curran, 'Politicizing the Crime Against Humanity' (n 31), referring at 704 fn 128 to Patrick Maistre du Chambon: 'L'hostilité de la Cour de Cassation à l'égard de la Prescription de l'Action Publique, [May 22 2002] J.C.P., II, 10075, at 934.'

<sup>603</sup> Roulot, 'Note: un état peut-il amnistier?' (n 46) 1330: '[U]n débat national brûlant dans lequel les juges n'ont manifestement pas voulu entrer' [author's translation].

<sup>604</sup> David Fraser, *Law after Auschwitz: Toward a Jurisprudence of the Holocaust* (Durham: Carolina Academic Press 2005) 189ff.

<sup>605</sup> Cass. Crim., 29 November 1988 unpublished judgment, see *Receuil Dalloz* (1991).

<sup>606</sup> Paul Gauthier, *Chronique du Procès Barbie pour Servir la Mémoire* (Paris, Le Cerf, 1988).

<sup>607</sup> See Fraser, *Law after Auschwitz* (n 89).

<sup>608</sup> Research interview, Jacques Vergès (Paris, 13 September 2012).

<sup>609</sup> Research interview, Jacques Vergès (Paris, 13 September 2012).

while the crimes of Nazism were being judged, no investigation had been undertaken for the crimes committed by the French troops in the colonies.<sup>610</sup> When Vergès made the analogy between the crimes perpetrated during the Nazi occupation and those committed by the French army during the Algerian war, the judicial response short-cut such analogy by stating that crimes against humanity are defined by the requirement of a ‘policy of ideological hegemony’. Many have commented that this strategy was a way to remove public attention from the general to the particular.<sup>611</sup>

The very same legal cases can be interpreted, and thus politically ‘used’, by different actors differently for various purposes. The Aussaresses affaire confronted the judges with the challenge to find a balance between society’s expectations and standard objectives of the criminal law, such as retribution, deterrence, and the rehabilitation of past offenders. The media’s buzzing interest in the trials related to the Algerian war illustrates the inevitable expectation of truth. The condemnation of Aussaresses and his publishers for vindicating war crimes (*apologie de crimes de guerre*) dissociated the substantive demands for justice from the historical meaning of the trial.<sup>612</sup> Hence it can hardly be contended that the Aussaresses trials constitute a ‘*Procès sur l’Algérie*’ (Algeria on Trial). After the judgment, historian Raphaëlle Branche commented that the 2003 ruling could be perceived as ‘censorship’ and that it could impede the progress of writings on the history of the Algerian war: it could deter other soldiers from publishing on the Algerian conflict.

The Vichy prosecutions were a consequence of the Nuremberg trials, which provided an outstanding staged exercise of collective pedagogy. They provided a detailed and accurate representation of the system that resulted in acts of mass atrocity.<sup>613</sup> Besides, where punishment focuses on the individuals it also displaces public attention to broader political issues which are not necessarily linked to the trial. The French courts’ response to demands for prosecution of acts perpetrated in Algeria has a legal basis in as much as they rely on past jurisprudence on crimes against humanity. However, if one accepts the French ‘creative legalism’ of the Vichy prosecutions, the judges can be seen as contributing to the progression of ‘the social continuum’.<sup>614</sup> Although the judgment

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<sup>610</sup> Research interview, Jacques Vergès (Paris, 13 September 2012).

<sup>611</sup> Research interview, Jacques Vergès (Paris, 13 September 2012).

<sup>612</sup> TGI (Ligue des Droits de l’Homme et autres c/ Aussaresses et Orban) (n 485).

<sup>613</sup> Teitel, *Transitional Justice* (n 7).

<sup>614</sup> Judith N. Shklar, *Legalism: Law, Morals, and Political Trials* (Cambridge and London: Harvard University Press 1964) 3; Geoffrey Nice and Philippe Vallières-Roland, ‘Procedural Innovations in War

recognizes the existence of torture and the fact that the conflict was a war, the judges did not assess the value of Paul Aussaresses's book as a historical testimony but as a public statement. It was important 'not to push for an anachronistic assessment of the acts described by Aussaresses'.<sup>615</sup> By focusing on the nature of the terms used to discuss the crimes, the judges relegated the historical question to the legislator.<sup>616</sup> As one legal commentator concluded: 'if there is to be a debate, it should not be decided by judges alone, however eminent they may be, but before elected assemblies.'<sup>617</sup>

Amnesty is a manifestation of a state's sovereignty over its territory.<sup>618</sup> The blocking of attempts to apply a Nuremberg-inspired logic to crimes perpetrated outside the context of World War II illustrates how 'politicisation has altered the French national concept of the crime against humanity until today it has become so circumscribed as to have lost much of its bite and original purpose'.<sup>619</sup> The elevation of the Nuremberg legacy as political judgment<sup>620</sup> has permitted the development of a jurisprudence aiming at persuading French society to accept its findings as establishing a historical judgment of the Nazi regime.

## Conclusion

This chapter has examined the influence of the amnesty on the application of criminal law. The analysis of the position of French judges undertaken in this chapter has shown how their interpretations contributed to drawing limits on the force of international law on the State's sovereign rights to grant amnesties. It has explained that, as a result of this influence, it is not possible for individuals to prosecute French soldiers on the ground of the French provisions on crimes against humanity. The application of the amnesty narrows the judges' interpretation of the definition of crimes against humanity. It has

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Crimes Trials' [2005] 3(2) *Journal of International Criminal Justice* 354–380; Leebaw *Judging State-Sponsored Violence* (n 80) 40.

<sup>615</sup> Research interview with lawyer William Bourdon (Paris, 10 May 2014)

<sup>616</sup> Research interview Raphaëlle Branche (Paris, April 2013)

<sup>617</sup> Roulot, 'Note: un état peut-il amnistier?' (n 46) 1330: 'Si débat il y a, ce dernier ne doit pas être tranché par les seuls juges, aussi éminents soient-ils, mais devant les assemblées élus' [author's translation].

<sup>618</sup> Mireille Delmas-Marty, 'La Responsabilité Pénale en Echec: prescription, amnistie, immunités' in Antonio Cassese and Mireille Delmas-Marty (eds), *Juridictions Nationales et Crimes Internationaux* (Paris: Presses Universitaires de France 2002) 630.

<sup>619</sup> Curran, 'Politicizing the Crime Against Humanity' (n 31) 680.

<sup>620</sup> Leebaw, *Judging State-Sponsored Violence* (n 80).

also discussed a series of cases that highlight that French criminal law does not consider the acts perpetrated outside the Axis countries, or not committed on behalf of them, as crimes against humanity and that it does not recognize international customary law as permitting the extension of these provisions to acts perpetrated in Algeria by French nationals before 1994. The chapter has also explored further the influence of the amnesty by examining the interaction between the amnesty decrees and legislation and demands for investigation and prosecution of past offences. It has explained that this interaction influenced judges' interpretation of past acts, resulting in a 'legal fiction'. The Aoussresses judgement notably demonstrates that, although the acts of torture cannot be prosecuted, it was nonetheless possible to achieve a form of condemnation, albeit limited, of past offenders by focusing on the discourse justifying the use of torture. For many commentators, such reading of the provisions on crimes against humanity is paradoxical in view of France's commitment to a duty to prosecute war crimes and crimes against humanity. However, it cannot be concluded that the French amnesties reflect a deficiency in France democratic functioning. The persistence of amnesties is the result of a political bargain, which was made necessary by the context in which they were implemented. Hence their legitimacy should be weighed in relation to the context and the defined objectives of the political community. The contemporary position of the French courts on the issue of torture in Algeria needs to be considered in terms of its diachronic significance.

Debating history in the courtroom raises fundamental questions about the role of legal proceedings in dealing with past events. This issue is analysed in detail in the next chapter with regard to the admission of evidence for facts covered by an amnesty. The following chapter also discusses the didactic outcomes of legal proceedings in relation to claims of justice based on access to information.

## **Chapter 6:**

### **Investigating the past:**

### **access to information on the Algerian war**

Examining the influence of amnesty on judges' interpretative role points to the gap between collective narratives constructed by society on past crimes and historical facts since the official recognition of the war in 1999. The previous chapter has shown how the amnesty influenced the judicial interpretation of criminal law. Generally, French law and international law do not permit the application of amnesty to crimes against humanity. Yet, in the case of the Algerian war, the exclusion of crimes perpetrated during the colonial wars from the French provisions on crimes against humanity inscribe the torture in Algeria in a situation of legal exception. While the use of torture by the French army was clearly established, the French judges were confronted by an ambiguous legal situation. After the revision of the French criminal code in 1994, the French judges relied on the principle of the non-retroactivity of criminal law to exclude the crimes perpetrated during the Algerian war from the scope of the provisions on crimes against humanity. However, while the crimes themselves could not be prosecuted, they nonetheless received a form of acknowledgement in the conviction and sentencing of Aussaresses and his publishers for apology for war crimes. Subsequently, though, Aussaresses' publishers managed to have their position vindicated by taking their case to the European Court of Human Rights, who recognised the legitimate rights of the publishers to publish controversial material.

This chapter seeks to develop further analysis of the dynamic of the relation between judicial decisions and the collective memory of society. In particular, it explores a series of cases involving veterans of the Algerians war who resorted to defamation proceedings to discredit historians' and journalists' exposures of their past, notably that they had perpetrated torture. This chapter argues that the restrictions amnesty imposes on the prosecution of crimes does not completely prevent legal proceedings from providing public knowledge of past crimes.

Defamation proceedings in the context of a quest for accountability for war crimes and crimes against humanity perpetrated during the Algerian war open up discussion of how claims made by historians affect the collective narrative. Analysis of the French

jurisprudence on defamation in this context highlights three main findings. First, defamation proceedings can extend the reach of judges to admit evidence that would establish that crimes were perpetrated. Secondly, that a legal venue with lower political stakes, such as defamation trials, can constitute a political opportunity to hear hidden accounts and shape the content of history. Thirdly, it argues that the success of defamation proceedings from this perspective lies more in providing a public space to discuss and record the memory of past victims and survivors and historian accounts than in their direct outcome.

## I. The Einaudi Affaire

The ‘Einaudi affaire’ refers to the defamation claim brought by Maurice Papon against Jean-Luc Einaudi. Papon’s role during the Algerian war had already been brought up in court in the course of his trial for complicity in crimes against humanity for his role in the deportation of Jews from the Gironde region in 1942–44. The prosecution of Maurice Papon prompted revelations about his responsibilities as Prefect of Police for Paris in the repression of the protest by Algerians on 17 October 1961.<sup>621</sup>

Despite the limited potential for history to be written in the courtroom, the impact of the Papon trial extended beyond the individual responsibility of Maurice Papon but touched upon the history of France itself. Although the trial was primarily about the Vichy period, the Algerian war became relevant by calling historian Jean-Luc Einaudi to testify on Maurice Papon. Indeed lawyer Gerard Boulanger representing the 27 victims of accused Nazi collaborator wanted to amplify the question of the responsibility of the state in sponsoring violence by bringing to light the part Maurice Papon had played as Prefect of the Paris police in the repression of 17 October 1961.<sup>622</sup>

### A. Prologue: The Battle of Paris, 17 October 1961

The *Battle of Paris*, as it is commonly called, refers to a police repression that occurred six months before the end of the War of Independence of Algeria. On the night of 17 October 1961, 200 to 300 people mostly French Algerians, were killed by the French

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<sup>621</sup> Cours d’Assises de la Gironde.

<sup>622</sup> Richard J. Golsan, *The Papon Affair: Memory and Justice on Trial*. (New York: Routledge, 2000).

police during a demonstration. The crowd was protesting against the curfew and the demonstration was also an opportunity to show their solidarity with the independence movement and support for the nationalists fighting against the French army in Algeria. At the time, France was still under a state of emergency and a curfew was ordered for Algerians/ French Muslims prohibiting them from being out on the streets between 8:30 pm and 5:30 am. The curfew was severely disruptive to FLN organisation and fundraising. As the Algerian nationalist movement was growing, the presence of French colonial subjects in metropolitan France was viewed as a potential threat to the stability of the regime and the decolonisation negotiations that were under way. More generally, the curfew was widely regarded by the Algerian community as a racist administrative measure.<sup>623</sup>

Full police powers were granted to the Maurice Papon, Prefect of the Paris police. He ordered a major deployment of police personnel, assembling 7,000 policemen, 1,400 CRS (Compagnies Républicaines de Sécurité) riot police supported by further riot police from the *gendarmes mobiles* to block the demonstration. The disproportionate police response turned a peaceful demonstration into a violent repression that shocked public opinion.<sup>624</sup> In the following days, the press was not allowed to publish any reports that compromised the official account of three deaths.<sup>625</sup>

To this day, the number of Algerians killed that night is disputed. The background police perspective may be gauged by a police report dated May 1947: '[...] the North African problem is not an issue of prevention any more, but has turned into a question of repression.'<sup>626</sup> Judicial enquiry into the deaths was blocked from leading any criminal investigations.<sup>627</sup>

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<sup>623</sup> Although the Algerians living at the time in Paris were officially considered French and possessed a French identity card, they were nonetheless bound by rules applying to foreigners.

<sup>624</sup> The Mandelkern Report ordered by the Ministry of the Interior in 1997 (released May 1988) stated there were most likely at least 32 victims. Dieudonné Mandelkern, André Wiehn and Jean Mireille, 'Rapport sur les archives de la Préfecture de police relatives à la manifestation organisée par le FLN le 17 octobre 1961' (Paris: Ministère de l'Intérieur 1998). Available at:

[ladocumentationfrancaise.fr/rapports-publics/984000823/](http://ladocumentationfrancaise.fr/rapports-publics/984000823/) [last accessed March 2013]

See also the response of Prime Minister, JORF, Débats (Sénat), 19 March 1998 893. The number of injured was in the thousands (Michel Levine, *Les Ratonnades d'Octobre: un meurtre collectif à Paris en 1961* (Paris, Ramsay 1985); Jean-Luc Einaudi *La Bataille de Paris: 17 Octobre 1961* (Paris: Editions Seuil 1991).

<sup>625</sup> Sylvie Thénault, 'Le 17 Octobre en Question' 1998 148 *Cahiers Jean Jaurès Semestriels*, 89–104.

<sup>626</sup> Directeur Général de la Sûreté Générale to Directeur des Affaires Générales, Sous-Direction de l'Algérie, 10 May 1947, AN F1a 5061: 'Le problème nord-africain dans la Métropole est devenu non plus une question de prévention mais une question de répression' [author's translation].

<sup>627</sup> Einaudi, *La Bataille de Paris* (n 6).

Despite the lack of prosecutions or official recognition of the events, civil society groups undertook to commemorate the dead of 17 October 1961. The movement was joined by anti-racist organisation the MRAP (Mouvement contre le racisme et pour l'amitié entre les peuples). In 1991, 10,000 demonstrators followed the symbolic route from the Canal Saint Martin to the Rex Cinema under the banner 'No to Racism, no to forgetting, for a right to memory'.<sup>628</sup> At the same time, a colloquium at the Sorbonne was organised to discuss Mehdi Lallaoui and Agnès Denis's documentary *Le silence du fleuve*. The publication of Jean-Luc Einaudi's *La bataille de Paris* that same year ensured that the 17 October 1961 resurfaced as a major theme of public debate. Jean-Luc Einaudi maintained, contrary to the official police version, that there were over 200 deaths during the relevant period.<sup>629</sup> His investigative research was based on the collection of testimonies of witnesses and survivors, and confrontation of archives repudiated the official version of the police.

## B. Einaudi's Testimony Trial of Papon for Crimes Against Humanity

Well before the recognition of the Algerian war in 1999, the French public had come to know Maurice Papon for his role during the Vichy regime during the protracted process that eventually led to the highly mediatised trial in 1997-98 where he was prosecuted for complicity in crimes against humanity. The Papon affair started when Michel Slitinsky, a French Jewish Holocaust survivor, passed on to the French left-wing newspaper, *Le Canard Enchaîné*, evidence about the collaborationist past of Maurice Papon. The newspaper published a document signed by Papon, which implicated him in the deportation of Jews in Bordeaux. The matter was of major significance as by that time Papon was Budget Minister. The evidence revealed that Papon had arranged for the arrest and deportation of more than 1,600 Jews when he was second in command of the police for the Gironde region during the Vichy period. A *jury d'honneur* was assembled in December 1981 composed of former members of the Resistance<sup>630</sup> Although the jury

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<sup>628</sup> *Le Monde* (19 Octobre 1991).

<sup>629</sup> Einaudi, *La Bataille de Paris* (n 6).

<sup>630</sup> The *jury d'honneur* was created in 1945 to hear quasi-criminal charges of 'national indignity' against Vichy-appointed officials. For more on this institution, see Mark Gibney, 'Decommunication: Human Rights Lessons from that Past and Present, and Prospects for the Future,' [1994] 23 *Denver Journal of*

exonerated him of crimes against humanity,<sup>631</sup> the public prosecutor then opened in investigations; seven complaints had been laid against Papon by May 1982 and in 1983 the trial against him began, which continued for some four years until, in February 1987, the *Cour de Cassation* dismissed the proceedings because of a procedural error. In July 1988 a second investigation was undertaken. In response to Papon's appeal against the indictment, a decision on January 1997 by the *Cour de Cassation* found no reason to doubt the Indictment Department's view that Papon was 'fully cognizant of the Vichy government's anti-Semitic policies'.<sup>632</sup> Papon had also argued, among other points, that he could not be found guilty because he did no more than follow the orders of the then-legitimate government. This legal defence, also proffered by defendants at the Nuremberg trials, is known in France as 'the order of law and command of the legitimate authority'. The Papon trial is inscribed in a foundational jurisprudence against the Vichy regime that had started in the 1980s. The *Cour de Cassation* rejected this argument, relying on Article 213-4 of the French Criminal Code, according to which, for crimes against humanity, 'the perpetrator or accomplice to a felony under the present title [crimes against humanity] is not exonerated from his responsibility on the sole basis that he performed an act prescribed or authorised by legislative or regulatory provisions or an act ordered by legitimate authority.'<sup>633</sup> On April 1998, Maurice Papon was convicted for complicity in crimes against humanity for his participation in the arrest, and detention of French Jews.<sup>634</sup>

The prosecution of Maurice Papon not only re-awakened the ghosts of Vichy, it also offered an opportunity to confront Maurice Papon with the misdeeds of 17 October

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International Law and Policy 87-133; Peter Novick, *The Resistance versus Vichy: The Purge of Collaborators in Vichy France* (London: Chatto & Windus 1968) 94-155.

<sup>631</sup> The jury considered that Maurice Papon ordered operations that were contrary to the principle held by the French Resistance. Further, it considered that Maurice Papon should have resigned from his position of General secretary of the Prefecture of Gironde in July 1942. However the accusation of crimes against humanity was dismissed as the jury also recognized the real contribution it provided to the Resistance. Pascale Nivelles, 'Maurice Papon devant ses juges. J-5. 1981, première fêlure dans la défense de Papon. Un jury d'honneur de cinq personnalités le certifie résistant, mais estime qu'il aurait dû démissionner de ses fonctions en juillet 1942' *Libération* 3 October 1997, Paris.

<sup>632</sup> Cour de Cassation, Cass Crim., 23 January 1997 n°. 502, 32 *Bull. Crim.* 1997.

available at:

[legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007066186](http://legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007066186)

<sup>633</sup> Code Pénal Art. 213-4: L'auteur ou le complice d'un crime visé par le present titre [Des crimes contre l'humanité] ne peut être exoneré de sa responsabilité du seul fait qu'il a accompli un acte prescrit ou autoris par des dispositions législatives ou réglementaires ou un acte commandé par l'autorité légitime. . English translation from:

[legifrance.gouv.fr/Traductions/Liste-des-traductions-Legifrance](http://legifrance.gouv.fr/Traductions/Liste-des-traductions-Legifrance)

<sup>634</sup> Cours d'Assises de la Gironde, Judgment of 2 April 1998.

1961 and to bring out his role in the police repression.<sup>635</sup> The issue of Papon's responsibility in the police repression against the Algerian nationalists in Paris was discussed in six sessions of the proceedings. Papon declared that 'the repression consisted in merely asking the Algerians to get in the buses [...] the police did not shoot at anyone, but Algerians were shot by the FLN groups'.<sup>636</sup> While admitting that 15 to 20 bodies were thrown in the Seine River, he puts the responsibility on fratricide rivalries between the FLN and the members of the MNA.<sup>637</sup> Jean-Luc Einaudi confronted this version and declared that: 'according to the research I undertook, I believe that there was at least two hundred death during that period'.<sup>638</sup> In his testimony, Einaudi explains how Papon proceeded to the round up of North African. Notably highlighting that Algerians were detained in internment camps that were used by the Vichy Regime.<sup>639</sup> He accounts that 11,000 persons were arrested, and transported in a public transport company RATP bus, to the *Parc des Expositions* in Vincennes where they were held in a detention centre. Others were beaten and tortured. Many were drowned in the Seine or canals, in both central Paris and the outskirts, their corpses dumped or placed in anonymous graves.

Soon after Einaudi's testimony in the Papon trial, in October 1997 the Minister of the Interior, Jean Pierre Chevènement, mandated Dieudonné Mandelkern to conduct an investigation into what was available in police archives concerning the events of 17 October 1962.<sup>640</sup> The report was, in fact intended merely to provide a survey of materials in the archives of the prefecture and to stop unauthorised leaks. However, the Mandelkern report went on to make a number of observations. Concerning the sequence of the events that led to the police operations, it notably discloses that, from 1959,

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<sup>635</sup> L'ordre de la Loi et le Commandement de L'autorité Legitime'. Cass. Crim. 23 January 1997 (n12). See Also the Commentary by Jacques-Henri Robert, 'Affaire Papon: Éléments Constitutifs De La Complicité' [1997, 2 April] 14 la Semaine Juridique, Edition Générale.

<sup>636</sup> 'La repression s'est réduite à prier les Algériens de monter dans les cars et les autobus [...] Il n'y a pas eu de mort par arme à feu par la police, mais par les groupes d'assaut du FLN [...]' [author's translation]. Cours d'Assises de la Gironde, judgment of 2 April 1998.

<sup>637</sup> 'Quinze ou vingt Nord-Africains jetés dans la Seine à la suite de règlements de comptes entre tenants du MNA et dissidents du FLN. On a fait de ce 17 octobre un tableau polémique, *poursuit-il*. Il n'y a pas eu de débordements. La répression s'est réduite à faire monter les Nord-Africains dans les autobus. Ils ne se sont pas fait prier.' cited in Beatrice Valley 'Seine Macabre' *Libération*, 15 October, 2011

<sup>638</sup> 'Je pense, après les recherches que j'ai pu faire, qu'il y a eut durant cette periode un minimum de 200 morts vraisemblablement environs 300' [author's translation]. Cours d'Assises de la Gironde, judgment of 2 April 1998.

<sup>639</sup> Michael Rothberg *Multidirectional Memory: Remembering the Holocaust in the Age of Decolonization*, (Stanford University Press, 2009) 286.

