The human body: victim, witness and evidence of mass violence¹

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Introduction

In the context of international criminal law and case law, the fact that the individual, as a human being, is the target of criminals against humanity and *génocidaires* alike is a legal reality that raises no doubt or controversy.² The definition of a crime against humanity protects ‘any civilian population’,³ while that of genocide refers to the victim ‘group’.⁴ Further, both definitions protect the physical and moral integrity of the individual – although the text of the law generally refrains from using the word ‘body’, a reluctance which, as it will be further developed, is not shared by the International Criminal Tribunals or by the International Criminal Court (ICC).

The individual, the first beneficiary of international criminal law, is thus protected in terms of his/her physical and moral integrity, to adopt the terminology used in the legal definitions of crimes of mass violence, or in his/her body and dignity, to refer to the case law of the International Criminal Tribunal for Rwanda (ICTR) and that for the former Yugoslavia (ICTY), as well as of the ICC. This semantic divergence, however slight it might seem, is not devoid of legal consequences at the normative, definitional and procedural level. The present analysis explores this linguistic impact on the judicial understanding of crimes of mass violence and their punishment by international bodies. The International Criminal Tribunals and the ICC generally avoid exercises in style

and language of a literary purport. As will be developed, the choice of words here is not without import and the recurring use in their decisions and judgments of the word 'body', although missing from the legal norm, has admittedly paved the way for a more acute comprehension of mass violence. And indeed, the main issue with the text of international criminal law is not so much its cautiousness in using the word 'body', and its preference for the expression 'physical integrity', as its omission of the consideration of the fate inflicted on the human body in the context of mass violence. If 'physical integrity' and 'body' reflect the same reality, the legal norm does not go much further in the perception of the human body, thus neglecting both the significance of the body in the criminal *modus operandi* and its evidentiary value. This lacuna has not escaped the attention of the international criminal institutions and, as this chapter will demonstrate, by means of a discreet semantic shift, the 'body' and the 'corpse'⁵ have entered the legal scene through the judicial door, enabling judges not only to better grasp the very nature of mass violence, as crimes consciously attacking the bodies of victims (the subject of the first section of this chapter), but also to adequately adjudicate such crimes based on the proof provided by the treatment inflicted by criminals on the bodies of their victims (in the second section).

The human body, outward covering of human dignity

In the death threat, which I felt for the first time in full clarity while reading the laws of Nuremberg, there also lay what is commonly referred to as the methodical 'degradation' of the Jews by the Nazis. Put differently: in the denial of human dignity itself sounded the death threat.⁶

Although it underlies the very phrase 'crime against humanity', human dignity remains a rather elusive concept, since international criminal law refrains from defining it. The contemporary definition of crimes against humanity, as enshrined in the 1998 Rome Statute of the International Criminal Court – whose extended list of prohibited acts is to be applauded – mentions neither human dignity nor the human body as such. The Rome Statute recognizes the following as crimes against humanity:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;

- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.⁷

An explicit reference to the ‘human body’ within this definition might seem purely rhetorical since the text of the law does protect the physical integrity of the human being (since ‘physical integrity’ expressly refers to the human body, there is strictly no doubt that the human body as such is protected by the prohibition of ‘serious injury to body or to mental or physical health’).⁸ The document ‘Elements of Crimes’ (under the Rome Statute) also specifies that prohibited inhumane acts encompass ‘great suffering’ and ‘serious injury to *body* or to mental or physical health’.⁹ Even if only implicitly, the human body is likewise protected by the prohibition of torture, in the context of which ‘[t]he perpetrator inflicted severe physical or mental pain or suffering upon one or more persons’,¹⁰ by that of forced pregnancy, as ‘[t]he perpetrator confined one or more women forcibly made pregnant’,¹¹ and that of forced sterilization, which deprives the victim of ‘*biological* reproductive capacity’.¹²

Is it this inescapable link between physical integrity and the human body that has prompted the judges of the International Criminal Tribunals to be more explicit and to take an express interest in the human body? Are the judges aware of their interpretation or is it a matter of involuntary – or unreflective – use of the word ‘body’? If this chapter does not pretend to provide a definitive answer to these questions, it is nonetheless true that the very expression ‘human body’, missing from the text of the law – at least in its French version – has incontestably been integrated into the judicial language relative to crimes against humanity.