<sup>640</sup> Mandelkern Report (n 6).

internment camps established in the outskirts of Paris, notably at Vincennes, had detained hundreds of Algerians without due process. In fact, as pointed out by Einaudi, it was Maurice Papon himself who had ordered the use of these camps that had previously been used during the Vichy regime to intern Jews. Further, based on the numbers of detainees registered in the Mandelkern Report, it characterises the police operations as ‘*une repression dure*’ (stiff repression). At the same time, the report notes the contradictory reports on the number of deaths. In the aftermath of the repression, the police had acknowledged the deaths of seven detainees. However, the report stresses that this number may not be accurate: ‘an assessment of the victims of this “stiff repression” cannot be given with any assurance’. While it refers to the official count of seven deaths and 136 wounded, the report also highlights that more victims could be accounted for from the archives of the morgue (*Institut Medico-Legal*).<sup>641</sup> Indeed, 88 bodies were brought to the morgue between 17 October 1962 and 31 December 1962.<sup>642</sup> Of these, the report considered that 25 could possibly be the victims of police repression.<sup>643</sup>

Nonetheless, as a way to mitigate the contradictory accounts, the Mandelkern Report states that:

[S]upposing that a total of twenty-five cases were added to the official number of seven dead [...] and allowing that uncertain factors, especially those pertaining to the geographical limits of this study, warrant a certain increase in numbers, we are still at the level of ten to twenties, which is considerable but fewer than the several hundreds sometimes claimed.<sup>644</sup>

In another example, where the Mandelkern Report refers to hundreds of ‘Algerians’ ‘neutralised’, it does not however say what happened to them.

The report’s true importance lies in the number of ‘gaps’ in the archives it underscores, noting that many of the archives that could have been useful had been destroyed. Among the missing documents, the records of the Brigade fluviale (River Authority Police), which could have shed light on the bodies thrown in the Seine, have been destroyed ‘several years ago’. It also states that a report that Papon had prepared for the Minister

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<sup>641</sup> Mandelkern Report (n 6).

<sup>642</sup> Mandelkern Report (n 6).

<sup>643</sup> Mandelkern Report (n 6).

<sup>644</sup> ‘Parmi ces chiffres, celui des morts serait le plus significatif s’il pouvait être donné avec assurance. Tel n’est pas le cas. Mais à supposer même que l’on ajoute au bilan officiel de sept morts la totalité des vingt-cinq cas figurant à l’annexe III, et que l’on considère que les facteurs d’incertitude, et notamment ceux qui tiennent aux limites géographiques de l’étude, justifient une certaine majoration, on reste au niveau des dizaines, ce qui est considérable, mais très inférieur aux quelques centaines de victimes dont il a parfois été question.’ [author’s translation] Mandelkern Report (n 6).

of the Interior, the Prime Minister and the Office of the President could not be consulted. Mandelkern notes that there is no copy of the report in the Archives de la prefecture de police (Archives of the Prefecture of Police) or in the Archives of the Direction Générale de la Police Nationale (Archives of the National Police).

The Mandelkern evaluation was published on 4 May 1998 in the newspaper the *Le Figaro*, just after the conclusion of the Papon trial in April 1998.<sup>645</sup> On 8 May 1998 Jean-Luc Einaudi published an opinion piece, ‘Octobre 1961, pour la vérité, enfin’ (October 1961, for the truth at last) in *Le Monde* contesting some of the findings of the Mandelkern Report.<sup>646</sup> Einaudi underlined the inadequacies of the Mandelkern report and disputed the official toll as recognised in the Report (32 deaths).<sup>647</sup> Einaudi also pointed to the failure of the report to examine what happened in the courtyard of the police Prefecture, where some of the worst atrocities were reported at the time.<sup>648</sup> Einaudi demanded an investigation as to why some of the archives of the River Authority Police had been destroyed in 1990.<sup>649</sup> He concluded his article by declaring that ‘But for the moment I persist and sign. On the night of 17 October 1961 a massacre took place perpetrated by the police forces acting under the orders of Maurice Papon’.<sup>650</sup> This assertion led Papon to bring a claim against Einaudi for ‘defamation of a government functionary’. From accused Papon became accuser. After days of hearings, the Court concluded that, although Einaudi’s statement was defamatory, it was made in good faith based on a body of serious and well-documented research.<sup>651</sup>

## II. Hearing the Evidences: the Good Faith of the Historian

By bringing a historian to court for accusing him of personal responsibility for a ‘massacre’ of Algerians on 17 October 1961 Maurice Papon sought to shut down the

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<sup>645</sup> Eric Pelletier, ‘Les Vrai Chiffres d’une Nuit Sauvage’, *Figaro*, 4 May 1998.

<sup>646</sup> Jean-Luc Einaudi, ‘Octobre 1961, pour la Verité, Enfin’ *Le Monde* (20 May 1998).

<sup>647</sup> Mandelkern Report (n 6).

<sup>648</sup> Einaudi, ‘Octobre 1961’ (n 26).

<sup>649</sup> Einaudi, ‘Octobre 1961’ (n 26).

<sup>650</sup> ‘Mais, pour le moment, je persiste et signe. En octobre 1961, il y eut à Paris un massacre perpétré par des forces de police agissant sous les ordres de Maurice Papon’, Einaudi, ‘Octobre 1961’ (n 23).

<sup>651</sup> ‘Cette assertion est à l’évidence, diffamatoire, en ce qu’elle impute à un ancien haut fonctionnaire de l’Etat d’avoir gravement manqué aux devoirs de sa charge, et d’avoir suscité, approuvé ou couvert des comportements constitutifs d’infractions pénales particulièrement révoltantes’ Judgment, 26 March 1999, Tribunal de Grande Instance de Paris, 17<sup>th</sup> chamber.

claims made by Einaudi. However, the Einaudi defamation trial highlights the potential role of legal proceedings to revise official narratives on past events.

As previously explored, the amnesty prevented any possibility of prosecuting Papon or his officers. In a decision of May 2000, the judges dismissed the demand of prosecution for crimes against humanity on the basis that the acts occurred outside the context of World War II and before 1 November 1994. Indeed the police operations were covered by Decree n° 62-328 of 22 March 1962, concerning infractions perpetrated during public order operations against the Algerian insurrection before the 20 March 1962, but the question remained as to whether a historian could investigate and publicly challenge one's past. As a matter of fact defamation proceedings can carry significant legal implications. Indeed, it is both a criminal and civil offence that pitches freedom of speech against the offence of defamation and draw the line between attempt to disclose one's past and statement made to injure someone's reputation. This section explores the unfolding of the Einaudi affair and how the judges ruled on the claim of defamation brought by Maurice Papon in February 1999 against Jean-Luc Einaudi.

The 1968 amnesty law prevented from the possibility to investigate on the acts.<sup>652</sup> Until 1999, Papon has benefited from the immunity granted by the amnesty to avoid any prosecution on his responsibility for the repression of October 1961. By engaging an action for criminal defamation (with Papon as the civil party), Papon's concern was that Einaudi's statement attacked his honour.

The offence of defamation is defined by the 1881 Law of the Press as 'any allegation or imputation of an act affecting the honour or reputation of the person or body against whom it is made.'<sup>653</sup> It is a form of legal action that seeks to protect the sphere of a person's public or private life.<sup>654</sup> Article 85 of the Code of Criminal Procedure related to the Law on the Press provides that anyone alleging to have been harmed by a crime may file a complaint and become a 'civil party' in a criminal case.<sup>655</sup> Typically, defamation proceedings concern publication of a presumptively untrue statement that tends to harm another person's reputation or standing.

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<sup>652</sup> Cass. crim. 30 Mai 2000, *Bull. Crim.* (2000) n°99-84024.

<sup>653</sup> Loi du 29 Juillet 1881 (n 488). Article 29: ...toute allégation ou imputation d'un fait qui porte atteinte à l'honneur ou à la considération de la personne ou du corps auquel le fait est imputé..

<sup>654</sup> Tim Crook, *Comparative Media Law and Ethics* (London: Routledge 2010) 336.

<sup>655</sup> See Code de Procédure Pénal Art. 85 (Daloz, 1988-89).

The proceedings launched against historian Jean-Luc Einaudi by Maurice Papon to avoid his past being unveiled raises fundamental questions about the admissibility of historical evidence. Unlike most other criminal trials, defamation proceedings in French law reverse the burden of proof to demonstrate that the statement made is deemed untrue and that there is a malicious intention. It is up to the defence to show otherwise. There are two main defences, both of which involve examining and cross-examining the author of the statement in question and probing his claim. First, article 35 of the Law of the Press of 1881 provides that truth is always a defence. The burden of proof in establishing truth falls on the accused. This provision, commonly called the *exceptio veritatis* (truth exception) refers to the principle according to which an individual can defend himself against claims of defamation by proving that the statement is true.<sup>656</sup> However, the same article provides that the truth exception cannot be invoked in three circumstances: where the defamatory assertion concerns a person's private life – evidently not relevant in this case –; where it concerns matters that occurred more than ten years earlier or where the acts in question are covered by an amnesty or are prescribed [by law], or relate to a 'rehabilitated' conviction.<sup>657</sup> Secondly, in cases where the truth defence is not available, defendants can rely on a different defence and present evidence of their 'good faith' in making the statement in question. The jurisprudence developed the cumulative criteria to assess the 'good faith' based on the legitimacy of the goal (*légitimité du but poursuivi*), absence of personal animosity (*l'absence d'animosité personnelle*).<sup>658</sup> A good faith defence will succeed if four conditions are all fulfilled: the statement concerns a matter of public importance; the tone used in the statement is measured and objective; there is no trace of personal hostility in the statement; and the statement is based on serious investigation.<sup>659</sup> A defence based on 'good faith' is defeated by the claimant showing that the publisher was malicious i.e. they wished to injure the claimant or were reckless as to the truth of the allegation.

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<sup>656</sup> Loi du 29 juillet 1881 (n 488) Article 35: La vérité des faits diffamatoires peut toujours être prouvée [...].

<sup>657</sup> Loi du 29 juillet 1881 (n 488) Article 35: [...] sauf: a) Lorsque l'imputation concerne la vie privée de la personne; b) Lorsque l'imputation se réfère à des faits qui remontent à plus de dix années ;c) Lorsque l'imputation se réfère à un fait constituant une infraction amnistiée ou prescrite, ou qui a donné lieu à une condamnation effacée par la réhabilitation ou la révision.

<sup>658</sup> Dalloz Actualité 'Bonne foi et exception de vérité : distinction et conditions d'application' 28 March 2011, (available at <http://www.dalloz-actualite.fr>)

<sup>659</sup> 'Admission de la bonne foi est traditionnellement soumise , par la jurisprudence , à la réunion de quatre critères légitimité du but poursuivi, absence d'animosité personnelle , sérieux de l'enquête et fiabilité des sources, prudence et modération dans l'expression.' Judgment, 26 March 1999, Tribunal de Grande instance de Paris, 17<sup>th</sup> chamber. p10.

Where the acts are covered by an amnesty, a way out is to demonstrate the good faith of the authors of the statement. This particular provision of French freedom of speech jurisprudence has permitted to historians and journalists to avoid civil and criminal action when they revealed the Algerian past of retired French officers. In the case of the defamation trial against Jean Luc Einaudi, the judge dismissed Papon's suit on the basis that Einaudi's statement was made in good faith. In another case involving an ex-officer's past, the judge ruled on the good faith of the author's claims, in the action brought by Le Pen in May 2005. Jean-Marie Le Pen initiated the action for defamation against journalist Florence Beaugé after she published two articles claiming that he had tortured Algerian civilians during his military years in Algeria. Beaugé's investigation was published in two parts. The first part was published on 4 May 2002.<sup>660</sup> It recounts the ordeal of Ahmed Moulay, an Algerian nationalist murdered by the French troopers on 3 May 1957. Ahmed Moulay was tortured in front of his wife and children. When the *paras* left Moulay's house, they left behind them the sheath of a dagger on which was engraved 'J. M Le Pen, 1er Rep'. The second part of Beaugé's investigation was published on 4 June 2002.<sup>661</sup> It gave the testimonies of Mustapha Merouane, Muhammad Abdellaoui and Abdelkader Ammour, identifying Jean-Marie Le Pen as one of the 20 French soldiers who burst into their home in the casbah of Algiers. Abdelbaker Ammour told how he was forced to lie naked on the floor with his hands bound. 'Then, they connected up electric wires directly to the plug and moved them about all over on my body,' he said. 'I was screaming. They took dirty water from the toilets and made me swallow it through a floor cloth held over my face. Le Pen was sitting on me. He held the cloth while someone else poured the water.' Le Pen sat on me and held the cloth while another person poured water. I can hear him shouting, "Get on with it, don't stop."'<sup>662</sup> In a ruling in 2005 the Cour de Cassation confirmed the 'good faith' defence offered by Florence Beaugé to justify her revelations about this ex-soldier's past in Algeria.<sup>663</sup>

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<sup>660</sup> Florence Beaugé, 'Guerre d'Algérie: le Poignard de Le Pen', *Le Monde* [reprinted 16 March 2012]. Available at:

[http://www.lemonde.fr/afrique/article/2012/03/16/le-grand-blond-au-poignard\\_1669337\\_3212.html](http://www.lemonde.fr/afrique/article/2012/03/16/le-grand-blond-au-poignard_1669337_3212.html)

<sup>661</sup> Florence Beaugé, 'Guerre d'Algérie: le Poignard de Le Pen', *Le Monde*

<sup>662</sup> Giles Tremlett and Paul Webster 'Battle of Algiers returns to haunt Le Pen as claims of torture focus on far-right leader: Wartime role of NF leader risks far-right vote in Sunday's election' *Guardian* 4 June 2002 available at <https://www.theguardian.com/world/2002/jun/04/france.thefarright> [last visited October 2016]

<sup>663</sup> Cass. Crim. 27 September 2005, 04-85.956. Available at:

This was not the first time that Jean-Marie Le Pen had brought an action against journalists for disclosing his Algerian past.

For Einaudi and his supporters, the defamation trial was a chance to bring forth additional evidence that enabled him to back up his claims. The defamation proceedings indeed offered an opportunity to defend his claims that ‘on the night of 17 October 1961 a massacre took place perpetrated by the police forces acting under the orders of Maurice Papon’.<sup>664</sup> To some extent, it can be argued that defamation proceedings are a way of circumventing the amnesty law barring from the possibility of directly investigating acts perpetrated before 1962 in connection with the Algerian war. However, the other effect of the amnesty was to rule out the option of a truth defence in the defamation action. In assessing the ‘good faith’ of the author’s claims, judges are not required to investigate the substance of the claim as would occur if the truth defence were available. Thus success in the case did not have the effect of a legal vindication of the truth of the facts.

#### A. Epilogue to the Einaudi Affair: The Responsibility of the Archivists

The government having announced that access to the archives would be eased, Jean Luc Einaudi made a request to the national Archives de Paris for access to the *Registre d’Information du Parquet* (archives of the Prosecutor’s Office). Einaudi was looking for judicial evidence on the police operations related to the demonstration of 17 October 1961 while Papon was head of the police. Two archivists Brigitte Lainé and Philippe Grand allowed him to consult documents that would enable him to defend himself in the defamation case. The two archivists were working on the archives of the police from the period of 1944 to 1962. In their oral (Lainé) and written (Grande) testimony given during the Einaudi’s trial, the two archivists confirmed the existence of records substantiating Einaudi’s statement.

With the Einaudi affaire the question of justice moved beyond the individual person, Maurice Papon, as a polemic sprang up around two questions: were the legal archives consulted by Jean-Luc Einaudi accessible? Can (and should) an archivist speak about the

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<https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007607564>

<sup>664</sup> Einaudi, ‘Octobre 1961’ (n 26).

existence and the content of archives not accessible to the public, or is it a violation of secrecy and professional obligations? In December 1998, Einaudi's request for access to the archives was refused.<sup>665</sup>

The military archives on the Algerian war first became accessible to the public in 1992 after the ending of the initial 30-year restricted access period. The Law of 3 January 1979 provides that official documents remain classified for a fixed period that limits their availability to the public. Article 1 of the 1979 law states that: 'Conservation of public archives is in the public interest'.<sup>666</sup> Public archives, including documents of National Police, 'which concern the lives of private persons or affect national security and defence' are accessible 'after a period of sixty years'.<sup>667</sup> The law can restrict access to the archives by a further time limit that can extend to 150 years. It also provides a *système dérogatoire* by which the access to some documents can only be authorised by a commission on access to administrative documents the *Commission d'accès aux documents administratifs* (CADA). In case of a request being refused, an appeal may be made to the administrative judge on the basis of state 'excess of powers' (*recours pour excès de pouvoirs*).<sup>668</sup>

By granting Einaudi access to restricted archives still covered by the time limitation, the two archivists violated the internal regulations of the archives (*Archives de Paris*) and the archivists' professional code of ethics. After giving their testimony in Einaudi's case, they were sanctioned for misconduct by the Director of the Paris archives and disapproved by the French Association of Archivists (Association des archivistes français (AAF)). On 3 March 1999 the AAF released a press statement stating that the association did not condone the behaviour of Brigitte Lainé and Philippe Grand,<sup>669</sup>

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<sup>665</sup> Jim House, Neil MacMaster Paris 1961: Algerians, State Terror, and Memory, (Oxford University Press, 2006) 313.

<sup>666</sup> Article 1: 'La conservation de ces documents est organisée dans l'intérêt public' [author's translation]. Loi n° 79-18 du 3 Janvier sur les archives, JORF 5 Janvier 1979 43; DSL, 62 1979. Here after [1979 law on the archives] Available at:

<https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000322519&categorieLien=id>

<sup>667</sup> 1979 Law on the Archives (n 633) Article 7(5).

<sup>668</sup> 1979 Law on the Archives (n 633).

<sup>669</sup> 3 March 1999. Available at:

<http://h-net.msu.edu/cgi-bin/logbrowse.pl?trx=vx&list=h-francais&month=9903&week=b&msg=ZvTD7jm8gPVVvytT6pbsrA&user=&pw=>

which, it stated, breached the ethical and juridical principles of the profession.<sup>670</sup> In May 1999, the Archives de France called Brigitte Lâiné and Philippe Grand for a disciplinary hearing. Brigitte Lâiné justified her actions by the fact the Jean-Luc Einaudi had not received a response to his derogation request to access the archives a year before and that he now needed to defend himself. Following this hearing, the Director of the Archives de Paris, Francois Gasnault, sanctioned the misconduct of the archivists administratively for having failed in their *devoir de reserve* (duty of confidentiality).<sup>671</sup> The official position of the Director of the Archives de Paris and the AAF was that Lâiné had no right to divulge secret documents. According to their professional Code of Ethics and the Law of 3 January 1979, archivists have no individual discretion to decide to communicate classified documents or their contents. Article 2 of the Law of 3 January 1979 clearly states that an agent in charge of the archives is bound by professional secrecy with regards to documents which are not made publicly available.<sup>672</sup> In addition, the Code of Ethics for archivists prevents the communication of documents from the public archive without authorisation by the government. The AAF statement on Lâiné and Grande cited Article 7 of the Code of Ethics of the International Council on Archives (ICA): ‘Archivists should respect both access and privacy, and act within the boundaries of relevant legislation’. Article 8 includes: They should not reveal or use information gained through work with holdings to which access is restricted’. It also referred to Article 26 of the *Statut Général de la Fonction Publique*, by which public servants are bound by a confidentiality clause on revealing the facts or information contained in documents that he comes to know in the course of exercising his functions.<sup>673</sup>

The statement concludes that:

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<sup>670</sup> ‘Elle ne se reconnaît pas dans un comportement qu’elle juge contraire au principe juridique et déontologique de la profession’ [author’s translation]. The Association cited provisions of the 1996 Code of Ethics of the International Council on Archives.

<sup>671</sup> Antoon De Baets, *Censorship of Historical Thought: A World Guide, 1945-2000* (Westport: Greenwood Publishing Group 2002) 208-9.

<sup>672</sup> 1979 Law on the Archives, Article 2: Tout fonctionnaire ou agent chargé de la collecte ou de la conservation d’archives en application des dispositions de la présente loi est tenu au secret professionnel en ce qui concerne tout document qui ne peut être légalement mis à la disposition du public.’

<sup>673</sup> Statut General de la Fonction Publique, Loi n° 83-634 du 13 Juillet 1983. Article 26 Secret professionnel: *Les fonctionnaires sont tenus au secret professionnel dans le cadre des règles instituées dans le code pénal*. Les fonctionnaires sont donc tenus au secret professionnel visé par le code pénal en tant que dépositaires de renseignements concernant ou intéressant des particuliers à moins que les nécessités du service ou des obligations légales ne leur imposent la communication des informations dont ils ont eu connaissance dans l’exercice ou à l’occasion de l’exercice de leur fonction. Available at:

[http://www.fonction-publique.gouv.fr/droits-et-obligations#secret\\_professionnel](http://www.fonction-publique.gouv.fr/droits-et-obligations#secret_professionnel)

The archivist has an absolute duty of integrity. It is not to help M. Papon to remind him of the republican principles of equality and continuity of public service. It is to highlight the responsibility of the Archivist to preserve documents. Archives are sacred and, contrary to what can be argued, they are not the truth, despite being evidence.<sup>674</sup>

In fact, the archivists did not reveal the content of any restricted documents to Einaudi. Indeed the contested information was presented their audition in front of the court. Ultimately, any demand to prosecute the archivists was dropped and it was accepted that answering the questions of a judge in a legal proceeding did not breach the duty of confidentiality. The law of 1983 however details the exception to confidentiality. It is notably stated that archivist can disclose information. Nonetheless, Laîné and Grand were relocated. Philippe Grand was sent to work in the prison archives and Brigitte Laîné to work on tax archives.

In its turn, the sanctioning of the archivists created an affair within the affair. Many stood by the archivists and did not consider that their whistle blowing should be punished. Laîné and Grand had acted within their professional domain and according to the law. Indeed, had they *not* told the court about the existence of the files, they would have violated Article 8 of the ICA Code of Ethics, which prescribes that ‘Archivists should use the special trust given to them in the general interest and avoid using their position to unfairly benefit themselves or others.’ Many argued that the archivists should not be considered to having breached their duty of confidentiality. A movement of support was spontaneously organised online in social forums where it was notably commented that Laîné and Grand had a ‘civic duty’ to act.<sup>675</sup> If Brigitte Laîné and

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<sup>674</sup> AAF Press release, 3 March 1999: ‘L’archiviste a un devoir absolu de neutralité. Ce n’est pas voler au secours de M. Papon que de rappeler ces principes republicains d’égalité et de continuité du service public. Il s’agit seulement de souligner l’étendue de la responsabilité de l’archiviste, conservateur de documents qui, en dépit de leur valeur probante, ne sont pas le receptacle de la vérité pure comme on est aujourd’hui trop enclin a le faire croire en les sacralisant’ [author’s translation]. Available at <http://h-net.msu.edu/cgi-bin/logbrowse.pl?trx=vx&list=hfrancais&month=9903&week=b&msg=ZvTD7jm8gPVVyvT6pbsrA&user=&pw>

[last accessed March 2015]

<sup>675</sup> Internet forum of the AAF, discussion

available at <http://h-net.msu.edu/cgi-bin/logbrowse.pl?trx=vx&list=hfrancais&month=9903&week=b&msg=ZvTD7jm8gPVVyvT6pbsrA&user=&pw> [last visited March 2015]

Philippe Grand had not disclosed to the tribunal the existence of the archival material, they would have violated Article 9 of the Code of Ethics approved by the CIA.<sup>676</sup>

The *Association au Nom de la Mémoire* (ANM), interviewed in March 2013, stressed that there was a real political stake in access to the archives. Preventing historians from accessing the archives despite the public demands to know the ‘truth about the Algerian war’ was a political choice. It was only then that victims would be able to know what happened to their relatives. As one member of the association explained, ‘Ultimately the objective is not to put people in prison. Families are beyond that. What matters today is to be able to publicly say: I was a victim of the French army. It should be recognised as such.’<sup>677</sup> Indeed, France has from very early on sought to keep control on the archives. Following the end of the war, the *Chef d’Etat Major* (defence Minister) ordered the Chief Commandant in Algeria to bring the archives concerning the colonization of Algeria located in the Bureau des Archives at Blida, near Algiers.<sup>678</sup> It is reported that the Minister expressly spoke of the need to avoid ‘compromising documents’ falling into the hands of the FLN and so an initial tranche of documents was destroyed in Algeria before the transfer.<sup>679</sup> However, any serious examination of the Algerian War of Independence became impossible after the adoption of the Law of January 1979 law with its 60-year restriction on documents, including documents of the National Police, concerning the lives of private persons or that affect national security or defence. As a partial remedy to the situation, the *Service Historique de l’Armée de Terre* (SHAT) in 1990 had published a collection of documents on the Algerian war,<sup>680</sup> *La guerre*

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<sup>676</sup> 1979 Law on the Archives, Article 9: Archivists should pursue professional excellence by systematically and continuously updating their archival knowledge, and sharing the results of their research and experience. Archivists should endeavour to develop their professional understanding and expertise, to contribute to the body of professional knowledge, and to ensure that those whose training or activities they supervise are equipped to carry out their tasks in a competent manner. They notably defended their action by considering that they had to contribute to the effort to disclose a state crime. ‘Par notre témoignage au procès Einaudi-Papon, nous nous sommes conformés à la déontologie archivistique, en contribuant à faire la lumière sur ce qui n’est pas un secret mais un crime d’Etat.’ Commentaries of Lainé and Grand on the forum of the AAF.

<sup>677</sup> Research interview with Houria Bouteldja (Paris March 2013).

<sup>678</sup> Lettre du ministre des Armées au général commandant en chef en Algérie, Paris, 1 Decembre 1959, n° 4841/EMA/1.0. (SHAT, 50 T 50) quoted in Thierry Sarmant, *Archives ‘secrètes’, secrets d’archives? Historiens et archivistes face aux archives sensibles* (Paris: CNRS Editions 2013).

<sup>679</sup> Lettre from Général Le Puloch, Chef d’état-major de l’armée de terre, to général commandant supérieur des forces en Algérie, Paris, 3 August 1962, n°12539/EMA/2/OM. The General wished to ‘éviter la divulgation de certains documents dont une exploitation tendancieuse pourrait être nuisible aux intérêts de la France’ ; quoted in Sarmant, *Archives ‘secrètes’, secrets d’archives?* (n 73).

<sup>680</sup> Initially, the year of release was planned for 1992; for reasons unknown it was published in 1990. See Charles Robert Ageron, ‘A propos des archives militaires sur la guerre d’Algérie’ [1999] 63(1) *Vingtième siècle*, revue d’histoire 127-129.

*d'Algérie par les documents*, in two volumes. The first, titled *L'Avertissement* (the warning), covers the period of 1943-1946 and the Second volume covering the period of 1945 to 1954 untitled *Les Portes de la Guerre* (the doors of the war) .<sup>681</sup>

Following the archivists' polemic, Culture Minister Catherine Trautmann ordered a new administrative investigation of the archives concerning the events of 17 October 1961, this time looking at the judicial archives. However, Einaudi then explained that despite repeated demands his requests to access archives were dismissed or simply ignored.<sup>682</sup>

On 5 May 1999, another report, the Geronimi report,<sup>683</sup> was submitted to Prime Minister Lionel Jospin.<sup>684</sup> This report reproduced documents from the archives, indicating that the government at the time was informed of these higher numbers. It notably reports that 48 people had died during the night of 17 October 1961, 18 deaths attributable to police action. However, it highlighted that this number was most probably lower than the actual death toll. A memo from the head of the office of the Minister of Justice to the director of the office of the Prime Minister, dated 27 October 1961, indicates that a hundred bodies were found and that for *very many* of them, according to *some indicators*, these murders could be attributable to actions of the police.<sup>685</sup> Another memo, sent directly to Prime Minister Michel Debré, informed the prime minister on the disappearance and assassination.<sup>686</sup> The Geronimi report was a way of showing that some efforts were being undertaken and even that police officers might be prosecuted. However, the proceedings were dismissed pursuant the enactment of the 1968 amnesty. Although the numbers and identity of the dead are still unclear, Papon's claim of only three deaths on 17 October has been refuted by both the official reports, the Mandelkern Report published in 1998 on the police archives, and the Geronimi Report of 1999 on the judicial archives. The 'other Papon affair' revealed the extent of the tension about the memory of the Algerian war. The trial was both indicative of a progressive

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<sup>681</sup> Jean Charles Jauffret (ed), *La guerre d'Algérie par les Documents*. Vol 1: *L'Avertissement* Vol 2: *Les Portes de la Guerre, 1946-1954* (Vincennes: Service Historique de l'Armée de Terre 1990).

<sup>682</sup> Jean-Luc Einaudi, 'Octobre 1961, pour la Verité, eEfin', in *Le Monde*, May 20 1998.

<sup>683</sup> Jean Geronimi, Rapport de mission: Recensement des archives judiciaires relatives d la manifestation organisée par le FLN le 17 octobre 1961 et, plus généralement, aux faits commis à Paris à l'encontre des Français Musulmans d'Algérie durant l'année 1961, 5 May 1999.

<sup>684</sup> Philippe Bernard, 'Un rapport propose de faciliter l'accès aux archives de la guerre d'Algérie', *Le Monde* (17 October 2001) 13.

<sup>685</sup> 'Une note du directeur du cabinet du garde des sceaux au directeur du cabinet du premier ministre, datée du 27 octobre 1961, mentionne la découverte d'une centaine de cadavres et ajoute que *le plus souvent*, selon *certaines indices*, les meurtres pourraient être imputables à des *actions policière*' [author's translation]. See Geronimi Report (n 650) 15.

<sup>686</sup> Nathaniel Herzberg 'Trente-Cinq ans de Mensonge Officiel sur les Crimes Policiers de 1961', *Le Mond* (13 August 1999) Referring to Geronimi Report (n 650)16 And 29.

resurgence of interest in the colonial period and the source of renewed debate over the underlying political consensus by which the war was terminated. Archives are a way to access to the ‘truth’ and even to shift the ‘accountability bargain’ on past violations.

## B. Reactivating Silenced Memories

Since the 1990s France has undergone a resurgence of interest in the Algerian war. Historians’ involvement in the debate on state responsibility for the violence of the Algerian war raised important ethical questions. As explored in Chapter 5, French amnesty law makes it impossible to establish the criminal accountability of the state agents involved in acts of violence of the Algerian war. Yet, the intervention of historians allowed new aspects of the war to come to light that until then had been ignored. This section has explored the implications of such intervention in the construction of a collective narrative of the past and the limitations of using trials as a venue of recognition for victims.

### 1. Historians as Instigators of Debates

Defamation claims brought against historians draw attention to the role of civil society actors in launching a truth-telling process when the state has not. In parallel to the public interest in knowing about the colonial period, the ‘other’ Papon trial created a ‘momentum’ to press the government to review access to the archives documenting the police repressions of 17 October 1961 as well as the way these events are remembered. Much earlier, in 1972, a colloquium was organised by the Court of Cassation to debate human rights violations during the French repression in Algeria. Historian Pierre Vidal-Naquet presented a report in which he stressed the state of impunity covering the torturers.<sup>687</sup> Rapidly, the discussions on torture turned the debate into an informal trial on the responsibility of the criminal justice system. Maurice Ayardot, chair of the session, left the room as torture was being described as perpetrated under orders. Was the judiciary accountable? Jean Reliquet, ex-prosecutor in Algeria, declared, ‘I could not do anything.’ Twenty years after this first attempt at truth telling, another colloquium was organised, at the *Ecole Nationale de la Magistrature* (National School for the

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<sup>687</sup> Pierre Vidal Naquet ‘Rapport sur l’Algérie’ in Pierre Vidal Naquet, *Face à la Raison d’Etat. Un Historien dans la Guerre D’Algérie*, (Paris La Découverte, 1989).

Judiciary).<sup>688</sup> However the presentation of testimonies by judges in service in Algeria raised more questions than it answered. In 1988 an international scientific colloquium on the theme of 'France in the Algerian war' was held in Paris,<sup>689</sup> organised under the direction of the historians Jean Pierre Rioux and Charles Robert Ageron. The conference discussed the question of the Algerian conflict only from a French perspective. This exclusion of the Algerian experience of the war and of colonialism meant that the military operations in Algeria, and notably the use of torture, were not discussed.

The historical impact of the Papon trial was to enable the recognition of a version of history that contradicted the official claim forwarded by Charles de Gaulle; namely that Vichy was a pawn of Germany and that abuses were carried out with the complicity of a few men.<sup>690</sup> However, the judgment itself did not permit such conclusions to be inferred. Instead, the lessons of the Vichy past can be observed in the debates that accompanied the proceedings and the increased interest in this period of French history. Yet, in the end, the court skirted the issue of attributing responsibility for crime to the Vichy government. It was, as the public prosecutor stated, 'the trial of a man and not of a regime'. The Papon trial played an important role in the construction of the historical narrative of World War II in France. It marked a significant shift in the historiography of the Vichy regime and the Resistance.<sup>691</sup> The press covered the trial as if it were the trial of the Vichy government itself and the court's judgment would stand as a history lesson. Simultaneously, however, that the trial established the Vichy government as illegitimate, allowing the Fourth and Fifth Republics to distance themselves as not responsible for the previous regime's oppressive policies, refusing to apologize for Vichy's crimes.<sup>692</sup>

## 2. Public Disclosure of the Past of French Soldiers

The defamation action brought against Jean-Luc Einaudi provided an opportunity to discuss access to the archives and the role of historian in the writing of a national

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<sup>688</sup> Published as a special issue of *Le Genre Humain*, *Juger sous Vichy* [1994] 28 and as a book edited by Maurice Olender (ed), *Juger sous Vichy* (Paris: Editions du Seuil 1994).

<sup>689</sup> 'La France en guerre d'Algérie', Colloquium of the Institut d'histoire du temps présent (IHTP), published as Jean-Pierre Rioux (ed), *La guerre d'Algérie et les Français* (Paris: Fayard 1990).

<sup>690</sup> Dominique Rousseau, *Vichy a-t-il Existé?*, in Olender *Juger sous Vichy* (n 85), 97, 103.

<sup>691</sup> Henry Rousso, *The Vichy Syndrome: History and Memory in France since 1944*. Translated by Arthur Goldhammer. (n595) 201.

<sup>692</sup> From De Gaulle to Mitterrand Presidency, no official responsibility for the mistreatment of Jews during World War II was recognized.

history. As Sylvie Thenault puts it, the trial was an unprecedented opportunity for the historian to enter the courtroom.<sup>693</sup> However, she nuances the potential impact of this intervention and stresses that the relationship between historians and judges does not extend to the possibility of rewriting history.<sup>694</sup> Indeed, defamation proceedings can only have a limited impact on the recognition of a hidden historical past.

Defamation litigations can be a part of a process of truth recovery. However, they are individual claims and their effect on the collective is limited. The cases explored above concern Frenchmen in high political positions. Thus the question was asked in terms of how far the divulging of an ex-combatant's past may affect his reputation. This question particularly was in issue in the different charges by Jean-Marie Le Pen, founder of the far right party the Front National against those who disclosed his Algerian past. The revelations that had been published during his electoral campaign and it is the revealing of these actions at that particular moment that was at the heart of the trial.

In 1989, the magistrate's court considered two newspapers, *Le Canard Enchaîné* and *Libération*, which had published interviews with victims who, claimed to have witnessed or suffered torture at the hands of Jean-Marie Le Pen.<sup>695</sup> The first article, titled 'Tortionnaire et Candidat' (torturer and [election] candidate) spurred the writing of another article titled 'Oui, Le Pen a torturé' (Yes, Le Pen tortured).<sup>696</sup> An ex-legionnaire told how he had seen Jean-Marie Le Pen 'in action' in the Villa des Roses, a place notorious for being an interrogation centre.<sup>697</sup> In an interview in 1963, and published in the far right newspaper *Combat*, Jean-Marie Le Pen had in fact admitted to using torture in Algeria during his service from 1956-1957.<sup>698</sup> Algerians accused Le Pen to have tortured and summary executed civilians. The Tribunal correctionnel relaxed the journalist considering that the defamation could not be constituted. The Court de Cassation confirmed the argument of the defence and acknowledged the argument that

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<sup>693</sup> Research interview, Sylvie Thénault, March 2013, Paris.

<sup>694</sup> See also Lawrence Douglas, 'The Didactic Trial: Filtering History and Memory into the Courtroom' [2006] 14(4) *European Review* 516.

<sup>695</sup> Cour de Cassation, Chambre criminelle, du 7 Novembre 1989, n°86-90.811 [hereafter *Canard Enchaîné Case, 1989*], available at:

<https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007064354>

<sup>696</sup> 4 April 1984, it was also the eve of the presidential elections to which Le Pen was candidate.

<sup>697</sup> *Libération* Le Pen, Villa Rose .

<sup>698</sup> *Combat*, November 1962.

Le Pen himself admitted having practiced torture during his service in Algeria in 1957.<sup>699</sup> Hence the French court dismissed le Pen's claim on the basis that one cannot invoke a violation of the articles, because he does not admit to have committed those acts and affirm that this endorsement is dishonouring.<sup>700</sup> It relied on the defence argument that Le Pen has admitted having practiced torture during his service in Algeria in 1957 in a press article published in 1962 in which he declared:

I have nothing to hide. I tortured because it was necessary. When someone is brought to you who has planted 20 bombs that could explode at any moment and who will not talk, you use all the methods at your disposal to make him talk.<sup>701</sup>

Hence the court dismissed le Pen's claim on the basis that one cannot claim to have had one's honour brought into disrepute in relation to practices (of torture) that one has endorsed elsewhere.<sup>702</sup>

In 1992, the Le Pen's controversy was reactivated by Michel Rocard on the TV show '7/7' during a televised debate where each candidate was presenting their programs for the upcoming elections. Rocard said of Le Pen, among other things, 'He then went to Algeria. He tortured' (*Il est ensuite allé en Algérie, il a torturé.*) After a long battle that lasted almost ten years, in 2000 the *Cour de Cassation* rendered its judgment and ruled that Michel Rocard had pursued a 'legitimate goal in making this information public' and accepted his good faith defense.<sup>703</sup>

In another case, this time brought against historian Pierre Vidal-Naquet, Jean-Marie Le Pen invoked a different aspect of defamation law, concerning insults.<sup>704</sup> What was in issue was the insulting nature in being called 'torturer'. It was notably ruled that the use of the term 'torturer' needed to be discussed not within the context of a libel trial but

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<sup>699</sup> Canard Enchaîné Case, 1989.

<sup>700</sup> Canard Enchaîné Case, 1989

<sup>701</sup> Canard Enchaîné Case, 1989. See also Cass. Crim. n° 00-84622, 19 June 2001 [hereafter Cass. Crim Vidal Naquet v. Le Pen, 19 June 2001]

<sup>702</sup> Cass. Crim Vidal Naquet v. Le Pen, 19 June 2001 (n 50).

<sup>703</sup> '[II] avait poursuivi un but légitime en portant cette information à la connaissance des téléspectateurs.' Cour de Cassation, Chambre mixte 24 November 2000 97-81.554., Bulletin 2000 CH. M. 4 5

See also an earlier moment in the protracted legal proceedings on Rocard's statement concerning Le Pen and torture on 7/7 : Cass. Crim. 4 January 1996 n° 94-83.585.

<sup>704</sup> Loi du 29 Juillet 1881 (n 488), Article 29: Toute expression outrageante, termes de mépris ou invective qui ne renferme l'imputation d'aucun fait est une injure.

rather in the broader context of ‘ethics, the debate of ideas, political discussion that should be permitted in a democratic society’.<sup>705</sup> However as French law provides that in case of claims related to the insulting character of the statement, in the case of libel, the claimant does not have to prove that he or she has suffered loss or damage as a result of the publication. In contrast, in claims for slander, the claimant must prove actual prejudice. Conversely the judgment recognises the fact that torture was perpetrated:

Torture during the Algerian conflict, is today as it is a historical fact that nobody questions, except those who consider that the term ‘torture’ is pejorative and should not be used.<sup>706</sup>

Disclosing his involvement in the repression perpetrated against civilians could have a detrimental impact on his political career. The disclosure of his past could tarnish his reputation as a politician. In the case of Florence Beaugé the court found, however, in Florence Beaugé’s favour, that her disclosures of his past were devoid of any ‘manifestation of personal animosity against’ his electoral ambitions’.<sup>707</sup> However, it is difficult to elevate this effect to a collective level. In Einaudi’s case, during the hearing he attempted to divert the discussion in the proceedings beyond the question of the dishonouring character of statement he had made and towards its historical significance. He sought to use the proceedings to highlight the inaccuracies of the official version and notably the failure of the Mandelkern Report to examine what happened in the courtyard of the police Prefecture (where some of the worst atrocities were reported to have been committed). He also asked why the archives of the River Authority were destroyed in 1990.<sup>708</sup> But it was in relation to Einaudi’s affaire the judges considered the evidence brought by an historian.<sup>709</sup> While ruling in favour of the good faith of the historian or the journalists instead of relying on the defence of truth, the court is unwilling to take responsibility for making a historical judgment.

Further, it has to be underlined that victims’ expectations of truth recovery from civil and criminal litigations should be mitigated. Firstly, even if a case is successful for those who tried to disclose a hidden past, the proceedings can take much time. Secondly, the

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<sup>705</sup> *Le Monde*, 1 September 1999.

<sup>706</sup> Cass. Crim Vidal Naquet v. Le Pen , 19 June 2001 (n50)

<sup>707</sup> The lower court’s judgment, stated: the judges find that the disputed writings are devoid of any manifestation of personal animosity towards the civil party

<sup>708</sup> Jean-Luc Einaudi, ‘Octobre 1961, pour la Verité, enfin’, in *Le Monde*, May 20 1998.

<sup>709</sup> Jean-Luc Einaudi, ‘Octobre 1961, pour la Verité, enfin’, in *Le Monde*, May 20 1998.

public nature of the claim can also work to trivialize the suffering of victims. Although the Le Pen against Beaugé affaire of 2005 enabled victims to testify to having seen Le Pen perpetrate acts of torture, his responses to their claims were provocative.<sup>710</sup> As he wrote in *Le Monde*, ‘I do not know if these people suffered what they say they did, but they certainly didn’t because of any action of mine’.<sup>711</sup> He also averred that ‘these witness statements are lies. Perhaps these people were persuaded to talk. Someone said to them: ‘You know the guy you saw? That was Le Pen.’ But how would they have known? It’s ridiculous’. This kind of public response can offend the victims and deter those whose wounds are still open from taking part in any trial proceedings.<sup>712</sup>

Secondly, although the intervention of the courts makes it possible to request access to archives, defamation proceedings do not, however, allow investigation of the crimes themselves. Nonetheless, these trials did enable a public affirmation of what was already known by the society, while the ensuing transcripts of trials and written opinions of judges produce a ‘legal memory’.<sup>713</sup>

### C. Society’s Right to Information

Demands for a ‘belated rendition of justice’ are often constrained by the political impact a prosecution would have.<sup>714</sup> Indeed, the terms of disengagement at the end of the conflict often reflect political bargaining between the opposing parties. The prosecution of offenders who were once forgiven may seem a revision of this bargain and trigger further tensions. The cases explored in this chapter shows that the role of the judge has not been to deliver a ‘truth’ on the Algerian war but, rather, to domesticate the narratives and discourses on the Algerian war.

The role of the judge was notably observable in the European Court of Court of Human Rights (ECtHR) 2009 proceedings launched by Aussaresses’s publishers against their conviction and sentencing by the French court for complicity in *apologie de crimes de*

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<sup>710</sup> Benjamin Stora, 290.

<sup>711</sup> Alan Cowell *Le Pen Accused of Torturing Prisoners During Algerian War New York Times*, JUNE 4, 2002.

<sup>712</sup> Alan Cowell *Le Pen Accused of Torturing Prisoners During Algerian War New York Times*, JUNE 4, 2002.

<sup>713</sup> Austin Sarat and Thomas R. Kearns (eds), *The Rhetoric of Law* (Ann Arbor: University of Michigan Press 1994) 13.

<sup>714</sup> Douglas, ‘The Didactic Trial’ (n 162) 519.

*guerre*. In its decision, the ECtHR ruled that by sanctioning the publishers for having participated in the dissemination of the witness's account of a third person concerning events belonging to the past of a particular nation significantly hindered public discussion of problems of general (public) interest.<sup>715</sup> Aussaresses's publishers, Olivier Orban and Xavier de Bartillat, had raised the issue of the memoirs as a matter of freedom of speech before the ECtHR. After two years of proceedings, the Court held that France had violated Article 10 (Freedom of Expression) of the European Convention on Human Rights. During the debates in court the publishers had argued that the book contributed to establishing the 'historical truth' regarding a traumatising page of French history. As was held by the court:

The publication of this type of witness account was undoubtedly part of a debate of general [public] interest and of singular importance for collective memory, namely not only that such practices were current, but more importantly [that they occurred] with the approval of the French authorities.<sup>716</sup>

The ECtHR recognised the French courts "legitimate goal" in sanctioning Aussaresses' memoirs.<sup>717</sup> The Court recalled that Article 10 protects not only "information" or "ideas" that are 'favourably received or regarded as inoffensive or indifference but also those that offend, shock or disturb and considered that the distance of time would mitigate the troubling effects on those who had suffered or witnessed the torture'.<sup>718</sup> However it ruled that the French court response was disproportionate and that it was not

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<sup>715</sup> 'Sanctionner un éditeur pour avoir aidé à la diffusion du témoignage d'un tiers sur des événements s'inscrivant dans l'histoire d'un pays entraverait gravement la contribution aux discussions de problèmes d'intérêt général et ne saurait se concevoir sans raisons particulièrement sérieuses' [author's translation]. *Orban and others v. France*, 15 January 2009, Application n°. 20985/05.[hereafter *Orban and others v. France* Available at:

[http://hudoc.echr.coe.int/eng/#{%22fulltext%22:\[%22orban%22\],%22languageisocode%22:\[%22FRE%22\],%22documentcollectionid%22:\[%22GRANDCHAMBER%22,%22CHAMBER%22\],%22itemid%22:\[%22001-90662%22\]}](http://hudoc.echr.coe.int/eng/#{%22fulltext%22:[%22orban%22],%22languageisocode%22:[%22FRE%22],%22documentcollectionid%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-90662%22]})

<sup>716</sup> [L]a publication d'un témoignage de ce type [...] s'inscrivait indubitablement dans un débat d'intérêt général d'une singulière importance pour la mémoire collective: [...] à savoir que non seulement de telles pratiques avaient cours, mais qui plus est avec l'aval des autorités françaises' [author's translation]. *Orban and others v France* 2009 (n 503) paragraph 49.

<sup>717</sup> Emmanuel Derieux 'Nouvelle condamnation de la France pour atteinte à la liberté d'expression' [25 February 2009] *La Semaine Juridique*.

<sup>718</sup> [L]a publication d'un témoignage de ce type [...] s'inscrivait indubitablement dans un débat d'intérêt général d'une singulière importance pour la mémoire collective: [...] à savoir que non seulement de telles pratiques avaient cours, mais qui plus est avec l'aval des autorités françaises' [author's translation]. *Orban and others v France* 2009 (n 503) paragraph 49.

‘necessary in a democratic society’.<sup>719</sup> There was insufficient reason to condemn someone for providing a witness account, no matter how shocking or troubling, four decades after the acts in question. The European Court judges emphasized the significance of the debate in deciding whether the actions of the French courts were justified and concluded:

... taking account specifically the singular importance of the debate of general [public] interest of which the publication of *Services Spéciaux Algérie 1955-1957* forms a part, the reasons of the domestic court are not sufficient to convince the Court that the conviction of the applicants was ‘necessary in a democratic society’.