It is, in this respect, particularly striking that the human body is not mentioned with regard to the crime against humanity of murder – no more than a simple specification that ‘[t]he perpetrator killed one or more persons’¹³ – nor with regard to that of extermination – in which context ‘[t]he conduct constituted, or took place as part of, a mass killing of members of a civilian population’.¹⁴ This legislative lacuna, however, has not prevented the ICTR Trial Chamber, in its *Akayesu* decision, from proceeding to a meticulous analysis of the murders perpetrated, which includes numerous references to the human body – with a preference in the original English version of the judgment for the word ‘body’ rather than ‘corpse’.¹⁵ Yet, it would be premature to see in this a genuine evolution if not of the law, at least of the judicial language, since other decisions refer not to bodies but to the ‘dead’ or to ‘victims’. Thus, in its consideration of the facts in *Kamuhanda*, the ICTR Trial Chamber noted that ‘Prosecution Witness GEA testified that he could not say how many people had died at that location, because “that day there were very many”’.¹⁶

Similarly, Pre-Trial Chamber II of the ICC has explained that ‘for the act of murder to be committed the victim has to be dead and the death must result from the act of murder’.¹⁷

The human body and the fate inflicted on it are also absent from the definition of the crime of persecution, which, however, directly concerns the treatment of the body before death, the victimized individual being expelled from both the social and the living spheres. This characteristic has not gone unnoticed by judges and several decisions handed down by the ICTR and the ICTY explicitly define the purpose of the crime of persecution as being the removal of people from society.¹⁸

When examining some of the examples of persecution mentioned above, one can discern a common element: those acts were all aimed at singling out and attacking certain individuals on discriminatory grounds, by depriving them of the political, social, or economic rights enjoyed by members of the wider society. The deprivation of these rights can be said to have as its aim the removal of those persons from the society in which they live alongside the perpetrators, or eventually even from humanity itself.¹⁹

Any explicit reference to the human body is likewise absent from the definitions of the crimes against humanity of enslavement and sexual slavery, whose essence nonetheless lies in considering the body as an object: as confirmed by the ICC’s ‘Elements of Crimes’,

enslavement and sexual slavery stem from the fact that '[t]he perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty'.²⁰ This ownership and the 'objectification' of the body in the context of these crimes have been further explained in the case law and, in its *Kunarac* decision, the ICTY Appeals Chamber clearly specified that:

the traditional concept of slavery, as defined in the 1926 Slavery Convention and often referred to as '*chattel* slavery', has evolved to encompass various contemporary forms of slavery which are also based on the exercise of any or all of the powers attaching to the right of ownership. In the case of these various contemporary forms of slavery, the victim is not subject to the exercise of the more extreme rights of ownership associated with '*chattel* slavery', but in all cases, as a result of the exercise of any or all of the powers attaching to the right of ownership, there is some destruction of the juridical personality; the destruction is greater in the case of '*chattel* slavery' but the difference is one of degree. The Appeals Chamber considers that, at the time relevant to the alleged crimes, these contemporary forms of slavery formed part of enslavement as a crime against humanity under customary international law.²¹

In this respect, it seems appropriate to note that the body as an object of which criminals dispose is a notion which remains implicit in the definition of the crime of enforced disappearance, for which the ICC's 'Elements of Crimes' document merely refers to the fact that '[t]he perpetrator [a]rrested, detained, or abducted one or more persons'.²²

But where the law ceases to be implicit and treats the human body – and even the human anatomy – and its 'being taken possession of' as legal ingredients of the crime is in the definition of sexual violence. In relation to the crime against humanity of rape, the 'Elements of Crimes', probably inspired by the *Akayesu* precedent, repeatedly insists on the word 'body':

The perpetrator *invaded the body* of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.²³

In the *Katanga and Ngudjolo Chui* case, the ICC Pre-Trial Chamber upheld this definition of rape²⁴ and, applying it to the facts of the case, reached the conclusion that:

there is sufficient evidence to establish substantial grounds to believe that members of the FNI and FRPI, by force or threat, *invaded the body, or parts of it, of women and girls abducted* before, during and after the February 2003 attack on the village of Bogoro.²⁵

It is here interesting that the Chamber noted the significance not only of the body of the victims but also that of the criminals:

The Chamber also finds that there is sufficient evidence to establish substantial grounds to believe that these rapes resulted in the *invasion of the body* of these civilian women by the penetration of the perpetrator's sexual organ or other body parts.²⁶

The 'invasion of the body' by other bodies' parts as constituting the crime against humanity of rape is also found in the *Bemba Gombo* case, where the Pre-Trial Chamber of the ICC found that:

Having reviewed the Disclosed Evidence ..., the Chamber finds that they consistently describe the multiple acts of rape they directly suffered from and detail *the invasion of their body by the sexual organ of MLC soldiers*, resulting in vaginal or anal penetration. The evidence shows that direct witnesses were raped by several MLC perpetrators in turn, that their clothes were ripped off by force, that they were pushed to the ground, immobilised by MLC soldiers standing on or holding them, raped at gunpoint, in public or in front of or near their family members.²⁷

Judges also distinguish sexual violence perpetrated on living bodies from that perpetrated on dead ones, thereby affording protection not only to the human being but also to human dignity:

the Chamber found that on 28 June 1994, near the Technical Training College, the Accused ordered Interahamwe to undress the body of a Tutsi woman, whom he called 'Inyenzi', who had just been shot dead, to fetch and sharpen a piece of wood, which he then instructed them to insert into her genitalia. This act was then carried out by the Interahamwe, in accordance with his instructions.

The Chamber finds that the acts committed with respect to Kabanda and the sexual violence to the dead woman's body are acts of seriousness comparable to other acts enumerated in the Article, and would cause mental suffering to civilians, in particular, Tutsi civilians, and constitute a *serious attack on the human dignity* of the Tutsi community as a whole.²⁸

This express reference to human dignity as a value to protect is a judicial innovation, the notion of human dignity being only implicit in the prohibition and punishment of crimes of mass violence. The

ICTR Trial Chamber thus proceeds here to a somewhat extended reading of the legal text insofar as it explicitly considers a ‘serious attack on human dignity’ as an inhumane act, although this appears nowhere in the definition of the crime. Indeed, considering the charge of inhumane acts as a crime against humanity, the Chamber found that:

In respect of this count, the Accused must be found to have participated in the commission of inhumane acts on individuals, being acts of similar gravity to the other acts enumerated in the Article, such as would cause serious physical or mental suffering or constitute a serious attack on human dignity.²⁹

This concern for the protection of human dignity is repeatedly found in decisions related to sexual violence, in the context of which, as mentioned above, the human body predominantly features. Could there be a legal link between the human body and human dignity? Could the human body be judicially considered as the guardian and receptacle of human dignity – the value to protect? This extract from the *Kajelijeli* decision handed down by Trial Chamber II of the ICTR would tend to go in that direction:

The Chamber finds that these acts constitute a *serious attack on the human dignity of the Tutsi community as a whole*. Cutting a woman’s breast off and licking it, and piercing a woman’s sexual organs with a spear are nefarious acts of a comparable gravity to the other acts listed as crimes against humanity, which would clearly cause great mental suffering to any members of the Tutsi community who observed them. Furthermore, given the circumstances under which these acts were committed, the Chamber finds that they were committed in the course of a widespread attack upon the Tutsi civilian population.³⁰

Could the human body thus be the shield of human dignity, the last protective bulwark of the value to protect? When the human body is targeted, martyred, destroyed, does it not become the irrefutable, tangible proof of the attack made on human dignity – or literally of the crime against humanity?

The body as evidence

If the idea developed here concerns mass violence in the sense of crimes against humanity and genocide, the probative value of the treatment and destruction of the victims’ bodies is perhaps better revealed in the case of genocide. The definition of the crime of

genocide, as enshrined in article 2 of the 1948 Genocide Convention – and reproduced verbatim in the Statutes of the International Criminal Tribunals and of the ICC – covers a whole range of genocidal acts that nonetheless remain unspecified. If it seems clear that these acts refer to the physical integrity of the person, the human body as such is not explicitly mentioned therein. In law, the crime of genocide –

means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.³¹

With respect to genocide, the ICC's 'Elements of Crimes' also refers to the physical integrity of the person – an expression that is to be found in the enumeration of prohibited acts under the category of 'causing serious bodily harm to members of the group', for which it is specified that '[t]he perpetrator caused serious bodily ... harm to one or more persons'.³² Referring slightly more explicitly to human anatomy, the case law had already established that 'to a large extent, "causing serious bodily harm" is self-explanatory. This phrase could be construed to mean harm that seriously injures the health, causes *disfigurement* or causes any serious injury to the *external, internal organs or senses*'.³³ In a similar vein, the concept of physical destruction features expressly in the definition of the crime of 'deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part'.³⁴