Thus the Court finds that this was a violation of Article 10 of the Convention.<sup>720</sup>

In particular, the Court highlighted that guaranteeing the freedom of speech of the publishers was all the more necessary in a context in which the witness account testimony was participating in the efforts that all countries must make to ‘debate their past frankly and dispassionately’.<sup>721</sup>

The 2009 ECtHR ruling relates to a broader trend occurring within Europe whereby memory of past violent event is integrated in a wider policy to combat racism and discrimination<sup>722</sup> Principle 3 of the UN Sets of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity (1997) to recognise a State’s need to preserve memory:

A people’s knowledge of the history of its oppression is part of its heritage and, as such, must be ensured by appropriate measures in fulfilment of the State’s duty to preserve archives and other evidence concerning violations of human rights and humanitarian law and to facilitate knowledge of those violations. Such measures shall be aimed at preserving the collective memory from extinction

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<sup>719</sup> Orban and others (n 503) para 42, 44.

<sup>720</sup> ‘Au regard de ce qui précède, et compte tenu tout particulièrement de la singulière importance du débat d’intérêt général dans lequel s’inscrivait la publication de *Services Spéciaux Algérie 1955-1957*, les motifs retenus par le juge interne ne suffisent pas pour convaincre la Cour que la condamnation des requérants à raison de celle-ci était ‘nécessaire dans une société démocratique. Elle conclut en conséquence à la violation de l’article 10 de la Convention.’ Orban and others (n 503) para 54.

<sup>721</sup> ‘Cela participe des efforts que tout pays est appelé à fournir pour débattre ouvertement et sereinement de sa propre histoire.’ *Orban and others v. France*, paragraph 52.

<sup>722</sup> See notably European debates on Documents of the European Conference against Racism, Strasbourg, France, October 11-13, 2000, UN GAOR, Preparatory Comm., 2d Sess., Annex IV-V, U.N. Doc. A/CONF.189/PC.2/6 (2001).

and, in particular, at guarding against the development of revisionist and negationist arguments. (Principle 3: Duty to Memory)<sup>723</sup>

The recognition of a right to access information about past events bridges the gap between constructed narratives on the past and historical facts. The European Court of Human Rights considers that it has a role in regulating historical dialogue in order to promote democratic values. In the earlier case of *Lehideux and Isorni v. France*, a case concerned with publications on the collaboration of the Petain regime during the Second World War, the ECtHR spoke of ‘the efforts that every country must make to debate its own history openly and dispassionately’.<sup>724</sup> This same sentence was paraphrased in *Orban and others* with regard to statements justifying war crimes such as torture or summary executions.<sup>725</sup> Denial of certain historical events is considered as contradicting fundamental values of the Convention and of democracy, namely justice and peace. In previous jurisprudence, the Court affirmed its position concerning the denial of crimes against humanity, notably the Holocaust.<sup>726</sup> However, in *Lehideux and Isorni* it was held by a majority that certain statements praising Petain’s collaborationist policies were part of a historical debate about the interpretation of facts and ‘as such [did] not belong to the category of clearly established historical facts – such as the Holocaust – whose negation or revision would be removed from the protection of Article 10 by Article 17’.<sup>727</sup> The jurisprudence of ECtHR identifies a broader purpose to the publication of testimony on past events. This role is not to establish ‘historical truth’ as such but to protect a public space for a society to debate on controversial issues of a country’s past. The Court of Cassation had dismissed the historical interest of Aussaresses’ memoirs, emphasizing that freedom of expression must be exercised ‘within the limits of the law’ as permitted by Article 10(2).<sup>728</sup> As the European Court saw it, the punishment of the publishers was

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<sup>723</sup> Updated Sets of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, UN Doc E/CN.4/2005/102/Add.1. 7.

<sup>724</sup> *Lehideux and Isorni v. France*, 23 September 1998 (Appl. no 24662/94) paragraph 55.

<sup>725</sup> *Orban and others v. France*, paragraph 52, quoted in n 503 above.

<sup>726</sup> *Garaudy v. France*, Appl. n° 65831/01 (ECHR, 24 June 2003).

<sup>727</sup> *Lehideux and Isorni v. France* 1998 (n 678) paragraph 47. Article 17 ECHR Prohibition of Abuse of Rights: Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

<sup>728</sup> Article 10 of the ECHR on Freedom of expression:

(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

disproportionate, especially as no incitement or expressions of hatred were involved. The Court found that a society's right to information and a democratic society's need to be able to debate its past was fundamental arising from Article 10(1) of the European Convention on Human Right on Freedom of Expression.

## Conclusion

The analysis of the Papon-Einaudi cases here has traced the evolution of the judicial debate that resulted in the public recognition of Maurice Papon's responsibility in the killing of Algerian demonstrators on 17 October 1961. The Vichy proceedings created a momentum and an opportunity to discuss the Algerian war and the responsibility of the French army. As the military practices of torture were increasingly exposed, amnesty still impeded the demonstration of truth before the courts. There is a natural expectation that 'truth' will emerge from criminal prosecutions. However, as this chapter demonstrated the role of trials dealing with serious crimes fail to satisfy the victims and help them to overcome their wounds but are also directed to a larger community. Amnesty laws bring a complex relationship with accountability and memory that extends beyond the realm of a courtroom. How these relationships develop over time and what constitutes the tenor of demands for justice call for further investigation. The next chapter examines the implications of amnesty in the construction of an official narrative of past events and its manifestation through the commemorative process.

The examination of the defamation proceedings more widely illuminated the influence of amnesty on the public airing of evidence. In particular, it has shown how individual circumstances of alleged perpetrators of torture bringing defamation suits allowed the public to hear evidence about past abuses through 'good faith' defences. Indeed by relying on the 'good faith' of the author's claims about a past torturer, the French courts apply the reverse burden of proof such that individuals have to provide sufficient evidence. However, while French jurisprudence protect the right of historians and journalists to disclosing the past in this way, it offers little satisfaction for the victims who cannot be officially recognised as such.

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(2) of the European Court of Human rights : 'The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.'

## Chapter 7:

### Dealing with the legacy of past conflict and amnesty

*We pass through the present with our eyes blindfolded. We are permitted merely to sense and guess at what we are actually experiencing. Only later when the cloth is untied can we glance at the past and find out what we have experienced and what meaning it has.*

Milan Kundera, *Laughable Loves*<sup>729</sup>

Up to this point, this thesis has examined judicial attitude towards the application of the amnesties. It has explored a series of cases and sought to frame the possibility for individuals to investigate and prosecute past crimes. This chapter turns to exploring the impact of amnesty legislation on the construction of a national narrative of past events. Given the influence of political variables, what is the likelihood of accounts established in legal proceedings to be recognised officially?

On 26 March 2012, the start of political recognition could be witnessed when French president Francois Holland pledged to atone for the acts of violence perpetrated by the French police in Paris on 17 October 1961:

Truth must be known. It is important to recognize what occurred [...] Algerians demonstrating for the right to independence were killed in a bloody crackdown. The Republic recognises these facts with clarity. Fifty-one years after the tragedy, I pay tribute to the memory of the victims.<sup>730</sup>

“Truth” is undoubtedly ‘one of the most elusive concepts that can be used to address what happened during a conflict’.<sup>731</sup> Hollande’s tribute came as the fulfilment of a political promise he had made during the campaign for the presidential election. It marks

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<sup>729</sup> Milan Kundera, *Laughable Loves* (Harmondsworth: Penguin 1987).

<sup>730</sup> ‘Hollande: la République Reconnaît la Répression “Sanglante” du 17 Octobre 1961’ *Libération*. Available at:

[liberation.fr/societe/2012/10/17/hollande-la-republique-reconnait-la-repression-sanglante-du-17-octobre-1961\\_853911](http://liberation.fr/societe/2012/10/17/hollande-la-republique-reconnait-la-repression-sanglante-du-17-octobre-1961_853911) [last accessed December 2014]

<sup>731</sup> Jonathan D Tepperman, ‘Truth and Consequences’ *Foreign Affairs*. [2002] 81(2)

a change of attitude towards dealing with the Algerian past and sends a message to groups striving for recognition.

This chapter examines how and why amnesty laws became the nexus of contested narratives about the Algerian past. Amnesty initially restricted the commemoration of past events by framing a selective political process of remembrance. The implementation of the amnesty affected the political construction of an official narrative on the Algerian war, which resulted in forestalling the forgetting of past crimes. However, the efforts of individuals to activate marginalised memories and cultivate an alternative narrative of past events have enabled revision of the official narrative of some episodes of the conflict.

This chapter first examines the relationship between amnesty and commemoration through three forms of dealing with the legacy of past conflict. The first one consists of understanding the evolution of a political discourse about past violent events. The second one examines the role of law in the writing of an official history. It maps the evolution of the political discourse on the official history of the Algerian war. In particular, it looks at debates surrounding the official recognition of the war in 1999. It also explores further the role of law in the writing of history and examines the French concept of memory laws (*lois mémorielles*) in protecting the memory of the past from being altered. Finally, it examines how individuals initiated their own commemorative actions. This last section seeks to pinpoint the emergence of a movement of resistance to the official discourse on the Algerian war as it emerged from civil society and, in particular, it examines the effect of contentious actions on the politics of commemoration of the events of 17 October 1961.

## I. Official History, Collective Memory and Sites of Memory

The issue of memory is increasingly becoming a central topic of political contention in the present. Contentious actions are both a response to, and an influence on political institutions. How States commemorate their past provide a template of the interpretative possibilities available. How the event is remembered enlighten on the vocabularies, the symbolism and attributions that attribute value.<sup>732</sup> Remembering and forgetting traumatizing events embeds crucial foundations for the reconstruction of a society.<sup>733</sup>

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<sup>732</sup> Emiliios Christodoulidis, 'Law's Immemorial' in Emiliios Christodoulidis and Scott Veitch (eds) *Lethe's Law: Justice, Law and Ethics in Reconciliation* (Oxford and Portland: Hart 2001) 223.

<sup>733</sup> Brewer, John D. Brewer, 'Memory, Truth and Victimhood in Post-trauma Societies' in Gerhard Delanty and Krishnan Kumar (eds) *The Sage Handbook of Nations and Nationalism* (London: Sage 2006).

Not only does remembering provide a form of recognition for the victims but also it ensures that recognition at a state level. By addressing this event publicly, a state may seek to explain these acts and release all details necessary to understand them. Impunity Watch's comparative study on the role of memorialisation found that political interests frequently drive states narratives.<sup>734</sup>

The role of the law in the narration of past events is characterised by a go-between in the relation of norms and facts. The presentation of the facts develops in a narration that culminates with atonement. The relation between normative and narrative coherence reflect the two faces of legal norms. As such, the law is meant to function in a normative and a narrative context simultaneously. Norms are in need of a narrative to come to be seen as relevant. As Chapter 6 explained, in criminal proceedings this relation serves an ambiguous function in the context of historical trials.<sup>735</sup> Judges' use of history serves to construct and reinforce particular views of the past, of the legal order, and of the relationship between the two. Claims of justice constructed on the establishment of a shared 'truth' risk engaging in a broader struggle of recognition between narratives that may overshadow the demands of victims or their relatives.

However, as demonstrated in Chapter Six, this relationship does not make it possible to address and resolve the discrepancies that may emerge between official memory and individual accounts. It found that legal proceedings inevitably produce a selective narrative. For Sociologist Pierre Nora the discrepancy between what is acknowledged and what is known reflect the opposition of memory to history. The authorised history produced by state institutions, unself-conscious, commanding and all powerful, clashes with the outburst of memories coming from individuals whose voices were marginalised.<sup>736</sup> Derrida's conceptualization of the 'metaphysics of presence' is useful here to complete the understanding of the exclusive and inclusive dynamics of memory. Oppositions such as 'good versus bad', 'inside versus outside', 'true and false', are reflective of a violent hierarchy. Memory is therefore shaped by the frame of reference of the one who remembers in the present. Secondly, memory introduces an element of

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<sup>734</sup> Impunity Watch, Policy Brief: Guiding Principles of Memorialisation (2013) 7. Available at: [http://www.impunitywatch.org/docs/Policy\\_Brief\\_Guiding\\_Principles\\_of\\_Memorialisation.pdf](http://www.impunitywatch.org/docs/Policy_Brief_Guiding_Principles_of_Memorialisation.pdf)

<sup>735</sup> For references for law as narrative see for instance: Bert Van Roermund, *Law, Narrative and Reality: An Essay in Intercepting Politics* (Dordrecht, Boston and London: Kluwer Academic Publishers 1997); Bernhard S. Jackson, *Making Sense in Law: Linguistic, Psychological and Semiotic Perspectives* (Liverpool: Deborah Charles Publications 1995); Austin Sarat and Thomas R. Kearns (eds) *The Rhetoric of Law* (Ann Arbor: University of Michigan Press 1994); Peter Goodrich, *Legal Discourse: Studies in Linguistics, Rhetoric and Legal Analysis* (London: Macmillan Press 1987).

<sup>736</sup> Pierre Nora, 'General Introduction: Between Memory and History' (n 229).

‘undecidability’ between past and present.<sup>737</sup> In this mode of reflection, one can understand that there are too many truths and too many memories of past crimes that the desire to harmonise them into a single memory appears to be both reductive and wrong. Nora develops his argument further, suggesting that official representations of the past can eradicate memory. Within this frame of analysis, the concept of sites of memory, as defined in Chapter 2, is linked to a dynamic that leads to the consolidation of a heritage and the disappearance of memory. As Nora explains, the sites of memory ‘originate with the sense that there is no spontaneous memory’.<sup>738</sup> Anniversaries, museums, and memorials are deliberately created to make up for the absence of memory.

To understand these dynamics, the ‘contentious politics’ model presented in Chapter 2 offers a grid to analyse how conflict may emerge from the silencing of individual accounts. Assessing the role of social movement, it is useful to focus on ‘the dynamic processes through which political actors, identities and forms of action emerge, interact [...] and evolved during complex episodes of contention’.<sup>739</sup> Following this suggestion Cath Collins proposes that identifying who entered ‘the arena of political contention’ offers a wider potential to explore the sites and how these actors interact with the post-transitional political and legal environment.<sup>740</sup> Over time, various types of grievance, interests and political aspirations may simultaneously emerge. In a related argument, Wimmer Cederman and Min, add that disentangling these intertwined contentious demands may be pointless. Instead they suggest focusing on studying the dynamics that motivate these actors.<sup>741</sup> Collins investigates the question of social mobilization, the ‘strategic coincidence’, and how these groups may appropriate structures of opportunity ‘construct interests and goals, innovate in action repertoires.’<sup>742</sup> Further, this framework makes it possible to understand that struggles over memory’s passage into history are shaped within the symbolic environment in which contentious politics take place.

In the case of the Algerian war, the absence of sites of memory that acknowledge the responsibility of French agents in the institutionalisation of torture has fuelled the

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<sup>737</sup> Maja Zehfuss, *Wounds of Memory: The Politics of War in Germany* (Cambridge: Cambridge University Press 2007) 179

<sup>738</sup> Nora, ‘General Introduction: Between Memory and History’ (n 229).

<sup>739</sup> Charles Tilly, Sidney G. Tarrow, *Contentious Politics* (Oxford University Press, 2015) 11.

<sup>740</sup> Cath Collins, *Post-transitional Justice: Human Rights Trials in Chile and El Salvador*. (University Park: Penn State University Press 2010) 41.

<sup>741</sup> Andreas Wimmer, Lars-Erik Cederman and Brian Min, ‘Ethnic Politics and Armed Conflict: A Configurational Analysis of a New Global Data Set’ [2009] 74(2) *American Sociological Review*.

<sup>742</sup> Collins *Post-transitional Justice* (n 12) 42.

victims with a sense of continuation of the harm.<sup>743</sup> Because legal language is inevitably selective, recourse to law to ‘fix’ history overlooks the fragmentation of memory in different individual accounts. The emergence of multiple memory groups, and the impossibility of a cohesive and collectively accepted narrative, indicate the difficulty for law in settling the past. The emergence of counter-memory groups reflects the relationship between memory and identity construction. Their intervention in the field of memory plays on the struggle for the recognition of a survivors’ identity.<sup>744</sup> Victims feeling marginalized and their needs ignored challenge the traditional landmarks of a collective memory by refusing their significance as key structures of identification and by claiming new hallmarks of recognition.

#### A. Mapping The Political Discourse on the Legacy of Past Conflict (1970-1990)

The memory of the Algerian war is characterised by antagonistic edges stemming from the controversial and deeply divisive nature of the Algerian War of Independence. Over time, debates over the Algerian War evolved from a discourse about restoration of national cohesion to a debate about the assertion of French national identity.

Since the 1990s, the emergence of multiple discourses of accountability and victimhood competed with the political project of reunification of the French nation. In *The Vichy Syndrome*, Henry Rousso advances the thesis that Algerian memories need to be regarded as part of a continuum with the commemoration of the past of the Vichy regime. The commemoration of the Algerian War fed into the memory of the Vichy Regime. Henry Rousso notes that such moments of crisis of a society feed into one another. Hence memories of past conflict are themselves components of each new crisis.<sup>745</sup> The emergence of a counter-discourse on violence has two contextual explanations, one at an international level, and the other one at a social level.<sup>746</sup>

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<sup>743</sup> Malvern Lumsden, ‘Breaking the Cycle of Violence: Three Zones of Social Reconstruction in War-Traumatized Societies’ [1997] 34(4) *Journal of Peace Research* 377–383.

<sup>744</sup> Simon Robins, ‘Towards Victim-Centred Transitional Justice: Understanding the Needs of Families of the Disappeared in Post-conflict Nepal’ [2011] 5(1) *International Journal of Transitional Justice* 78.

<sup>745</sup> Henry Rousso, *The Vichy Syndrome: History and Memory in France Since 1944* (n 595) 3-4,

<sup>746</sup> Rousso, *Vichy Syndrome*(n 595) 3.

Rousso advances the thesis that memories of past conflict are themselves components of each new crisis.<sup>747</sup> For him the debates on the memory of the Algerian War subscribe to a historical narrative of French republicanism.<sup>748</sup> This history of the Algerian War relied on previous constructed myth and interpretations. From the beginning of the conflict, France refused to label the operations undertaken in Algeria as a 'war'. De Gaulle's skilful navigation prepared the two countries to end the conflict in a manner that resembled more of a strategic economic cooperation than the end of Franco-Algerian relations. By taking the helm of the amnesty debate in 1962, De Gaulle was primarily concerned to restore the lost national cohesion and facilitate the reunification of groups divided by the conflict. However, as explained above, the *colons* and veterans considered they were 'abandoned'. France developed a narrative of its colonial history, which presented decolonisation as a predetermined end point.<sup>749</sup> However, as observed by Todd Shepard in *The Invention of Decolonization: The Algerian War and the Remaking of France*, this representation of colonisation 'has allowed France to forget that Algeria has been an integral part of France since 1830 and to escape many of the implications of this shared past'.<sup>750</sup> The trauma of the territorial separation was described as an inevitable momentum in the 'tide of history'.<sup>751</sup>

For historian Benjamin Stora, de Gaulle's policy yielded more than an attempt to safeguard the ideal of Republican values. He contends that, from 1963 to the 1990s 'France appeared to be increasingly occupied with erasing the traces of a war she had lost'.<sup>752</sup> The grant of amnesty prevented the possibility of investigating the repressive methods used by the French army.

In the 1970s, the amnesty debate shifted towards a more symbolic dialogue and was used as a way to re-shape the relationship between France as a nation and the 'lost soldiers' of the Algerian war. The amnesty process permitted the construction of a narrative about the French operations in Algeria and the subsequent end of the war based on the Republican ethos that the Republic is '*une et indivisible*' (one and indivisible). Under colonial rule, this principle was embedded in a civilising mission. This mission

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<sup>747</sup> Rousso, *Vichy Syndrome* (n 595).

<sup>748</sup> Rousso, *Vichy Syndrome* (n 595) 3-4.

<sup>749</sup> Todd Shepard, *The Invention of Decolonization: The Algerian War and the Remaking of France*. (n 237) 4.

<sup>750</sup> Shepard, *The Invention of Decolonization: The Algerian War and the Remaking of France*. (n 237).

<sup>751</sup> Shepard, *The Invention of Decolonization: The Algerian War and the Remaking of France*. (n 237) 4.

<sup>752</sup> Benjamin Stora and R. H. Mitsch, 'Women's Writing between Two Algerian Wars' [1999] 30(3) *Research in African Literatures*, 84.

consisted in freeing the indigenous population from forms of tyranny and improving conditions of life by introducing them to ideas of equality and democratic values. The colonial depiction of indigenous societies, particularly in Africa, pictured these societies as ‘blinded by obscurantism’, bound by misery, anarchy and barbarism.

The ideal of unity of the French nation has been the driving force behind the grant of amnesty. De Gaulle himself incarnated an idealised vision of national unity. He sought continuity between the struggles of the French Resistance and the advent of the Fifth Republic. ‘The Republic has never ceased to exist. Free France, fighting France, the French Committee of National Liberation has by turn embodied it. Vichy was and is null and void.’<sup>753</sup> By this representation of the history of Vichy, de Gaulle sought to downplay the internal divisions that characterized World War II.<sup>163</sup> The birth of the Fifth Republic was the occasion to reassert the republican ethos of the unity of the nation.<sup>754</sup> Driven by a desire to modernise the country’s economic and political institutions, de Gaulle’s exercise of power was thus formulated in terms of political independence from the United States and a powerful French presence in the developing world. De Gaulle undertook a process of restoration of national cohesion centred on the deployment of ex-colonial personnel. Melissa Byrnes explains that personnel from the colonial administrations were placed in government offices for immigration and re-kitted the colonial system to regulate the arrival of North African migrants in the Metropole.<sup>755</sup> Linked to the peace agreements, the issue of human rights abuses perpetrated by the French army was put aside for the immediate needs for political stability and restoration of democratic institutions

With the achievement of the amnesty process, one of the most immediate issues for the *colons* and ex-combatants was material reparations. As such the *assimilationist* nature of the language used to commemorate the Algerian War has exalted a past expunged from the guilt of the violence of the colonial system. In the 1980s President Francois Mitterrand pursued this direction and inaugurated his presidential mandate with the reintegration of the OAS members in their military ranks and their military pensions. In 1988 Jacques Chirac, then Prime Minister declared:

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<sup>753</sup> Rousso, *Vichy Syndrome* (n 595). 16,17.

<sup>754</sup> Stanley Hoffmann, ‘The French Constitution of 1958: The Final text and its Prospects’ [1959] 53(2) *American Political Science Review*, 332, 337.

<sup>755</sup> Melissa K. Byrnes, *French Like Us? Municipal Policies and North African Migrants in the Parisian Banlieues, 1945-1975* (Ph.D. dissertation, Washington: Georgetown University, 2008). Available at: ProQuest) 10.

[T]he accomplishments of France overseas [were] something great, ambitious, generous, and imperishable [...] France has no reason to blush over these accomplishments, they are above all a task of civilization, progress, liberty and fraternity.<sup>756</sup>

The official policy seems to continue the spirit of the amnesty laws and did not address the most contentious aspect of the conflict. A first theme of contestation is related to the role of the French army and the legitimacy of the French operations during the war. Between 1968 and 1974, a veteran's memory emerged from the publication of personal testimonies. From the memory of conscripts, elite paratroopers, four-star generals, OAS members, and Gaullist secret police, emerges the 'embattled self' of the combatants with regard to the issue of violence and loyalty to the Nation. The *memoirs* of high-ranking officers notably reflected on the division within the army on the question of torture and the legitimacy of the French counterinsurgency strategy. General Jacques Massu, head of the 10<sup>th</sup> Parachute Division, published *La vraie bataille d'Alger* (The real battle of Algiers).<sup>757</sup> In his book, Massu describes torture as instrumental to the French success in the Battle of Algiers.<sup>758</sup> In response to Massu, General Jacques Pâris de Bollardière published *Bataille d'Alger, bataille de l'homme* (Battle of Algiers, Battle of Man), which protested vehemently against Massu's justification of torture.<sup>759</sup> Conscripts portrayed the ordinary combatant as the victim of the hypocrisy of the French government. As a way to illustrate this, the writings of Pierre Dominique Giacomoni, a civilian claiming to have been the top killer in the OAS, published *J'ai tué pour rien* (I killed for nothing), in which he denounces the hypocritical way in which the French government framed combat in the Algerian war.<sup>760</sup> In contrast, the memoirs of putschist Colonel Argoud portray the figure of the combatant as holding faithfully to his mission, but failing because of the hypocrisy of the government.<sup>761</sup> Where the French army is concerned, responsibility for the escalation of violence is presented as lying with key political figures. Caught between the pride associated with having served France and the

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<sup>756</sup> France Horizon (February 1988) 289 in William B. Cohen, 'The Algerian War and the Revision of France's Overseas Mission' [2003] 4 French Colonial History 234.

<sup>757</sup> General Jacques Massu, *La vraie bataille d'Alger* (Paris: Plon 1971).

<sup>758</sup> Massu *Vraie bataille* (n 27).

<sup>759</sup> General Jacques Pâris de Bollardière, *Bataille d'Alger, bataille de l'homme* (Paris: Desclée de Brouwer 1972).

<sup>760</sup> Pierre Dominique Giacomoni, *J'ai tué pour rien* (Paris: Fayard 1974).

<sup>761</sup> Antoine Argoud, *La Décadence, l'Imposture, et la Tragédie* (Paris: Fayard 1974).

guilt associated with having practised torture, the veterans of the war expressed various kinds of victimhood.<sup>762</sup>

At the peripheries of this memory, the experience of Algerian soldiers who fought alongside the French soldiers against their fellow countrymen challenged the idea of equality. This group of approximately of 180,000 men had a symbolic and military function. They represented a group of Algerians who supported the continuation of French rule.<sup>763</sup> After the war, most of them were disarmed and sent home.<sup>764</sup> Because of their collaboration with the French army, the *Harkis* were in the front line of FLN retaliations and post conflict purges.<sup>765</sup> However, the government of Charles de Gaulle explicitly refused to ‘repatriate’ the bulk of the *Harkis* population to France.<sup>766</sup> He declared, ‘We cannot accept all Muslims who claim they are not getting along with their government.’<sup>767</sup> In January 1963, at a cabinet meeting, Prime Minister George Pompidou said, ‘We must not let ourselves be invaded by the Algerian labour force, even if it pretends to be *Harkis*. If we are not careful, all the Algerians will settle in France.’<sup>768</sup> It is estimated that 75,000 to 100,000 *Harkis* were killed in Algeria. In addition, the 25,000 *Harkis* who could have been repatriated to France between 1962 and 1967 were considered “inassimilable”.<sup>769</sup> Upon their arrival, nearly all of the *Harkis* were taken to internment camps as part of their official processing. Those who were housed long-term were considered to be inassimilable: the chronically ill, traumatized, aged, and families without male heads of household.<sup>770</sup> Demands of recognition of their role and for compensation has been one of the most contentious issues in remembering the Algerian war.

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<sup>762</sup> Martin Evans, ‘The Case of French Conscripts from the Algerian War, 1954-1962’ in Martin Evans and Ken Lunn (eds), *War and Memory in the Twentieth Century* (Oxford: Berg 1997) 73-85; Martin Evans, Rehabilitating the Traumatized War Veteran: The Memory of Resistance: French Opposition to the Algerian War, 1954-1962 in Evans and Lunn (eds), *War and Memory in the Twentieth Century* 78-88.

<sup>763</sup> William B. Cohen, ‘The *Harkis*: History and Memory’ in Patricia M.E. Lorcin (ed), *Algeria 1800-2000: Identity, Memory, braly*

(Syracuse: Syracuse University Press 2006) 164.

<sup>764</sup> Cohen, ‘The *Harkis*’ (n 33) 164.

<sup>765</sup> See Moumen Abderahmen, ‘De l’Algérie à la France. Les Conditions de Départ et d’Accueil des Rapatriés, Pieds-noirs et Harkis en 1962’ [2010] 3(99) *Matériaux pour l’Histoire de Notre Temps*.

<sup>766</sup> Chantal Morelle, ‘Les Pouvoirs Publics Français et le Rapatriement des Harkis en 1961-1962’ [2004] 3(83) *Vingtième Siècle. Revue d’histoire*.

<sup>767</sup> Cohen, ‘The *Harkis*’ (n 33) :166

<sup>768</sup> Vincent Crapanzano, *The Harkis: The Wound That Never Heals* (Chicago and London: University of Chicago Press 2011) 105.

<sup>769</sup> Cohen, ‘The *Harkis*’ (n 33) :166

<sup>770</sup> Cohen, ‘The *Harkis*’ (n 33) 170.

A second theme of contestation emerged from the repatriated *colons*. Commonly called the *pieds noirs*,<sup>771</sup> this group generally viewed the colonial period as a blessing and lived the independence of Algeria as a tragedy. During the war, the French *colons* were vehemently opposed to the decolonisation of Algeria. They developed strong patriotism and an attachment to a certain idea of the French nation.<sup>772</sup> However their support for the terrorist actions of the OAS against the central authority stigmatised the *pieds noirs*. This population, who had grown up in Algeria, felt Algerian, and strongly believed in an *Algérie-Française*.<sup>773</sup> However their support for the pro *Algérie-Française* hardliners marked a rupture with French public opinion.<sup>774</sup> The left accused the *pieds noirs* of fascist impulses and argued that it was because of them that torture was widespread during the war.<sup>775</sup> The enactment of the 1974 and 1982 amnesty laws was a clear political gesture aimed at the *pieds noirs* community.<sup>776</sup> But as these efforts concentrated on the *grandeur* of France and the rehabilitation of the veterans, successor governments pursued a ‘wilful forgetting’ of its responsibility for the perpetration of human rights violation.<sup>777</sup> The *pieds noirs*, although from Algeria, were recognised as French. As Shepard expresses it, ‘the war’s close allowed the Gaullist government to reaffirm the national boundaries as not only hexagonal but also distinctly “European”’.<sup>778</sup> As such, the presence of Algerians on the French territory was a reminder of the French defeat in the war. The presence of Algerian workers in France

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<sup>771</sup> Literal translation: ‘black foot’. The origins of the term are obscure. It generally refers to the European *colons* who immigrated to Algeria mostly from Spain, Italy, Germany, Malta and other European countries, often as labourers and farmers. They became French citizens during colonisation. This thesis subscribes to the use of this expression as it appeared in the context of the repatriation in France of the people of French. In its broad sense, this expression designated the Europeans living in Algeria who were born before 1962 (including the Jewish people who underwent a naturalisation with the Décret Crémieux in 1870). In *extenso*, it is also used to refer to the French people born in Tunisia and Morocco before the two country became independent. In today’s parlance, the term can be equated to the one of ‘white african’.

<sup>772</sup> Shepard, *Invention of Decolonization* (n 229) 6.

<sup>773</sup> Azzedine Haddour, ‘Algeria and its History: Colonial Myths and the Forging and Deconstructing of identity in Pieds Noirs Literature’ in Alec G. Hargreaves and Michael J. Heffernan (eds) *French and Algerian Identities from Colonial Times to the Present: A Century of Interaction* (Lewiston and Lampeter: Edwin Mellen 1993) 45.

<sup>774</sup> Shepard, ‘*Pieds Noirs, Bêtes Noires*’ (n 460) 150-163.

<sup>775</sup> Shepard, ‘*Pieds Noirs, Bêtes Noires*’ (n 460) 152.

<sup>776</sup> Sidi Mohammed Barkat, ‘Les “Rapatriés” d’Algérie et le Simulacra de la Loi’ in Sebastien Jahan and Alain Ruscio (eds), *Histoire de la Colonization: Rehabilitations, Falsifications et Instrumentalisations*, (Paris: Les Indes Savants 2007).

<sup>777</sup> Richard L. Derderian, ‘Algeria as a *Lieu de Mémoire*: Ethnic Minority Memory and National Identity in Contemporary France’, [2002] 83 *Radical History Review* 29.

<sup>778</sup> Shepard, ‘*Pieds Noirs, Bêtes Noires*’ (n 460):162.

was seen a phenomenon alien to French history.<sup>779</sup> Migrants from Algeria bore the mark of, at the very least, an old enemy. It was thought to be a temporary phenomenon and the image of the ‘single labour migrant’ epitomised the social profile of migrants.<sup>780</sup> Most of these workers eventually brought their dependants from their homeland to France. *Bidonvilles* (slums) rapidly proliferated on the French landscape.<sup>781</sup> Immigrants were no longer a mere economic commodity but a fast growing and increasingly settled population.<sup>782</sup> From 1965 to the 1970s, Algerian immigration became an increasingly contentious issue and their presence was characterised as ‘undesirable’.<sup>783</sup> The growing hostility towards the North African migrants, coupled with economic crisis, resulted in what Yves Gastaut describes as the ‘apogee of anti-Arab Racism’.<sup>784</sup> Successive French governments have continued to insist upon, and disproportionately emphasise to these immigrants, the need for them to assimilate into the basic model of secular republican citizenship.<sup>785</sup> In December 1971, the yearly quota was reduced from 35,000 to 25,000.<sup>786</sup> From the mid-1970s onwards, the tension between France and Algeria was exacerbated to the extent that Algeria suspended all immigration to France in September 1973 as France toughened its policy on global immigration. The far right political party- the Front National (FN)- was founded by an ex-soldier and member of the OAS, Jean Marie Le Pen in 1972.<sup>787</sup> The party ideology was particularly appealing to repatriated community. The FN emphasised its political programme on the theme of preservation of the French national identity and an anti-north African migrant policy. It considered the presence of Algerians in France as an ‘enemy ‘within’.<sup>788</sup> Discussions about the failure

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<sup>779</sup> Benjamin Stora, *Le Transfert d'une Mémoire: De 'l'Algérie française' au Racisme Anti-Arabe* (Paris: La Découverte 1999) 71.

<sup>780</sup> Abdelmalek Sayad, *L'Immigration ou les Paradoxes de l'Altérité. 2. Les Enfants Illégitimes* (Paris: Raisons d'agir 2006).

<sup>781</sup> See Pierre Bourdieu and Abdelmalak Sayad, *Le Déracinement. La Crise de l'Agriculture traditionnelle en Algérie* (Paris: Les Éditions de Minuit 1964).

<sup>782</sup> From 1961 to 1972, the Algerian population in France grew from 350,000 to 800,000. See Alain Gillette and Abdelmalek Sayad, *L'immigration Algérienne en France* (Paris: Editions Entente 1984) 46.

<sup>783</sup> Alexis Spire, *Etranger à la Carte: l'Administration de l'Immigration en France (1945-1975)* (Paris: Grasset 2005) 23.

<sup>784</sup> Yves Gastaut, *L'immigration et l'opinion publique en France sous la Ve République* (Paris: Editions du Seuil 2000) 282

<sup>785</sup> Krishan Kuman, ‘English and French National Identity: Comparisons and Contrasts’ [2006] 12(3) *Nations and Nationalism* 422.

<sup>786</sup> Accord Décembre 1971. This agreement also provided a vocational training in accordance with the law on vocational training.

<sup>787</sup> Peter Davies, *The National Front in France: Ideology, Discourse and Power* (London: Routledge, 1999) 18-20.

<sup>788</sup> Kuman, ‘English and French National Identity’ (n783) 422.

of the French model of integration became the platform for passionate debate on national identity and colonial memory. Algerian migrants are trapped within a binary conversation of inclusion or exclusion in the French nation. France's construction of identity rests on the development of an imagined narrative.<sup>789</sup>

Another dimension to the memory of the Algerian war can be observed on the diplomatic scene. The issue of amnesty has played an important role in defining the relation between France and the newly born Algerian state. Since the 1990s France and Algerian relations have moved back and forth with a treaty of friendship still pending. The frictions between France and Algeria illustrate this. In June 2000, Algerian president Abdelaziz Bouteflika addressed the French National Assembly to denounce the politics of forgetting concerning the Algerian war. 'The colonial past cannot be ignored', he said:

Whether you come out of the limbo of *non-dits* of the Algerian War, by naming it, or that your educational institutions try to rectify in school programs the distorted image of some colonial episode, would represent a step forward in the achievement of truth in which you have engaged for the good of historical knowledge and equity between men.<sup>790</sup>

Relations stalled at the point of the recognition of the violence of the colonial regime. This reconstitution of the Algerian past did not allow France to question its heritage. This policy was to elevate the issue of the commemoration of the Algerian war in a political project of self-assertion. Stina Loytomaki argues that contemporary official representations of history which contribute to the definition of the concept of national identity of the nation resort to teleological universalism in their narrative construction.<sup>791</sup> Her examination of France's politics of memory highlights the prevalence of the Jacobin ethos of '*la république est une et indivisible*,' the republic is one and indivisible in the official language used to commemorate the war. The French Republic sees itself as the incarnation of universal values of equality. Within the official narrative on the colonial period, the French state sought to preserve the ideal of a *mission civilisatrice* (civilising

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<sup>789</sup> Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London: Verso 2006).

<sup>790</sup>Speech re-transcribed in *Le Monde*, 'Le Message de M. Bouteflika' (Paris, 17 June 2000) 18. Also Available at: <http://www.assemblee-nationale.fr/international/reception-Algerie-cr.asp>

<sup>791</sup> Stina Löytömäki, *Law and the Politics of Memory: Confronting the Past* (Milton Park: and New York: Routledge 2014).

mission). The concept of civilising mission encapsulates the idea that France is a ‘*Great Nation*’ and as such it has an obligation to carry its revolutionary ideals beyond the French borders.<sup>792</sup> At the time, the ‘civilising mission’ core to the idea of history as progress and directly implied the superiority of French culture. The French politics of memory thus also held a nostalgia for the past. The birth of French universalism, traditionally associated with the Revolution of 1789, prefaced the creation of the Republican state.<sup>793</sup> Universalism refers to the civilising mission as the ideology that underpinned and inspired the colonial expansion. ‘Civilisation’ was not just a marker of material improvement but also a normative judgment about the moral progress of society.<sup>794</sup> The French mission to civilise had sincere humanistic engagement.<sup>795</sup> French values and institutions were considered to be not only superior to others but also universally valid and applicable.

Under Sarkozy’s presidency, the relationship between memory and political practice is all the more present. The rehabilitation of the colonial implementation, as well as officers, putschists and members of the OAS, reached a new milestone with the theme of ‘refusal of a repentance’.<sup>796</sup> Sarkozy based his presidential campaign on patriotism and pride of the French people. He clearly stated that France would never apologise for French colonialism in Algeria because, as he said, children are not responsible of their parents’ actions. He also asserted that an apology and repentance was not good for the French national feeling. In a speech given at Mentouri University in Constantine on December 5, 2007, Sarkozy explicitly condemned the violence and injustice of the colonial system, and conceded that it was a ‘profoundly unjust’ period for the Algerians. In his speech, Sarkozy referred to the ‘sincerity’ of many colonisers and to suffering shared by both the Algerian and French people. The same year, he addressed the African youth and acknowledged the violent realities of the colonial period, but speaks of Africa in terms of ‘mysterious nature’ and exhorted the ‘Africans’ to ‘enter history’. His speech

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<sup>792</sup> Bruce Marshall, *The French Colonial Myth and Constitution-Making in the Fourth Republic* (New Haven: Yale University Press 1973) 6; see also Naomi Schor, ‘Universalism’ in Lawrence D. Kritzman (ed), *The Columbia History of Twentieth-Century French Thought* (New York: Columbia University Press 2006) 344,345; Alice Conklin, *A Mission to Civilize: The Republican Idea of Empire in France and West Africa, 1895-1930* (Stanford: Stanford University Press 1997) 17-94.

<sup>793</sup> Stanley Hoffman, ‘The Nation, Nationalism, and After: The Case of France’ (The Tanner Lectures on Human Values, Delivered at Princeton University, March 3 and 4 1993) 220-223.

<sup>794</sup> Margaret Kohn and Daniel I. O’Neill, ‘A Tale of Two Indias: Burke and Mill on Empire and Slavery in the West Indies and America’ [2006] 34(2) *Political Theory*.

<sup>795</sup> Conklin, *A Mission to Civilize* (n 62) 17, 94.

<sup>796</sup> Luisa Passerini, ‘From the Ironies of Identity to the Identities of Irony’ in Anthony Pagden (ed), *The Idea of Europe* (Cambridge University Press 2002) p. 200.

was criticised for being largely drawn upon 19<sup>th</sup> century colonial stereotypes.<sup>797</sup> As he declared ‘nobody could ask today’s generation to expiate this crime.’<sup>798</sup> During his visit in Algeria, he reasserted the same message and added that the friendship treaty is no longer a priority.<sup>799</sup>

The creation of the Ministry of National Identity in 2007 cemented the link between a process of commemoration of the colonial past and French national identity. Hortefeux, Minister for Immigration, Integration, National Identity and Development Solidarity, declared that ‘there is nothing wrong in linking immigration, assimilation and identity’. Further, he declared that ‘to hide our identity from those who wish to settle in France is to deny the values that forged our history’.<sup>800</sup> In March 2009, a letter addressed to Eric Besson, Minister in charge of immigration and national identity, defined the central task of the minister as the ‘promotion of national identity at the heart of every action of the government’.<sup>801</sup> Sarkozy entered the presidential campaign with the desire to strengthen French patriotism. Hence gesture of commemoration aimed at remedying the *Harkis* tragedy.

From 1990, successive governments sought to construct a unifying framework of collective identity and the universality of ‘national history’. It required the state to intervene in the field of memory. Indeed, France is currently immersed in an era of commemoration.<sup>802</sup> However, with the emergence of national identity debate and multicultural demands on the part of second-generation migrants, challenges emerged to the role of the state as master of memory. This ideal of Frenchness was associated with the idea of progress, and to a large extent, this legitimated conquest and created a conflict between the ideas of equality and freedom.

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<sup>797</sup> The African peasant, who for millennia has lived according to the rhythm of the changing seasons, whose idea of life was to be in harmony with nature, knows only the eternal cycles of time punctuated by constant repetition of the same gestures and the same words ... The problem of Africa, and let me, a friend of Africa say it, is just that.

<sup>798</sup> Yves Gounin, « De la Françafrique à l'Eurafrrique. Les débats nés du discours de Nicolas Sarkozy à Dakar », *Question internationales*, 33, sep-oct. 2008.

<sup>799</sup> ‘Sarkozy tells Algeria no apology for the Past’, *Reuters*, available at <http://uk.reuters.com/article/uk-algeria-france-apology-idUKL1063873720070710> [Last accessed March 2014]

<sup>800</sup> Laetitia Van Eeckhout, Brice Hortefeux à la tête d'un Grand Ministère de l'Immigration Incluant l'Identité Nationale, *Le Monde*, (Paris, May 8, 2007).

<sup>801</sup> *Libération* (Paris, 15 October 2010).

<sup>802</sup> Pierre Nora, ‘L’Ere de la Commemoration’ in *Les Lieux de Mémoire*, Vol. 3, *Les France*, Part. 3. De l’archive à l’emblème (Paris: Gallimard 1992) 1007-1008.

## B. The Official Recognition of the War: the 1999 Law

The predominant representation of the conflict had complex legal and social consequences. The ideological dynamics explored above shaped official discourse on the Algerian war.

On 18 October 1999, the National Assembly voted for a law officially recognising that the conflict in Algeria had been a war.<sup>803</sup> This ad hoc recognition brought out a most striking singularity of the Algerian amnesties, namely that they are based on the notion that between 1954 and 1962 France was not at war but merely involved in a ‘policing operations’. The notion of the ‘Algerian war’ ‘was already present in the language of historians long before the 1999 law. The law was therefore more about officialising a terminology already in use than pioneering recognition. The law on the recognition of the Algerian war has permitted the re-adjustment of the narrative of the war to the ‘historical reality’ and the language in common use. Deputy Georges Colombier, Didier Quentin and Francois Rochebloine drafted the law with the need for a more accurate recognition of the status of the combatants in mind. Throughout the conflict France adopted a euphemistic discourse to address the Algerian war. In the late 1990s and after it mutated into no less euphemistic terms. The law has a memorial function; it seeks ‘to integrate the Algerian war in the collective memory’.<sup>804</sup> However, semantic ‘readjustment’ to refer to the conflict was not the principal role of the 1999 law.<sup>805</sup> Indeed the drafters sought first and foremost to instate a form of equality for the *génération du feu*.<sup>806</sup>

Five articles in the 1999 law deal with the question of veterans’ pensions. It also permitted the recognition of the role of the Algerian auxiliaries, the *Harkis*, as veterans

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<sup>803</sup> Loi n° 99-882 du 18 Octobre 1999 relative à la substitution, à l’expression ‘aux opérations effectuées en Afrique du Nord’, de l’expression ‘à la guerre d’Algérie ou aux combats en Tunisie et au Maroc’, JORF 20 octobre 1999 15647 (*Journal officiel*, Débats (Assemblée nationale) 11 June 1999 5710-33. .. Available at:

[legifrance.gouv.fr/lo\\_jo\\_pdf.do?id=JORFTEXT000000578132](http://legifrance.gouv.fr/lo_jo_pdf.do?id=JORFTEXT000000578132)

<sup>804</sup> ‘Réponse du Ministère: anciens combattant’, *Journal officiel*, Débats (Sénat) 6 January 2000 33: ‘[...] Il s’est agit alors de faire une oeuvre de mémoire, afin que cette période tragique de l’histoire contemporaine de notre pays puisse enfin être intégrée pleinement dans notre mémoire collective.’

<sup>805</sup> Blandine Grosjean, ‘La France reconnaît qu’elle a fait la ‘guerre’ en Algérie. L’assemblée vote aujourd’hui un texte qui enterre le terme officiel d’opérations de maintien de l’ordre’ *Libération* (Paris, 10 June 1999).

<sup>806</sup> ‘Question écrite n° 02097 de M. François Grosdidier (Moselle - UMP) *Journal officiel*, Débats (Sénat) 2012. Available at:

[senat.fr/questions/base/2012/qSEQ120902097.html](http://senat.fr/questions/base/2012/qSEQ120902097.html)

of the war. The law granted a military pension to the 50,000 Muslims Algerians who had served in the French Army. According to the statements available on the website of the ONACVG (Office nationale des anciens combattants et victims de guerre), Algerians who belonged to the following groups are considered to be either former auxiliaries or ‘assimilated personnel’:

[Former auxiliaries are those who belonged to] the following units: *harka*, the self-defence groups or *maghzen*, the mobile security groups, gendarmerie auxiliaries, specialist urban administrative section

The ‘assimilated’ categories [are]: contracted auxiliary police officers, casual temporary police, rural police in country areas, intelligence officers, military medical auxiliaries, French repatriated from North Africa, former soldiers in the regular French forces, participating in the operations to maintain order in Algeria but who left the army with less than fifteen years’ service, excluding those who completed their compulsory military service only in regular units.<sup>807</sup>

As a result of the 1999 law, victims of the war have the legal status of ‘Mort pour la France’. The term ‘Mort pour la France’ is defined in the code of military pensions, the code des pensions *militaires d’invalidité et de victims de guerre* at Article L.488 to L.492 (bis). As it stands, the applicant must be domiciled in France or a member state of the European Union, have retained French nationality and have made a declaration recognising this nationality before 10 January 1973. The beneficiary has a choice of one of the following three options. Firstly, they may receive a quarterly award, the annual equivalent of which is €2,800. The second option is that this quarterly award can be granted at a rate of €1,857.50 per year and a capital sum of €20,000. The third option consists of the payment of a capital sum of €30,000. Under the new scheme of indemnification, these measures also apply to surviving repatriated spouses or former spouses of former auxiliaries or ‘assimilated personnel’ who have not remarried and are aged 60 or over, as well as their children.

In parallel, historians, human rights activists and journalists rallied around the idea of reviving ‘lost memories’. The recognition of the war in 1999 constituted an opportunity for this group to raise the interest of the public in France’s involvement in the Algerian

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<sup>807</sup> <http://www.onac-vg.fr/en/missions/measures-assist-harkis-and-widows/>

operations. Mainstream newspaper *Le Monde* published the testimony of Louisette Ighilariz, a former member of the FLN describing the conditions of her imprisonment. Louisette Ighilariz named the officers in attendance during that time. Most notably, she named Jacques Massu, head of the 10<sup>th</sup> division of paratroopers.<sup>808</sup> The compelling account of her ordeal ignited an unprecedented debate on the absence of recognition of victims of torture and whether the State should apologise.<sup>809</sup> The controversy grew more intense when retired officer Paul Aussaresses published his testimony of the war (as discussed in Chapter 5). Aussaresses admitted that torture formed part of a deliberate military strategy and, more than that, he described the torture as a legitimate and effective means of ending the Algerian nationalists' terrorism. He further explained his actions as a gesture of his patriotic commitment to defend the interests of France:

These policemen were neither *bourreaux* nor monsters but ordinary men. People devoted to their country profoundly penetrated by the sense of duty and left to exceptional circumstances.<sup>810</sup>

Official responses to Aussaresses' public justifications of the torture were ambiguous. Immediately after his confession was published, President Jacques Chirac issued a statement expressing his horror at the atrocities revealed to have been carried out in Algeria.<sup>811</sup> Aussaresses was stripped of his *legion d'honneur*. Despite President Chirac expressing his revulsion at such a practice, he rejected demands from the victims of torture for an official apology or reparations. To him it was important not to 'open old wounds and he urged the two countries to continue along the path of reconciliation.'<sup>812</sup>

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<sup>808</sup> Florence Beaugé, 'Torturée par l'armée Française en Algérie, « Lila » recherche l'homme qui l'a sauvée', *Le Monde* (Paris, 20 June 2000); Florence Beaugé, 'La question d'une femme: Louisette Ighilariz qui permit de rouvrir le dossier de la torture en Algérie raconte son parcours de militante à Anne Nivet', *Le Monde: Le Monde des Livres* (Paris, 15 June 2001). Her articles were part of a series of articles: 'Torture en Algérie: l'aveu des généraux' and Philippe Bernard, 'Torture en Algérie: deux généraux français affrontent leur mémoire', *Le Monde* (Paris, 23 November 2000) 1; Jean-Michel Bezat and Jean-Louis Saux, 'Le PCF réclame une commission d'enquête sur la torture pendant la guerre d'Algérie', *Le Monde* (Paris 24 Novembre 2000) 10; Jean-Michel Bezat and Ariane Chemin, 'Lionel Jospin écarte l'idée d'une commission spéciale sur la guerre d'Algérie', *Le Monde*, (Paris, 29 November 2000); Georgette Elgey, 'Crimes de la guerre d'Algérie: divulguer pour ne pas répéter', *Le Monde* (Paris, 5 May 2001) 1.

<sup>809</sup> Tramor Quemeneur 'Le débat sur les tortures dans la guerre d'Algérie' [2000] 276 *Regards sur l'actualité* 29.

<sup>810</sup> Paul Aussaresses, *Services Spéciaux: Algérie 1955–1957* (Paris: Perrin 2001) 30.

<sup>811</sup> 'Chirac Condemns Torture General', BBC News (London, 4 May 2001). Available at: [news.bbc.co.uk/1/hi/world/europe/1312556.stm](http://news.bbc.co.uk/1/hi/world/europe/1312556.stm) [last accessed 3 April 2013]

<sup>812</sup> 'Algeria: Chirac Rejects "Torture Apology"', BBC News (London 15 December 2000). Available at: <http://news.bbc.co.uk/1/hi/world/europe/1071504.stm> [last accessed 3 April 2013]

This brief sketch of the memory of the Algerian war from the perspective of the repatriated *colons* and veterans sought to highlight the divisive nature and use of memories regarding the Algerian war. The amnesty provided a way to avoid discussing the issue of the brutality on both sides of the conflict. One can observe the dissociation in the narrative explaining the transition from decolonisation to modernisation:

[It is as if] France's colonial history was nothing more than an 'exterior' experience that somehow came to an abrupt end, cleanly in 1962 [...] colonialism itself was made to seem like a dusty archaism, as though it had not transpired in the twentieth century and in the personal histories of many people living today, as though it played only a tiny role in France's national history and no role at all in its modern identity.<sup>813</sup>

The discrepancy between an official narrative and the history of the Algerian war turns the collective memory into an ipseity; the incarnation of a rebuilt past, that characterises the French nation. By focusing on stories that reinforce French republican values, the colonial past has been made meaningful so as to create a 'fictitious ethnicity'.<sup>814</sup> Despite the defence of an ideal of France during the Colonial era, the French politics of memory of the Algerian war it took some time before the translation of this narrative in sites of memory.<sup>815</sup> Pierre Nora observed that the omnipresence of the theme of memory in French politics in the 1980s immersed France in an era of commemoration.<sup>816</sup>

## II. Attempt to Reunify Fragmented Memories: 2005 Law on the Positive Aspects of Colonialism

Since the 1960s, gestures commemorating the Algerian war in France have evolved in a sporadic fashion. The dynamics of construction of a collective narrative acknowledged a significant shift as the issue of memory opened up with debates about the French national identity and what it means to be French in the post-colonial age. The grant of

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<sup>813</sup> Kristin Ross, *Fast Cars, Clean Bodies: Decolonization and the Reordering of French Culture*. (Cambridge: Massachusetts Institute of Technology Press 1995) 9.

<sup>814</sup> Etienne Balibar, *Politics and the Other Scene* (London: Verso 2002) 68. See also Luisa Passerini, 'From the Ironies of Identity to the Identities of Irony' in Anthony Pagden (ed), *The Idea of Europe* (Cambridge: Cambridge University Press 2002) 200.

<sup>815</sup> Jean Pierre Rioux, 'La flamme et les bûchers' in Jean Pierre Rioux (ed), *La guerre d'Algérie et les Français* (Paris: Fayard 1993) 497–508. See also Benjamin Stora, *La gangrène et l'oubli. La mémoire de la guerre d'Algérie* (Paris: La Découverte 1992).

<sup>816</sup> Nora, 'L'Ère de la Commémoration' (n 800) 1007-1008.

amnesty that prohibited the prosecution of Algerian nationalists and any French man involved in the war curtailed any debate on the war and the legitimacy of the use of violence. This section turns to demonstrating that the law's intervention in narration of the memory of the Algerian war in France resulted in a deformed picture of the colonial enterprise whereby the colonial enterprise is depicted in a 'positive light'.

#### A. 2005 Law On The Recognition of the Positive Aspect of Colonialism

The Chirac government sought to construct a unifying framework of collective identity and the universality of 'national history'. This required the state to intervene in the field of memory. In 2005, Jacques Chirac thought to reconcile the *pieds noirs* with the new promises made to this lobby, which led to the *Loi portant reconnaissance de la Nation et contribution nationale en faveur des Français rapatriés*,<sup>817</sup> commonly known as the Mekachera Law, covers the issue of recognition of the contribution of the repatriated French. The adoption of the Mekachera law was propelled by the work undertaken by the Commission Inter-ministerielles aux rapatriés (the inter-ministry Commissions for the Repatriated), initiated by former Prime Minister Jean Pierre Raffarin. The goal of this commission was to accomplish a 'gesture of national solidarity with the repatriated'. The primary occasion of the Law of 23 February 2005 was to acknowledge demands for recognition, and to create an official legislative response to, injustices suffered by those who had been repatriate from French Algeria, in particular both the *Harkis* and the *pieds noirs*. By way of symbolic recognition, Article 3 created the Fondation pour la Mémoire de la Guerre d'Algérie, des Combats du Maroc et de la Tunisie.<sup>818</sup> Article 13 dealt further with the restoring the pensions of the veterans. It extended the benefits of the Courrière law to OAS members who had not contributed to a pension scheme during their exile and until the passing of the 1968 amnesty.<sup>819</sup> Assimilating all those who

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<sup>817</sup> Loi n° 2005-158 du 23 Février 2005 Portant Reconnaissance de la Nation et Contribution Nationale en Faveur des Français Rapatriés, JORF 24 Février 2005 3128. Available at:

[legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000444898](http://legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000444898) [last accessed March 2013]

<sup>818</sup> Loi n° 2005-158 du 23 février 2005 (n 815). Article 3: 'Une fondation pour la mémoire de la guerre d'Algérie, des combats du Maroc et de Tunisie est créée, avec le concours de l'Etat. Les conditions de la création de cette fondation sont fixées par décret en Conseil d'Etat.'

<sup>819</sup> Law n° 2005-158 du 23 février 2005 (n 815). Article 13: 'Peuvent demander le bénéfice d'une indemnisation forfaitaire les personnes de nationalité française à la date de la publication de la présente loi ayant fait l'objet, en relation directe avec les événements d'Algérie pendant la période du 31 octobre 1954 au 3 juillet 1962, de condamnations ou de sanctions amnistiées, de mesures administratives d'expulsion,

fought ‘on the side of France’, this legislative recognition of repatriated *colons* and the *harkis* (and the *Ias*) yielded a narrative representation in which the actions perpetrated to preserve a French Algeria could be aligned with the actions of the Resistance against the Nazi occupations.

Following the enactment of the law, many voices objected that this narrative overlooked the contradictions of the colonial ideology and the doctrines of assimilation that had guided French policy in Algeria. The articulation of the legacy of France’s colonial past drew much attention to the acknowledgement of responsibility of the French state for the crimes perpetrated by the French army. The Mekachera law was considered an attempt to officialise a certain interpretation of the legacy of colonialism, which is recognised as ‘positive’. The 2005 law also sought to enter France’s pedagogical fabric. Article 4 of the Mercherak law provides that ‘university research programmes [shall] give the history of the French presence overseas, notably in North Africa, the place it deserves’ and requires that elementary and secondary ‘school programmes recognize in particular the positive role of the French presence overseas, notably in North Africa, and give the history and sacrifices of the French soldiers from these territories ‘the prominent place they deserve’.<sup>820</sup>

During the debates that followed the Mekachera law, concern was strongly voiced by a group of historians who considered that the emphasis placed on the ‘positive aspects’ of colonialism reactivated the old paradigm of the ‘colonial history of colonisation’ dating from the end of the 19<sup>th</sup> century. On 25 March 2005 a petition against the law was published in *Le Monde*. Two petitions had been signed by tens of thousands of people asking for the repeal of the law.<sup>821</sup> 800 historians signed one petition, known as ‘l’appel des 19 historiens’.<sup>822</sup> Historians like Pascal Blanchard denounced the ‘self-congratulating view of the Western past’. In particular, it was argued that the view on history presented by the Mekachera law overlooked the power relations and violence

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d'internement ou d'assignation à résidence, ayant de ce fait dû cesser leur activité professionnelle et ne figurant pas parmi les bénéficiaires mentionnés à l'article 1er de la loi n° 82-1021 du 3 décembre 1982 relative au règlement de certaines situations résultant des événements d'Afrique du Nord, de la guerre d'Indochine ou de la Seconde Guerre mondiale. L'indemnité forfaitaire mentionnée au précédent alinéa n'a pas le caractère de revenu pour l'assiette des impôts et taxes recouvrés au profit de l'Etat ou des collectivités territoriales. Un décret en Conseil d'Etat détermine le montant de cette indemnité qui tient compte notamment de la durée d'inactivité justifiée ainsi que les modalités de versement de cette allocation. Cette demande d'indemnité est présentée dans le délai d'un an suivant la publication du décret d'application du présent article’.

<sup>820</sup> Loi n° 2005-158 du 23 Février 2005 (n 815). Article 4: ‘Les programmes scolaires reconnaissent en particulier le rôle positif de la présence française outre-mer, notamment en Afrique du Nord.’

<sup>821</sup> Petition of 19s. Available at: [lph-asso.fr/actualities/42.html](http://lph-asso.fr/actualities/42.html) [last accessed January 2014]

<sup>822</sup> Petitions of 19s. Available at: [lph-asso.fr/actualities/42.html](http://lph-asso.fr/actualities/42.html). [last accessed January 2014]

inherent to the colonial period. For the petitioners, the law impeded the autonomy of the history profession and legalised a kind of ‘national communitarianism’.<sup>823</sup> Following this petition, the organisation *Liberté pour l’histoire*, headed by Pierre Nora, was created and demanded the repeal of all memory laws. Historians denounced as a form of historical revisionism the government’s attempt to conceal the violence of colonialism.<sup>824</sup> It was the theory of anti-revolutionary warfare developed by the French army, and notably the centrality of torture to those practices, that had caused the most controversy over the legitimacy of the French military operations in Algeria. For these historians, the Mekachera law curtailed the possibility of breaking the policy of silence instituted by the amnesties.

A second concern was about the legitimacy of the state’s interference in the field of history. The 2005 law on the legacy of colonialism triggered a vivid debate on the role of the state to deem a unitary authorised history, pointing to the conflict between official memory and the marginalised memories of colonisation that did not find recognition.

The 2005 law was commonly considered a ‘memory law’ or *loi mémorielle* i.e. legislation related to the memory of a violent past. Before the Mekachera law, France had already passed a form of Holocaust denial law (Gayssot law),<sup>825</sup> and more recently a law regulating the memory of slavery (Taouira law)<sup>826</sup> and a law recognising the Armenian genocide.<sup>827</sup> These laws have two roles. The first is a declarative statute, which consists of recognising and defining a set of events. The legislative regulation of the memory of past events seeks to give juridical recognition of wrongs and sufferings and, thereby legitimacy to a political consensus between opposing parties. Moreover, these laws play an important role in the creation and protection of a collective political

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<sup>823</sup> Claude Liauzu, Gerard Meynier et al, ‘Non à l’enseignement d’une histoire officielle’, *Le Monde* (Paris 25 March 2005).

<sup>824</sup> Vincent Duclert, ‘L’Etat et les Historiens’ [2006] 325 *Regards sur l’Actualité* 5-15

<sup>825</sup> Loi n° 90-615 du 13 juillet 1990 tendant à réprimer tout acte raciste, antisémite ou xenophobe. JORF 14 juillet 1990 8333. Available at:

[legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000532990&categorieLien=id](http://legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000532990&categorieLien=id)

<sup>826</sup> Loi n° 2001-434 du 23 mai 2001 tendant à la reconnaissance de la traite et de l’esclavage en tant que crime contre l’humanité, JORF 23 mai 2001 8175. Available at:

[legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000405369&categorieLien=id](http://legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000405369&categorieLien=id) [last accessed March 2013]

<sup>827</sup> Loi n° 2001-70 du 29 janvier 2001 relative à la reconnaissance du génocide arménien de 1915, JORF 30 janvier 2001 1590. Available at:

[legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000403928](http://legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000403928) [last accessed March 2013]

identity. Hence the second function of these types of laws is to act as laws policing the distortion or denial of the events whose facts and classifications they protect.<sup>828</sup>

The petition had insisted on the autonomy of history as a scientific discipline. It reflected historians' opposition to the state interference in the codification of history.<sup>829</sup>

They emphasized that: history is not religion, history is not moral, history is not the slave of current events, history is not memory, and, mi of all, history should not be subject to law and jurisdiction.<sup>830</sup> The movement considered that history should remain independent and not participate in a 'certain kind of memorial communitarianism'.<sup>831</sup>

Historian Jacques Le Goff explained that, in the case of the Algerian conflict, the role of the historian is intrinsically linked to national memory of the conflict.<sup>832</sup> The historian relies on an honest culture of memory.<sup>833</sup> Benjamin Stora commented that the law

'emanates from a profoundly reactionary movement'.<sup>834</sup> Indeed many of those who had advocated the Law of 25 February 2005 in the French parliament belonged to the centre-right party, Union pour un Mouvement Populaire (UMP). Claude Askolovitch had argued that the law reflected a generational memory: 'They [the deputies] are talking about themselves when they believe they are discussing the law, when they evoke the past they are thinking of the dead'.<sup>835</sup>

The debates following the Mekachera law also located the law within a larger debate in which Republican universalism was pitched against multiculturalism. Indeed, Betts explains that in effect the law presented the colonisation of Algeria as a temporary period of political dependency or tutelage necessary in order for the 'un-civilised' societies to advance to the point where they were capable of upholding liberal

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<sup>828</sup> Other examples: Loi n° 90-615 du 13 juillet 1990 tendant à réprimer tout acte raciste, antisémite ou xenophobe, JORF 14 juillet 1990. Available at:

[legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000532990&categorieLien=id](http://legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000532990&categorieLien=id)

Loi n° 2001-70 du 29 janvier 2001 (n 825).

<sup>829</sup> Liauzu, Meynier et al. 'Non à l'enseignement d'une histoire officielle' (n 821).

<sup>830</sup> Liauzu, Meynier et al. 'Non à l'enseignement d'une histoire officielle' (n 821).

<sup>831</sup> René Remond, 'Pourquoi Abroger les Lois Memorielles?' [2006] 325 *Regards sur L'Actualité* 17-26.

<sup>832</sup> Laurent Theis, 'Interview [avec] Jacques Le Goff: Cessons de confondre histoire et mémoire' *Le Point* No 1478 (Paris, 12 December 2001) 88.

<sup>833</sup> Laurent, Le Goff interview (n830).

<sup>834</sup> Benjamin Stora, *Le Monde* (Paris, 6 July 2005).

<sup>835</sup> Claude Askolovitch, 'Colonisation D'une Vérité À Une Autre' *Nouvel Observateur* (Paris, 8 December 2005).

institutions and self-government.<sup>836</sup> In any case, the improvements in healthcare and agricultural development shadowed an economic programme that was essentially oriented towards France.<sup>837</sup> Algeria's agricultural production and vineyards are often cited as an economy destined for the French market.<sup>838</sup> Furthermore, for many the law went beyond putting a positive 'spin' on the colonial period: its revisionist character was most visible in how it dealt with the harms of the colonial past. France's violence is framed as an exception and as 'excess' rather than as inherent to the colonial system in which North African migrants were trapped within a binary conversation of inclusion in, or exclusion from, the French nation. This is the 'imagined' narrative upholding France's construction of identity.<sup>839</sup>

In January 2005, the Conseil Constitutionnel, France's supreme administrative court, declared that the law had exceeded its domain and President Jacques Chirac issued a decree repealing the controversial article (Article 4).<sup>840</sup> The Council declared that the expression *rôle positif* (positive role) had only a *caractère réglementaire* (regulatory character) and could thus be eliminated by governmental decree; it further added that 'the law should serve to set mandatory duties and rights, not to be an incantation'.<sup>841</sup> To some extent it could be argued that a legislative protection of memory is necessary and it is what makes it possible for the scientific work of historians to be taken to court and evaluated 'in terms of their correspondence and conformity to the contents of memorial laws'.<sup>842</sup> But the normative aspect of a memory law is incompatible with the strict interpretation of the law. Because of this normativity, the law runs the risks of establishing a ranking of memory based on a 'regime of historicity'.<sup>843</sup>

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<sup>836</sup> Raymond Betts, *Assimilation and Association in French Colonial Theory, 1890-1914* (Lincoln and London: University of Nebraska Press 2005) xiii.

<sup>837</sup> Martha Crenshaw Hutchinson, *Revolutionary Terrorism: The FLN in Algeria, 1954-1962* (Stanford: Hoover Institution Press, Stanford University 1978).

<sup>838</sup> Eric R. Wolf, *Peasant Wars of the Twentieth Century* (New York: Harper & Row 1969) 222-24; see also John Dunn, *Modern Revolutions: An Introduction to the Analysis of a Political Phenomenon* (Cambridge: Cambridge University Press 1972) 154; Mohamed Choukri, *For Bread Alone* (London: Saqi Books 2007).

<sup>839</sup> Anderson, *Imagined Communities* (n 789).

<sup>840</sup> Juliette Fette, 'Apology and the Past in Contemporary France' [2008] 26 (78) *French Politics, Culture and Society* 78-113.

<sup>841</sup> Décision n° 2006-203 L du 31 Janvier 2006, Journal officiel 2 Février 2006 1747. Available at: [conseil-constitutionnel.fr/decision/2006/2006203l.htm](http://conseil-constitutionnel.fr/decision/2006/2006203l.htm)

<sup>842</sup> Michel Troper and Eric Savarese, *Algérie, La Guerre des Mémoires* (Paris: Non Lieu 2007) 145-146.

<sup>843</sup> For discussions of the 'judicialisation' of history, see Antoine Garapon, *Peut-On Réparer L'histoire? Colonisation, Esclavage, Shoah* (Paris: Odile Jacob 2008).

## B. The Potential of Sites Of Memory

The production of norms around historical events works alongside the creation of sites of memory. Sites of memory are part of the inscription of crimes and may officially acknowledge the victims' 'suffering and the trauma of the nation as a whole'. Sites of memory 'mobilize power because they are implacably material'.<sup>844</sup>

As France is currently immersed in an 'era of commemoration' and, due to the increasing identity-related struggles, the state no longer has control over what kind of historical narratives enter into, and gain visibility, in the public space. The state's presence and role in memory activity, once that of directing, has become 'enabling' or 'allowing', indicating the state's relegation to the side-lines of contemporary politics of memory.<sup>845</sup> As a consequence, France has experienced a "transformation of historic memory which has been invaded, subverted, and flooded by group memories."<sup>846</sup> According to critics, the result is that France has lost herself in the 'tyranny of the present', in the memory battles and demands for debts and rectification arising out of the past.<sup>847</sup>

France's main memorial on the Algerian war is located in near the Quai Branly on the riverbank of the Seine in Paris. The *Mémorial de la Guerre d'Algérie et des Combats du Maroc de la Tunisie, (1952-1962)* (Figure 1) pays tribute to the French veterans who died during the war of decolonisation in Algeria, Morocco and Tunisia. Instituted on 5 December 2002 by President Chirac, the memorial is France's first national memorial to commemorate Algerian war. During his inauguration speech, President Chirac declared:

When the noise from the weapons has been silent for a long time,  
when the wounds are healing slowly, not without leaving deep scars,  
then comes the time for memory and recognition.<sup>848</sup>

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<sup>844</sup> Greg Dickinson, Carole Blair and Brian L.Ott (eds) *Places of Public Memory: The Rhetoric of Museums and Memorials* (Tuscaloosa: The University of Alabama Press 2010) 29.

<sup>845</sup> Nora, 'L'Ere de la Commémoration' (n 800) 984.

<sup>846</sup> Pierre Nora, 'Reasons for the Current Upsurge in Memory', *Transit* /www.eurozine.com 2002) 7. Available at: <http://www.eurozine.com/articles/2002-04-19-Nora-en.html>

<sup>847</sup> Jean-Pierre Rioux, *La France Perd la Mémoire: comment un pays démissionne de son histoire* (Paris: Perrin 2006) 149-150.

<sup>848</sup> Jacques Chirac, 'Discours de M. Jacques Chirac, Président de la République, À l'occasion de l'inauguration du Mémorial national de la guerre d'Algérie, des combats du Maroc et de la Tunisie: 'Quand le bruit des armes s'est tu depuis longtemps, quand les plaies se sont lentement refermées, non sans laisser de profondes cicatrices, alors, vient le temps de la mémoire et de la reconnaissance [author's translation]. Available at:

The memorial comprises three minimalist concrete pillars and scrolling LED lights. A list of the names of the 23,000 soldiers who fought in North Africa during the French colonial wars scrolls down the pillars.



Commemoration du 26 mars 1962, Quai Branly, Paris 2013

Chirac's government sought to provide a communal site where official memory and individual memories could co-exist. Nonetheless it has been said that what it does is reinforce a discourse of nostalgia about the past and the mythical unity of the French nation. President Chirac's inauguration speech emphasised the role of the soldiers who fought alongside the French troops. He addressed the veterans in general without distinguishing between the combatants in Algeria, Morocco and Tunisia.

In March 2010, Hubert Falco, Secretary of State for Defence and Veterans, re-inaugurated the Memorial of Quai Branly to include the names of civilian victims of the March 26, 1962 'massacre' on the rue d'Isly. Falco's gesture was considered a 'revisionist move developed by extremist organizations'. In July 2010, the French Senate held an emergency session to debate the memorial question in relation to the

memory of the victims of the OAS.<sup>849</sup> The senate denounced the inclusion of these civilian names on the national memorial to the Algerian war, one senator declaring: ‘Victims of the massacre on 26 March 1962 in Algiers cannot be assimilated to those who died for France’.<sup>850</sup> The names of the dead that run across the surface of the memorial are not distinguished into categories and identified only as those who ‘died for France’. The names are thereby emptied of meaning so as to elude controversial identification. The 2002 memorial controversy illustrates this confrontation between individual memories and official recognition. Falco’s attempt to rehabilitated the OAS victims subscribe to a ‘cult of continuity’ (Pierre Nora’s terminology) of ideals and myth around colonialism.<sup>851</sup> With regard to the 2002 memorial, the electronic display means that names can easily be added or removed.<sup>852</sup> This begs the question, on what basis can names be removed, and on what basis do they deserve to be added? Who, exactly, has the right to say?

### III. The Role of Social Movements

The process of constructing meanings of the Algerian war is marked by the confrontation between memory and history. The analysis of the role of law in the construction of a permitted narrative shows areas of tension between different understanding and interpretation of the past. As seen above, the historians opposed the intervention of the state in the writing of history as it conflates collective meaning of the past with the framing of national identity. The official history of the Algerian war seeks to affirm a sense of collective belonging and identity rooted in the conflict. In addition, to historians, civil society groups criticized the creation of official sites of memory as privileging a selective interpretation of the past. This section turns to the role of civil society groups. It explores how civil society groups received these state policies of memorialization. As these groups’ struggles centres around the recognition of

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<sup>849</sup> Guy Fischer: Proposition de loi: Fixant la destination du Mémorial National De La Guerre d'Algérie Et Des Combats Du Maroc et de la Tunisie Et Relative À La Mémoire Des Victimes de l'OAS (Organisation armée secrète). Available at:

[senat.fr/leg/pp109-618.html](http://senat.fr/leg/pp109-618.html) [last accessed December 2012]

<sup>850</sup> Fischer, Proposition de loi (n 117).

<sup>851</sup> Pierre Nora, *Realms of Memory: Rethinking the French Past*. Translated by Arthur Goldhammer. (New York: Columbia University Press 1996). 7-24.

<sup>852</sup> Collin Thiébaud, ‘Mémorial national de la Guerre d'algérie: Pour un mémorial lumineux’ (2010). Available at:

[http://gerardcollinthiebaut.com/pages/biograph/2002\\_MemoGarAlg\\_QBranly.html](http://gerardcollinthiebaut.com/pages/biograph/2002_MemoGarAlg_QBranly.html) [last accessed December 2012]

marginalized memory, their goal is not to have a single alternative vision of the past. Their efforts subscribe to a process of building and recognizing collective identities. It particularly it looks at the contestation of meaning over the commemorations of the police repression of 17 October 1961. In 2012, a civil society group, the Raspouteam project (examined below) undertook to hold parallel commemoration of the events of 17 October 1961 to the official ceremony. The approach of the project stemmed from the realization of the need to activate and to cultivate alternative narratives to counter the forgetting of past events.

### A. Contestation of Meaning

The emergence of a movement of contention on memory in the 2000s coincided with the national disaggregation of the Republican ideal and the grievances of the multi-plurality of French national identity. The French State's attempt to clarify the past sought to converge different interpretations of the past towards a single memory was not accepted by groups holding the colonial past as a marker of their self-identification.

The salient question of history was brought back with the debate on the integration of youth with a migrant. The Mekachera law was vividly criticized for touching on question of integration of immigrants and their children through framing the history to be taught. The exclusion of the episodes of oppression by the colonial state would result in the erasing of memories held by children of colonized population from their parents' and grandparents' telling. In 2005, a group of people called the *Indigènes de la République* (indigenous people of the Republic) sought to push for a post-coloniality where the legacy of colonialism was yet to be discussed. The *Indigènes de la République* proclaimed the colonial legacy in its moment of entry into the political spectrum with a motto proclaiming new sort of identity: *Nous sommes les Indigènes de la République* (we are the Republic's indigenes). In a manifesto published online, the *Indigènes de la République* denounces the 'collective amnesia on the past' and demands for redress for the cultural discrimination, economic exploitation and social disenfranchisement:

The Republic of equality does not exist [...] Our parents and grandparents were reduced to slavery [...] We, the daughters and sons of colonised peoples and immigrants, are engaged in a struggle against

oppression and the discrimination produced by the post-colonial Republic.<sup>853</sup>

This movement emerged in the background of the opposition to the Mekachera law and another law, which had stirred a vivid controversy on banning conspicuous religious signs from public schools (mainly targeting Muslim headscarves equates the treatment of the immigrants in France with the colonial situation). To the *Indigènes de la République* the *non-dits* of s colonial period fostered anti-Maghreb racism, which manifest itself in legislation restricting the freedom of speech and religion of Muslims in France. The *Indigènes de la République* has continued to link its political activism with historical references by commemorating, for example, the anniversary of the massacres by French troop in Setif and Guemla.<sup>854</sup> In 2009 the government launched a public debate hoping to find a new Gallic consciousness. The ministry charged with organising the debate, which also happened to be the ministry in charge of immigration, invited French citizen to debate on what it means to be French.

Inevitably interpretation of the past leads to confrontation between different actors and understandings. The emergence of groups like the *Indigènes de la République* seek to challenge the racism towards immigrants in present-day France by linking contemporary discrimination to colonial practices. The necessarily incomplete process of forging French national identity provoked a form of resistance from minority groups and French citizen with colonial descent.

This post-colonial scepticism towards meta-narratives and teleological notions of history lead authors like Pierre Nora to argues that France has undergone a ‘crisis of memory’ whereby memory has been replaced by history.<sup>855</sup> As observed by Elizabeth Jelin, contestations of meaning over sites of memory are attempts to ‘reaffirm a feeling of collective belonging and an identity’.<sup>856</sup> The decision as to which date a shall be commemorated and whose ‘stories should be represented comes to deciding who is the master of this memory.’<sup>857</sup>

After the Einaudi affair, Bertrand Delanoë, Mayor of Paris, offered a symbolic recognition to the victims of 17 October 1961. In October 2002 a commemorative

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<sup>853</sup> <http://indigenes-republique.fr/>

<sup>854</sup> *Le Monde*, 7 May 2005.

<sup>855</sup> Nora, *Realms of Memory* (n 805) 4.

<sup>856</sup> Elizabeth Jelin, ‘Public Memorialisation in Perspective: Truth, Justice and Memory of Past Repression in the Southern Cone of South America’ [2007] 1(1) *The International Journal of Transitional Justice* 146.

<sup>857</sup> Jelin, ‘Public Memorialisation’ (n 124) 146.

plaque marking the tragic event was placed on the Pont Saint Michel on which can be read: ‘In memory of the Algerians, victims of the blood-stained repression of a peaceful demonstration.’



Commemorative Plaque, Victims of 17 October 1961, Pont Saint Michel Paris 2013

The *Indigènes de la République* critiqued the significance of this ad hoc recognition for survivors and family victims. Indeed, as Houria Boutedlja, explains the fact that the plaque does not acknowledge the responsibility of French agents and does not name Maurice Papon nor that additional official acknowledgements were made weakens its impact. The police repression of 17 October 1961 has a remarkable symbolic significance. She further explains that the function of commemorative gestures is to ‘understand what happened and making sure that it will not be reproduced; a commemoration without acknowledgement of accountability is a weak way for the French government to avoid facing up to its responsibility and it is unfair to those who suffered and still live this pain as an open wound’.<sup>858</sup>

The exclusion of colonialism among the cultural markers of identification reinforced the sense of exclusion of ethnic minorities. Hence these markers constitute as much requirement enabling to determine and strengthen the boundary between “us” and “them”. The movement of the *Indigènes de la République* seeks to be a rallying call for French citizens who share counter-memories of colonialism. For them, the question of the legacy of the colonial past needs to be framed in terms of rights of the victims and obligations of the French state to recognise its responsibility. For those reasons, in parallel to a state-sponsored public event marking the 50<sup>th</sup> anniversary of the brutal police repression of 17 October 1961, the *Indigènes de République* initiated its own

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<sup>858</sup> Research interview, January 2013.

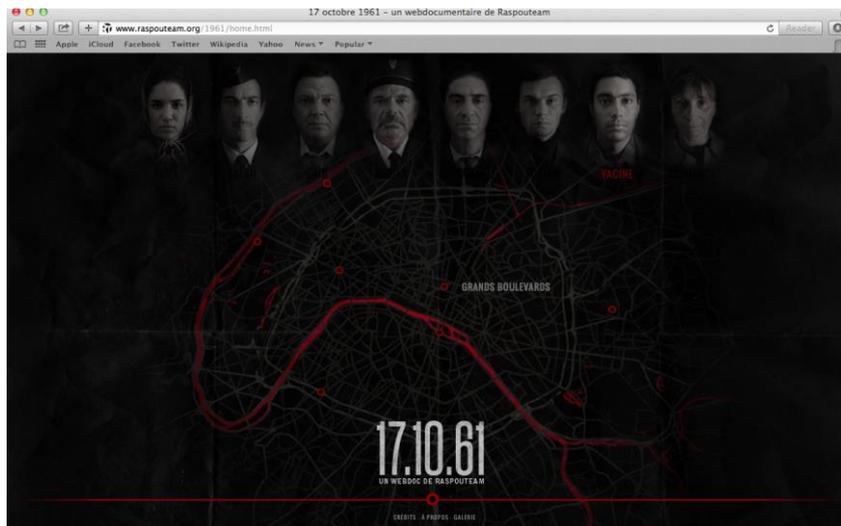
commemorative event, paying tribute to the victims. The procession starts at the Pont Neuf and then moves on to the Pont Saint Michel where the massacre occurred. One of the members of the group took a mic and recounts the facts, acknowledging that many of the victims were thrown into the Seine making it impossible to know how many people died. At some point, one of the participants addressed the young people in the crowd directly about their duty to ensure that justice would be done. The commemoration follows with naming one by one the registered victims. The tribute mixes emotion and anger. Many of the participants denounced the injustices of the colonial state and link past violence to contemporary police abuses. As such other civil society movement such the group *Stop aux control au Facies* (stop racial profiling) was represented and joined in the celebration.<sup>859</sup>

## B. The RaspouTEAM Project

With the fiftieth anniversary of the end of the Algerian war, the commemoration of the war carried a lot of symbolism. For counter memory groups, this anniversary and the interest of the public provided an opportunity to get a wider audience interested in their attempt to push for the recognition of marginalised stories. In 2012, two web designers and a historian who founded the group RaspouTEAM were at the origins of a subversive act-up to commemorate the protests of 17 October 1961. It is a web documentary consisting of a series of testimonies from Algerian labourers, FLN activists and French police officers. The documentary was made available online and is accessible at the time this thesis is written. The website incorporates newspaper articles, interviews with contemporary historians such as Mohammed Harbi and Neil Macmaster. The project started on 17 October 2011; the documentaries were made accessible via the scanning of QR codes placed in seven different locations in Paris: Pont de Clichy, Pont de Neuilly, Palais des Sports, Etoile, Grands Boulevards, Saint Michel and Montreuil.

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<sup>859</sup> Commemoration of 17 October 1961 Paris 2012.



The project presents a series of interventions in what it considers to be the key places to understand the experience of the events of 17 October 1961. QR codes were printed on ceramic tiles and glued to the wall in each location. Images related to the event were pasted on the walls and an accompanying QR (quick response) code links us to the website where the history of the event is presented. Notably it displayed the famous graffiti '*ici on noie les Algériens*' (here they drown Algerians) drawn the day after the police repression.



Quai de Conti, Paris October 17, 2012.

Today the Raspouteam project is an interactive online map linked to these archival documents.<sup>860</sup> Somewhere between street art and an educational project, Raspouteam offered a new and alternative way to engage and interact with France's past and the cover-up of the Algerian war. The originality of Raspouteam's initiative is to question the remembrance of the past by 'placing the onus on each individual to act upon their

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<sup>860</sup> <http://www.raspouteam.org/1961/>

curiosity'.<sup>861</sup> Engaging with the past, therefore, becomes an act of civic responsibility. However, unlike museums or memorials, Hollis explains, spontaneous public engagements are restricted to the medium it utilises (in this case the 'quick response' technology).<sup>862</sup>

The participation of civil society groups in the commemoration of past events is a way for victims to reclaim the space and narrative of those events. As argued by Jenny Edkins, the 'force of non-violent protest against state power can be amplified when they take place in the very locations that memorialize violent traumas of the past'.<sup>863</sup> As such the Raspousteam project has permitted to challenge the State dominance over the writing of history by rendering the past more accessible.

## Conclusion

This chapter has sought to explore the paradigmatic issues emerging from authorisation of the history of the Algerian war. It examined how historical meaning endorsed by the amnesties affected the official remembering of the conflict. Three different areas are at stake: the relation between history and memory, sites of memory, and memory laws. From the 2000s, France politics of memory was marked by an important and deep transformation.<sup>864</sup> It certainly was not before 2002 that France had a proper commemoration the Algerian war.<sup>865</sup> However, as this process focused on the recognition of the contribution of the repatriated *colons*, it also overlooked the other face of colonialism, marked by violence.

These debates about the memory of the Algerian war emphasize the diachronic effects of amnesty laws on the construction of a narrative of the Algerian war and its effect on different groups of French society. Over time, the amnesty law evolved in a narrative where past crimes were silenced and victims ignored. The assumption is that the law is a

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<sup>861</sup> Isabel Hollis, 'Algeria in Paris: Fifty Years on' in Emile Chabal (ed), *France since the 1970s, History, Politics and Memory in an Age of Uncertainty* (London: Bloomsbury 2014) 139.

<sup>862</sup> Hollis, 'Algeria in Paris' (n 859) 139.

<sup>863</sup> Henny Edkins, *Trauma and the Memory of Politics* (Cambridge: Cambridge University Press 2003) 232.

<sup>864</sup> Tramor Quemeneur, 'Le Débat sur es Tortures dans la Guerre d'Algérie, Juin 2000-Septembre 2001', *Regards sur l'Actualité*, n° 276, 2001.

<sup>865</sup> For more monuments, see the lists of the monuments in the South of France '[LDH-Toulon] Les Monuments de l'Algérie Française en France Méditerranéenne'. Available at:

<http://www.ldh-toulon.net/spip.php?article4443> [last accessed May 2013]

more powerful source of recognition than the memory preserved by individuals. This is for two principal reasons. Resorting to law to ‘fix’ historical meaning can reflect the state’s attempt to shape the memory of past events. Law validates the official language used to commemorate the past. Secondly, law’s authoritative function ensures the receptivity of a collective message. The amnesty laws and subsequent legislation enacted regarding the Algerian war support a historiography that emphasized the French experience of colonialism and erased the colonized subjects from colonial history, an aspect of critique which remains at the heart of post-colonial demands.<sup>866</sup> These reforms relied on the ‘subjectification’ of the colonised people and at the same time denied them the political rights afforded to native citizens.<sup>867</sup>

However social movements can challenge these authorised narratives. Social movement intervention, in the language of commemoration, can challenge the set of patterns used to give meaning to the symbolic language. Counter memory groups such as the *Indigenes de la République* and the Raspouteam collective entered the arena of memory by initiating their own process of commemoration and intervening in the ‘making of traditions’. To counter the authorised and mythical representations of the past, civil society groups sought to reactivate the marginal memories carved out of testimony of wrongs and injustices perpetrated by the French army. The construction of a historical narrative is both an imagined and negotiated process. It reflects the opposition of individual demands for recognition with their universal application.

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<sup>866</sup> Éric Savarese, *Algérie, la guerre des mémoires* (Paris: Non Lieu 2007) 140-142.

<sup>867</sup> Nicolas Bancel and Pascal Blanchard, ‘Le colonialisme, un “anneau dans le nez de la République”’ [2000] 1228 *Revue hommes et migrations*.

## Chapter 8 : Conclusion

*France has a 'duty of truth on violence, injustice, massacres and torture.*

President Francois Hollande December 20, 2012

At the commencement of this project, there was an attempt to conduct a conclusive study on the role of amnesty laws in post-conflict society. The selection of the French case was first chosen from the desire to provide an original case from which to reflect on the significance of amnesty laws in societies undergoing a revision of their past. This thesis has shown that in order to understand patterns of continuities and discontinuities of a transitional process, it is necessary to expand the conceptual framework of analysis of the amnesty. This framework has been applied to the case of amnesty following the War on the Independence of Algeria.

The seven chapters explored the relationship between the three levels of contestation of the amnesty laws: amnesty - criminal accountability, amnesty - right of society to information and amnesty - recognition of past crimes. Issues discussed include the application of amnesty laws by domestic Courts; commemoration as institutions of informal justice; the role of social movements to in transformative justice. This chapter concludes this research project: it discusses the value of the research and proceeds to reflect on the findings and makes suggestions for future research. It presents the major conclusions for each issue before drawing thematic and theoretical conclusions.

### I. Value of research

The selective exploration of the archives undertaken in this thesis has enabled to trace the evolution of the amnesty from 1962 to 2012. Using both primary and secondary sources it sought to observe the process through which amnesty affect the prospect of justice and interfere in the process of construction of legacies of the Algerian conflict. The interviews conducted throughout this research, has enabled to complement the textual analysis undertaken and has covered the issue of amnesty on both a factual and meaning level. This combined approach was useful in order to understand the 'story' behind the implementation of the law. In order to remain as open and adaptable as possible to the interviewee's position, interest and priorities, there were no predetermined questions asked (annexe 1). Nevertheless a standardized, open-ended interview questionnaire was established to facilitate faster interviews (see annexe 2).

Telephone interviews enable a researcher to gather information rapidly. Like personal interviews, they allow for some personal contact between the interviewer and the respondent.

This thesis has focus its attention on domestic legal trials and legislations. From this axis it sought to study the role played by the courts as opposed to civil society or the executive branch in the transition. The historical exploration of the Algerian war undertaken in Chapter 3, backgrounds the discussion on the opportunity of individuals to use courts to revise the narratives of the past.

## II. Main findings

### A. Transition and Continuities of past injustices

The historico-legal analysis developed in this thesis sought to explore the enduring effects of injustice resulting from the Algerian war. Transitional justice enables to address the harm in its temporality as well as defining a justice model. The development of this justice model in the context of colonial settlers injustice extended the field of inquiry beyond conventional dichotomies. As such, understanding post-conflict resolution in terms of a ‘continuum’ between past, present, and future, the question of justice enables to address how structural injustices. Transitional justice institutions inevitably engage with ‘inherited traditions and centres of power’.<sup>868</sup> Among these traditions, the legacy of wars of decolonisation remains unclear.<sup>869</sup> Post-colonial theorist strived to denounce the resilience of colonial practices and how it shapes relations and political aspirations.<sup>870</sup> The resolution of war for the independence of Algeria is a foundation moment in the political transformation of France. The war has marked France by its brutality and also because it revealed the contradictions of the colonial

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<sup>868</sup> Teitel, *Transitional Justice* (n 7). 8.

<sup>869</sup> See Anthony Anghie *Imperialism, Sovereignty and the Making of International Law*, (Cambridge: Cambridge University Press, 2004); Martti Koskenniemi, *The Gentle Civilizer of Nations*. (Cambridge: Cambridge University Press, 2002). Matthew Craven *The Decolonization of International Law - State Succession and the Law of Treaties*, (Oxford: Oxford University Press, 2007).

<sup>870</sup> See for example Edward Said, *Orientalism* (New York: Pantheon Books, 1978); Samir Amin, *Eurocentrism* (New York: Monthly Review Press, 1989); Robert Young, *White Mythologies: Writing History and the West* (New York: Routledge, 1990)

regime. Since the independence of Algeria, France has struggled to legitimate its action in Algeria and the effort engaged to preserve France colonial governance.<sup>871</sup>

This research started by tracing the transformation of the debate about the amnesty. It was suggested that three phases could be discerned. The first phase (1962-1968), analysed in Chapter 4, corresponds to the concern to secure peace with the different actors of the conflict. The period immediately following the end of the conflict generally remained politically tense and state efforts focused on achieving the process of rehabilitation of the French soldiers. The amnesty were incorporated in the peace agreements, to facilitate the transition from violence and secured the application of rule of law. Indeed it was argued that the grant of amnesty was necessary to entice the FLN in the peace negotiation and as a bargain with the OAS fighters. Subsequent governments' continued De Gaulle's policy by rehabilitating the OAS members and compensating the repatriated *pieds noirs*. In the second phase (1972-1981) the amnesties were used as a political tool to support the political reconstruction of French society. The scope of the amnesty was extended so as to rehabilitate the veterans and address the need for recognition of the repatriated colons. The third phase (1999 to 2012) shows that the amnesty are being integrated within the construction of a narrative of commemoration of the Algerian war. In France, the legal debates that have taken place determined the trajectory undertaken by collective historical narrative. The increase interest of the French public towards the legacy of its colonial history required developing a trans-generational veneer of commemoration.

This historically rooted analysis permitted to establish three important observations. The first one is that the amnesties following the Algerian War are at the nexus for contestation over the legitimacy of French military operations in Algeria and the recognition of victims of human rights violation. Next, the apparent fragmentation of memories on the Algerian War in France ensuing to the end of the war accuse of the infiltration of the Algerian War in identity politics. Finally, the growth of a social movement of contestation in France rallying victims, journalists and historians highlights the trans-generational nature of claims of recognition.

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<sup>871</sup> Pascal Blanchard, *La Fracture coloniale* éditions La Découverte, septembre 2005 ; see also Pascal Blanchard, 'Le colonialisme, un "anneau dans le nez de la République"', *Hommes & Migrations (L'Héritage Colonial : un Trou de Mémoire)*, n.1228 November-December 2000 p. 84.; Nicolas Bancel, Pascal Blanchard, Françoise Vergès (eds.), *La République Coloniale* (2003) pp. 13-14.

## C. Judicial capacity in the post-transitional phase

The exploration of the judicial capacity of courts to revise the narrative of past event sought to reveal the streams of receptivity between demands for recognition and demands for accountability. This thesis found that once society is less concerned by the immediate need to end violence, the issue of accountability involves two keystone elements: access to information on what happened and a justification.<sup>872</sup>

### 1. Judges Interpretative Function

The construction of a narrative about the past draws meaning from the ‘master narrative’, that is the conceptual framework for historical interpretation. As such, this conceptual framework determines the receptivity between criminal accountability and public recognition.

This interpretative function of the law and the facts results in the production of a particular narrative and meaning given to an event. Subsequently, law’s function in the construction of meaning about what took place in the past point to role of law in memory transmitting, and community strengthening.<sup>873</sup> The deconstruction of the process of adjudication highlighted judges’ commitment to a narrative coherence. On domestic level, it is the ‘story element’ that seemed to have drive the judges interpretation of the law.

The success of post-World War II prosecutions is to be attributed to three factors that have been missing in the case of the legacy of the Algerian war. First, the re-establishment of the rule of law was framed through the enforcement of the law. Legalism provided a ‘measured process of fixing guilt, which in each case was ‘a unique alternative to vengeance.’<sup>874</sup> Creative legalism as a doctrine of interpretation of the law aims at generating a consensus in order to protest against specific forms of state-

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<sup>872</sup> Andreas Schedler, ‘A. Conceptualizing Accountability’, in Andreas Schedler Larry J. Diamond, and Marc F. Plattner (eds.) *The Self-Restraining State: Power and Accountability in New Democracies*, (Boulder, Colo: Lynne Rienner Publishers, 1999) 23.

<sup>873</sup> For literature about law, memory and dealing with the past, see for instance: Sarat *Trauma and Memory* (n 85); Joerges and Ghaleigh *Darker Legacies of Law* (n 85) ; Felman, *Juridical Unconscious* (n 85) ; Minow, *Breaking the Cycles of Hatred* (n 86); Sarat and Kearns, *History, Memory and the Law* (n 85); Christodoulidis and Veitch, *Lethe’s Law* (n 13); Douglas, *Memory of Judgment* (n 85); Osiel, *Mass Atrocity* (n 85).

<sup>874</sup> Judith N. Shklar, *Legalism* Cambridge, (Mass: Harvard University Press, 1964) 158.

sponsored violence.<sup>875</sup> Shklar also based the success of legalism on the model it proposed. Through a process that was flawed, a ‘decent model of a trial’ was on display. However the French courts’ interpretation of criminal law in relation to the Algerian war reflected the use of the logic of legalism as a vehicle to mask state-sponsored abuse. The amnesty affected the memory politics by excluding the atrocities perpetrated during the Algerian war from the scope of application of crimes against humanity. Under such examination, the value of amnesty within the juridical hierarchy was revealed as one of ‘didactic constraint’ (my term).

The exploration of defamation cases undertaken in Chapter 6 pointed to the conditions that have led to the recognition of the use of torture as a historical fact. However this success needs to be mitigated in light of the contextual and meta-textual meaning of this recognition. At a meta-textual level, it is important to highlight that defamation proceedings involve lesser stakes than criminal trials. The success of defamation proceedings to disclose the ‘truth, needs to be mitigated by the proceeding itself. Indeed the *truth* revealed about Papon’s past was not based on the verification of the fact but on the recognition of the ‘good faith’ of Jean Luc Einaudi as such, the salience of defamation proceedings resides in the fact that it is a legal venue that allows for the creation of ‘stories’ to take place. Furthermore, despite recognising the responsibility of Maurice Papon in the police repression it did not result in his condemnation. In addition, defamation proceedings outcome needs to be situated within a particular context. Trials on historical injustices hold an expectation of truth for the general public. The very idea of reaching an unambiguous ‘truth’ through defamation proceedings is mistaken and overall an unrealistic goal. By its very nature the legal process is a selective process whereby evidences are being examined within a limited scope. It would be therefore, inaccurate to consider the story that unfolds in front of judges as universal and absolute.

## 2. Limitations to Judicial Capacity

When crimes perpetrated by an individual are part of a wider political criminality, there is a risk of turning a trial into a ‘show trial’. As Klaus Gunther expresses it ‘legal attribution focuses on the individual person and abstracts from the circumstances of the

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<sup>875</sup> Bronwyn Leebaw, ‘The Politics of Impartial Activism: Humanitarianism and Human Rights,’ [May 14, 2007] 5 Perspectives on Politics 2.

[http://www.journals.cambridge.org/abstract\\_S1537592707070752](http://www.journals.cambridge.org/abstract_S1537592707070752). Last visited December 2011.

situation, especially if these are seen as rather remote from the concrete illegal act in question'.<sup>876</sup>

A major challenge for courts in the process of revision of the past relates to finding the balance between opposing forces and competing political interests.<sup>877</sup> Kimberly Lanegran highlights that political interests are ever-present in the courtroom.<sup>878</sup> In our case, the opening of legal proceedings was disturbing the transitional bargain represented by the amnesty. Victims of torture's plea for recognition are in contradiction with the policy of forgetting adopted at the end of the conflict.

As such, the Algerian trials related more to an issue of memory than of the judging of crimes themselves. Central to the Algerian affair, courts became a space to debate the protection of memory of past crimes. Judges have a function role in ensuring the transmission and the protection of the memory of the past. It participates in efforts to ensure that past crimes are not reiterated. The question therefore does not centre on whether trials may participate in the writing of an official history but rather asks how it can do so responsibly. Debating the past indeed involve a public interest dimension. It opens for a confrontation between those who call for remembrance and those who consider that forgetting about past crimes may disrupt the transitional process. In the Orban and others decision of the ECtH, while the court recognised the French judges 'legitimate goal' in sanctioning Aussaresses' memoirs<sup>879</sup> it ruled that the French court response was disproportionate and that it was not 'necessary in a democratic society'.<sup>880</sup> During the debates, the publishers had argued that the book contributed to establishing the 'historical truth' regarding a traumatising page of French history. However for the ECtH, its role is not about that but it is to protect a public space for a society to debate on controversial issues of a country's past. The legal proceedings against Paul Aussaresses and his publisher did not aim at establishing his individual accountability. However the debate on the use of torture was taken out of the courtroom put a moral condemnation on the methods used by the French army, the state at large for endorsing them.

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<sup>877</sup> Leila Sadat Wexler, 'Reflections on the Trial of Vichy Collaborator Paul Touvier for Crimes Against Humanity in France', [1995] 20 (1) *Law & Social Inquiry*, 215.

<sup>878</sup> Kimberly Lanegran, *Truth Commissions, Human Rights Trials, and the Politics of Memory*. [2005] *Comparative Studies of South Asia, Africa and the Middle East*, 113-119.

<sup>879</sup> Emmanuel Derieux 'Nouvelle condamnation de la France pour atteinte à la liberté d'expression' [25 February 2009] *La Semaine Juridique*.

<sup>880</sup> Orban and others (n 670) para 42, 44.

### III. The Construction of a Collective Narrative on Past Events

By deconstructing the process formation of a collective narrative of the Algerian events, this thesis illuminated on of remembrance and meaning about the past. The historical endurance of transitional issues transcends the individuals directly involved in the conflict to reach the collective and help construct a collective political identity.<sup>881</sup>

The rendition of justice is charged with the task of actively re-imposing norms into spaces in which rule-based legality has been either radically evacuated or perverted.<sup>882</sup>

The very process of trials open a forum to investigate and verify narratives located at the margins or even outside collective memory. A sustainable nation- building discourse resulting from the amnesty should aim at homogenising the disparate memories of the war.<sup>883</sup>

This thesis illuminated on the influence that Amnesty played on the judges interpretation of criminal law. Acting as a constraining norm, the meaning of the past endorsed by amnesty dived in the creation of a collective narrative on the rehabilitation of the French soldiers and the attribution of guilt. The amnesty laws and subsequent legislation enacted regarding the Algerian war support a historiography that emphasized the French experience of colonialism and erased the colonized subjects from colonial history, an aspect of critique which remains at the heart of post-colonial demands.

Chapter 7 explored the impact of the amnesty law on construction of a national narrative. More precisely it assessed the likelihood for counter memory accounts established in legal proceedings to be recognised officially. It identified that two different areas are at prone to transformation: sites of memory, and memory laws. This impact manifests principally through the production various symbolic messages. The Raspouteam example provides interesting insights as the how the success of a social movement can be measured. Firstly, social movements need to be able to balance the

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<sup>881</sup> Teitel, *Transitional Justice* ( n 7), 102

<sup>882</sup> Lawrence Douglas, 'The Didactic Trial: Filtering History and Memory into the Courtroom' [2006] *European Review*, 14, 513-522. See Lawrence Douglas (2001) *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (New Haven: Yale University Press 2001).

<sup>883</sup> Elazar Barkan, *The Guilt of Nations. Restitution and Negotiating Historical Injustices* (Baltimore, MD 2000), xxiii, pp.308-49.

expectation of the audience while producing resonant frames. The judicial trial that preceded the Raspousteam action to commemorate the events of 17 October 1961 enabled to facilitate an effective communication. The ‘other’ Papon trial which displayed the inaccuracies of the official narratives created a ‘momentum’ to press the government to welcome these initiatives and open the access to the archives documenting the police repressions of 17 October 1961. This case revealed the centrality of access to archives to advance historical records and victims’ recognition. The judicial recognition of a right to access information about past events that has managed to bridges the gap between constructed narratives on the past and historical facts. It has enabled the Raspousteam movement to integrate its action within project of re adjustment of the historical narrative of the past and effectively address the historical gap. Secondly, it situates the role of historians within such attempt of transformative justice.

#### **IV. Evaluating Continuities of Colonial Settlers Harm**

The justification for an amnesty in the aftermath of a conflict is generally framed in terms of the role of amnesty to secure peace. Yet, as the examination of France political re-construction demonstrates, in the long term, amnesty may create grievance of social nature. Indeed amnesty by itself does not protect from the past to prone to political reclamation. As such, this leads to the question: to what extent do amnesties participate in the preservation of Law? And if so, which Law? The use of amnesty following the Algerian war reflects the idea of a conflation between the rehabilitation of veterans and the forgetting of the crimes.

##### **A. Measuring the Impact of Colonial Settlers Injustices**

The introduction of amnesty laws and their subsequent extensions was a foundational moment in the political reconstruction of France. The ensuing Commemoration promotes society’s commitment to a particular reading of the past by producing symbols of its values and aspiration. The various material manifestations of the past such as museums, monuments, archives, festivals or anniversaries can be created so as to enshrine a collective understanding of the past and work as a mnemonic process. The role of these markers is inter-generational and they have the function of revitalising the social history of a represented group.

Yet France contemporary struggle in defining neutral and inclusive cultural legacies with regard to French colonial history brings up critical questions on the continuities of historical injustices. The examination of judges' attitude towards the application of French criminal provisions and international law on acts of torture was one way to explore this continuity.

The formation of civil society group coincided with the creation of physical markers of the past such as plaques and commemorative inscriptions, museums or memorials to commemorate the past. Yet it is profoundly difficult to pinpoint how past binaries of exclusion may effect on the construction of a political future. Further research is required to suggest platforms of reparation that rectify colonial settlers harm yet maintain society's cohesion. The French national narrative on the Algerian war has been constructed according to a combination of memorial policies that can be traced back to the beginning of the Third Republic. A construction akin to the 'binaries' that underpinned and legitimised the spread of international law from the 16th to the 19th centuries during the process of colonisation.<sup>884</sup> Where the 'civilised' once opposed the 'barbarian', one may see in the discourse of 'othering' of the North African immigrant population how colonial opposing binaries may still be in operation today. In France, the limited inclusion of the colonial experience in France collective memory was used by the government to shift from addressing comprehensively questions of integration of migrants. One could take further this inquiry so as to whether it can be connected to the concern held by many about the nature of Europe and the development of European citizenship.

By building continuity with the past, memory does the work of laying the foundations for identity, on an individual and a cultural level. Noting the interconnection between colonial racism and the veneer used to address the question integration of North African immigrants it would be necessary explore if identity a key feature of the dispute over France self-image.

## B. Impact of Civil Society's in Transformative Justice

The strength of grassroots movements is assessed in terms of ability to invoke the past and make it accessible in order to produce and reproduce the past in the present. The

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<sup>884</sup> Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (2007),

agency of grass-roots action, such as the one of the RaspouTEAM Project to interfere in the sphere of collective memory initiatives highlight that, the law is not the only recipient for a project of transformative justice. Chapter 7 analysed the engagement of civil society in their capacity to create alternative commemoration. While this chapter explored these initiatives within the construction of a historical narrative and in the construction of an alternative system of referential markers of identification of communities further research is needed to assess how these initiatives impact on the shaping of a group identity. A follow-up study on the sustainability of these grassroots actions is necessary.

## Conclusion

This thesis sought to develop a comprehensive study of the enduring effect of past injustices. The examination of the enduring effects of amnesty in French post-colonial settler settings highlighted the centrality of memory as a field of contention and appropriation. This has highlighted the role played by collective narratives and official recognition in a symbolic form of reparation.

The question of colonial legacy sits at the heart of the debate on structural injustices. In the present second generation of migrants born in France remain sensitive to the recognition of their individual experience of colonialism. Yet at the official level, France is still reluctant to integrate these experiences in the collective narrative of the past and embrace grass root activities of commemoration. Framing France politics of memory through the transitional justice discourse enable to recognise how past harms features into structural injustices. The study of amnesty within the prism of collective memory has highlighted that a transitional historical production alongside justice mechanisms is critical. Transitional history necessitates negotiating between contested accounts and is deployed within a broader narrative and state history. The politics of memory on past conflict presumes a degree of consensus and dialogue between individual subjectivities, and societal or collective sense of belonging. As such, demands for the transformation of memory imply a decisive shift from the historical to the psychological, from the social to the individual, from the objective message to its subjective reception. The challenge is to place guilt and repentance at the centre of a reconstituted collective memory in such a way as to keep the memory alive as the justification of prospective relief.

Recourse to law to 'fix' history is not unusual. In many cases, post-conflict societies have coupled legislative reforms with the re-envisioning of past crimes. In a public lecture, Justice Richard Goldstone stressed the role of the legal institution in the South African Truth and the Reconciliation Commission in terms of an official acknowledgement. 'If it were not for the Truth and Reconciliation Commission, people who today are saying that they did not know about apartheid would be saying that it did not happen. This is a fact and it cannot be underestimated'.<sup>885</sup> Such intervention by the law may occur decades after the end of violations and represent a break with the past consensus. Struggles over memories and competition over the recognition of particular versions of the past refer to the active role of participants in the making of a historical meaning. The role of the state is highly significant in the untangling of competing narratives by adopting measures and institutionalising mechanisms to deal with the past.<sup>886</sup> On the other hand, the remembrance of the past plays an important role in the redefinition of the nation and the reconstruction of broken relationships. Law's function as a narrative has to do with its functions and the expectation structures of the society.<sup>887</sup> Because the law offers a canonical language of recognition, it plays a central role in the construction of symbols and a ritual of passage for recognition. 'Truth' is undoubtedly 'one of the most elusive concepts that can be used to address what happened during a conflict'.<sup>888</sup>

A third way out of this imbroglio may be found in the investment of a French-Algerian cooperation in the like of the Franco-German reconciliation process. Indeed by investing in the memory of the past, French people overcame the image of German as an external enemy, and instead centred this criticism on the Vichy regime. Therefore settling the Algerian question would require adopting 'a new set of lenses through which we do not primarily see the setting and the people in it as the problem and the outsider as the answer. Rather, we understand the long-term goal of transformation as validating and building on people and resources within the setting'.<sup>889</sup> The state should complement the

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<sup>885</sup> Justice Goldstone, 'Justice or reconciliation', paper presented un University of Chicago Law school, Center for international Studies Conference, University of Chicago, 26 April 1997.

<sup>886</sup> Brownyn Anne Leebaw, 'The Irreconcilable Goals of Transitional Justice, *Human Rights Quarterly*, 30.1, 99 (2008):97.

<sup>887</sup> Christodoulidis (2001) Law's immemorial. In Christodoulidis E and veitch S (eds) *Lethe's law: Justice, Law and Ethics in Reconciliation*, (Oxford and Portland Hart 2001)223

<sup>888</sup> Steven Shapin (1994) *A Social History of Truth*. Chicago: University of Chicago Press.

<sup>889</sup> Paul J.Lederach, John Paul. *Preparing for Peace: Conflict Transformation Across Cultures*. Syracuse University Press, 1995.

decision to not prosecute and incorporate mechanisms to understand the roots of violence.<sup>890</sup>

Elazar Barkan suggests that restitution at best encourages a political dialogue among cultures and contributes to establishing international cooperation and standards of morality that can further encourage future agreements. In restitution schemas, ‘the West is in a dialogue with the rest of the world and is shaped by the encounter with other cultures. The dialogue of restitution brings new pluralistic perspectives of the national historic and current identity into public view and thus redefines the nation and its historical narrative’.<sup>891</sup> Restitution schemes can enable multiple group identities to influence and contribute to a new kind of historical narrative. ‘It is a testimony to a global morality that envelops pluralism and multiculturalism while maintaining the nation-state as the sovereign unit’.<sup>892</sup> As Ricoeur writes ‘[t]he duty to remember consists not only in having a deep concern for the past but in transmitting the meaning of the past to the next generation.’<sup>893</sup> Memory groups today denounce the difficulty of finding an appropriate space to discuss and commemorate the state sponsored violence that was perpetrated during the conflict.<sup>894</sup> The acknowledgement of ethnic and cultural diversity not only depends on the symbolical meaning attached to it but also on a practical dimension. The recognition of the right to self-government and the recognition of their differences are trapped within the dichotomy between the universalism concept of justice and the particularism of their claims.<sup>895</sup> Therefore addressing past crimes is a matter of ‘human rights’ is an ethically loaded project. But it also offers opportunities to re-inscribe the responsibility of the state towards their indigenous populations, empowering vulnerable communities.

The real challenge of post-transitional anticolonial movement is today to deal with the legacy of the Algerian war is to turn the colonial narrative imposed by the powerful into

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<sup>890</sup> Ronald C. Slye, ‘The Legitimacy of Amnesties Under International Law and General Principles of Anglo-American Law: Is a Legitimate Amnesty Possible?’ (2002) 43 Va. J. Int’l L. (Virginia Journal of International Law) 173, at 179.

<sup>891</sup> Elazar Barkan, *The Guilt of Nations* (2000) p. 321.

<sup>892</sup> Elazar Barkan, *The Guilt of Nations* (2000) p. 322.

<sup>893</sup> Paul Ricoeur, ‘Memory and Forgetting,’ 9.

<sup>894</sup> Charles Villa Vicencion *Why Perpetrator Should Not Always Be Prosecuted*, 9 Emory L. J. 205 2000

<sup>895</sup> Ellen Messer, « Anthropology and Human Rights », *Annual Review of Anthropology* 22 (janvier 1, 1993): 221-249. Margaret Anne Wilson et Paul Hunt, *Culture, rights and cultural rights: perspectives from the South Pacific* (Huia, 2000).

a cohesive and inclusive language. In the legal realm, the challenge is to overcome the selective process steered by the law on a collective memory, directly and selectively. Attempts to reconstruct the dialectics that direct the discourse on historical justice requires developing strategies of international law while at the same time serving as a basis for reconciliation. The ideal of a cosmopolitan justice turns the acknowledgement of past responsibilities towards the recognition of the 'other' as vulnerable. This way, it is suggested that the memories of different nations could open up towards each other, and they could begin to form a 'community of history', itself an element of a moral community. It is suggested that this could be a cornerstone of a post-national European identity.<sup>896</sup> However, this can only be executed if individuals, communities, and memory groups are considered as full participants in the official project of the social reconstruction of the nation.

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<sup>896</sup> Jean-Marc Ferry, *La Question de l'État Européen* (2000) p. 160.

## Annexe 1 : List of Participants

<b>State &amp; intermediate actors</b>	<b>Contact person</b>	<b>Activity</b>
ONACVG	Abderrhaman Moumen	The French National Office for Veterans and Victims of War (ONACV) task whose task is to compensate the persons affected by war. Abderahmen Moumen is the head of the départements of the National Office for Veterans and Victims of War (ONACVG) responsible for the application of measures adopted by the government for the repatriation of former members and their surviving spouses of auxiliary and assimilated units that served in Algeria.
Secretary of State for Defence and Veterans	Benoit LeMaire	French Secretary of State for War Veterans and Memory is in charge of organizing the commemorative activities and sites of memory
Historian	Sylvie Thenault	Expert on the colonial Judicial system
Historian	Raphaëlle Branche	Specialist in colonial violence and colonial wars, focusing on Algeria. Her doctoral thesis published in 2001 was the first scientific study on the use of torture by the French army
<b>Direct actors</b>	<b>Name</b>	<b>Story</b>
Historian/ Party at the Defamation trial versus Maurice Papon	Jean Luc Einaudi	Historian specialized in the events of 17 October 1961. He was able to prove in court that it Maurice Papon directed the police repression in October 1961.
Lawyer	Jacques Vergès	A prominent and outspoken lawyer known for his activism in the anti-colonial cause and famed attacking French torture in Algeria and defending Nazi criminal Klaus Barbie for divisive legal tactics, including
Journalist	Florence Beaugé	Journalist at Le Monde was one of the first French journalists who revealed the policy of systematic torture, rape and deportation in Paris by the French army and police.
Son of a victim of torture	Mohammed Garne	M.Garne was born after his mother was gang-raped by French soldiers and tortured by soldiers who tried to provoke a miscarriage on learning that she was pregnant.
Wife of a disappeared detainees	Josette Audin	She is the widow of Maurice Audin, an Algerian Communist professor who was arrested by French paratroopers, tortured and executed in secret.
Victim of Torture	Louisette Ighilahriz	As a young woman, Mme Ighilahriz, joined the Algerian national liberation movement after her father was seized by French colonial authorities in the 1950s. Arrested in 1957, she was tortured for three months by the French soldiers. She would not have survived from her ordeal if it was not for a French doctor who helped her being transferred

## Annexe 2 : interviews

Type of data collection: Interview: Face-to-face (email or via telephone)

Ethics guideline of the interview:

- My name and role was given. I explained that I was doing data collection for a research project called *forgetting the unforgivable: the use of amnesty following the Algerian war*.
- I explained to the interviewee that I would like to find out about his/her view and experience regarding the amnesty laws and France attitude towards the Algerian war.
- I explain that it will take minimum approximately 30 minutes.

List of interviewees

General Information.	
Date:	
Location:	
Type of interview: (telephone, Skype, face-to-face)	
Title:	
Organization:	
Name of interviewer:	
Date :	

### Section 1: General questions

1. What do you think about the Algerian war?
2. Are you familiar with the amnesty laws enacted after the end of the war?
3. Have you been personally affected by the war? if yes how?

Section 2: background history (direct actors )

4. Could you explain me how the war has impacted on you?
5. Do you think that the resolution of the conflict was satisfying
6. have you attempted to seek reparations?
7. what are the major obstacles to your attempt?
8. Do you find your efforts supported by civil society?

### Section 3: Lawyers

14. Do you consider that the amnesty related to the Algerian war is lawful?
15. how would you define the attitude of the judges towards the Algerian war?
16. Are you aware of any action in order to come to terms with this issue? Do you have any suggestion to solve this problem?
17. Are you familiar with any local NGOs who represent victims?

### Section 3: Historians

18. What kind of role do the amnesty play in the historiography of the conflict?
19. How would you define the role of the historian in relation to the Algerian war?
20. What recommendations could you provide to improve the commemoration of the war

21.what is the role of commemoration?

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