If physical destruction is thus explicitly present in the definition of the crime of genocide, this is not the case for the human body. If it is true that physical destruction encompasses an assault on the human body, the absence from the definition of the word 'body' and of any reference to its treatment by the *génocidaires* remains an unfortunate lacuna, precisely because the body is at the core of the criminal enterprise. The *génocidaire* fantasizes a body with various particularities on the basis of which the group targeted for annihilation is defined and differentiated. The bodies are marked with distinctive signs. Need one recall the ignoble yellow star? The bodies and the faces of the individuals are mocked, caricatured, mistreated, dehumanized and then destroyed. This has a very

precise objective: to remove all traces of the existence of the group targeted for destruction, including in the bodies of the individuals, including in their human aspects.

The Nazi *univers concentrationnaire*, to adopt the expression of David Rousset,³⁵ planned precisely to orchestrate this dehumanization via fury directed against the body of the victims arrested and deported. “The greatest enterprise of dehumanization of all times”³⁶ operated through atrocious brutalities inflicted on the bodies of the victims. They found themselves dispossessed of every personal effect, including their clothes, that is to say the social covering of the body; their hair was shaved; and their names were replaced by numbers, sometimes branded directly on the skin. The bodies of the victims were stripped of all human physical aspects before they were robbed of all living physical aspects, as is well captured by Ariane Kalfa:

What is new and specific to concentration camps is the transformation of human beings into living cadavers. The frontier between life and death having ceased to be identifiable, man loses all dignity... The anonymity of death in Auschwitz, the impossibility of distinguishing whether a prisoner was alive or dead, all this is worse than death and pushes the prisoner into the ‘sub-humanity’ to which Nazism destined him.³⁷

The extreme violence of genocidal death culminates in the total destruction of the physical appearance of the victims and their bodies. It is more than a pathological outburst of violence. Rather, it is the destruction of the existence of the victims as human beings, the annihilation of their identity so as to wipe them out, including from both individual and collective memories. Destruction of the bodies is a purposeful act perfectly in tune with the genocidal *modus operandi*. Not only does it destroy life; it also destroys death. Once the life and death of the victims are annihilated, the existence of the targeted group is highly endangered, to the point of eradication. This idea has been perfectly expressed by Hélène Piralian:

what genocide makes impossible and destroys is, we have to repeat it: Death itself, that is to say the possibility to symbolize death, the death of a has-been-alive who, after being part of the community of the living, would be part of that of the dead, thus making his death and mourning possible for his children who may then take over from him, as is the destiny of all humans.³⁸

In an analysis of this ‘killing of death’ specific to the crime of genocide, Kalfa argues – very aptly – that destruction of death

represents 'the physical annihilation of the existence of millions of individuals, and thus of the very idea of humanity itself':

The industrial production of death where individuals are de-individualized, where subjectivity is annihilated, shows that death has become very different. Because what can the facts of transforming individuals into living skeletons and of reducing living human beings to ashes and smoke actually mean? What can the fact of erasing all traces, 'the memory and grief of the persons' who have loved those who have died signify? What is the sense of the censorship of the terms 'death' or 'victim' and of the imposition of the word 'Figuren' as a substitute, if it is not the sentencing to death of death, which is neither a metaphor nor a linguistic figure, but the physical annihilation of the existence of millions of individuals, and thus of the very idea of humanity itself?³⁹

It is absolutely not by chance that, in all genocidal instances, the bodies of the victims are martyred to the point of becoming unknowable, that is to say unrecognizable. The destruction of their bodies denies the victims any belonging both to the targeted group and to the broader group of human beings. The *génocidaires* exclude their victims from the human sphere through the destruction of their physical appearance and bodily covering, thereby erasing every trace of the existence of their victims and facilitating their total eradication from individual and collective memories. Indeed, if the victims are physically destroyed, if their bodies become unrecognizable and unidentifiable as human corpses, thus impeding their incorporation into the human race, every trace of their passage on earth will disappear with their bodies. This disappearance puts into question the very existence of the group in the sense that, if there are no victims, there can no longer be an original group and furthermore no descendants. How could the group continue to exist in new generations if there never was a group? Piralian, in her study of the Armenian genocide, has explained that:

The breaking up of the corpses into unnameable, that is to say unidentifiable, unattributable, pieces means that these pieces cannot be reunited in a nameable corpse of a 'has-been-alive' to whom a history could be given back. *This breaking up is pivotal for the perpetration of genocide as it concretely orchestrates the pulverization of the identities, excluding the targeted being from the human order as well as all possibility for him of any descendance. The crucial matter here is therefore, far beyond the incorporation of a loved one for whom mourning was made impossible (due to the misfortunes of his family's history), the pulverization and the destruction of the very link that unites a subject with his loved ones as, in the place of loved ones, there remains only an*

anonymous corpse, the same for all, made of all these disparate pieces which strew the deportation paths. Under the weight of this violence, of this willingness to destroy, it is then the whole personal genealogical link of the individuals which finds itself broken and unreachable and the total link with the past is destroyed. In other words, *it is the scattering of unrecognizable corpses which makes impossible the constitution of identification links.*⁴⁰

Further, by denying the existence of the victims through the destruction of their physical human aspects, the perpetrators leave the door open for the continued perpetration of the crime, through its denial. By denying the crime, deniers deny that there ever were victims and thereby question the existence of the victim group as such. According to their sordid reasoning, the absence of human bodies implies the absence of crimes and they will either minimize the real number of victims or bring about the conclusion that genocide was in fact never committed, paradoxically allowing it to continue. Both the reduction of the number of victims – which denies the reality of some victims and thus of some crimes – as well as the blatant and flagrant denial of the whole genocide proceed with the same intent: to ensure the ongoing annihilation of the group. According to Piralian:

As a matter of fact, this disappearance of the dead, which consists in pretending that no living human being is dead but that, as having never existed, cannot be dead, casts new light on the burning controversy surrounding the number of deaths caused by a genocide as, in this case, to reduce the number of deaths means reducing the number of living who had existed, sustaining their disappearance and not registering their death. The reduction of the number of deaths should therefore not be understood as the parameter of a disaster but as an indirect means of continuing the disappearance of as many individuals as possible from the have-been-alive so that they also disappear from memories. Because how could we remember individuals who have never existed and how, in turn, could one deprived of antecedents exist? Where would he come from? ... In that sense, the denial of the number of deaths is part of the genocidal project as this backwards interpretation of time is nothing but an attempt to erase the origins.⁴¹

The goal of the destruction of the body is thus twofold: not only does it enable the criminals to erase all traces of their crimes; it also allows them to pursue their destructive and genocidal behaviour. Beyond the evident and barbarous violence of the acts perpetrated, the destruction of the human bodies responds to a clearly defined objective: the destruction of the group as such. In other words, the

destroyed body matches both the genocidal *modus operandi* and the genocidal intent. It also provides irrefutable proof of the crime. From a practical perspective, this is not without consequence, since it raises the problems of how to reconcile the absence of the body, since it is destroyed, with the rules of evidence; and how to prove the existence of something that no longer exists.

If the letter of the law neglects to expressly consider the human body and its destruction as proofs of the crime perpetrated, the International Criminal Tribunals did, however, not hesitate to consider that the absence of the bodies or their non-identification was no barrier to the characterization of the crime. For instance, to prove that murder had been committed as a crime against humanity, the ICC insisted on the fact that:

In determining whether the legal requirements of the act of murder as a crime against humanity are met, the Chamber points out the Prosecutor's obligation to provide the particulars in the charging document when seeking to prove that the perpetrator killed specific individuals. While the Chamber concedes that *there is no need to find and/or identify the corpse*, the Prosecutor is still expected to specify, to the extent possible, *inter alia*, the location of the alleged murder, its approximate date, the means by which the act was committed with enough precision, the circumstances of the incident and the perpetrator's link to the crime.

However, the Chamber bears in mind the evidentiary threshold to be met at the pre-trial stage – ‘substantial grounds’ threshold – and the fact that *in case of mass crimes, it may be impractical to insist on a high degree of specificity*. In this respect, it is not necessary for the Prosecutor to demonstrate, for each individual killing, the identity of the victim and the direct perpetrator. Nor is it necessary that the precise number of victims be known. This allows the Chamber to consider evidence referring to ‘many’ killings or ‘hundreds’ of killings without indicating a specific number.⁴²

It is true that this is a decision relative to murder as a crime against humanity and not to genocide, but the finding of the Court that ‘in case of mass crimes, it may be impractical to insist on a high degree of specificity’ is valid in both categories of crimes. Further, decisions of the ICTY concerning Srebrenica and those of the ICTR concerning Rwanda's genocide understand the treatment of the human body as proof of the crime. They rely especially on the existence and use of the means of destruction implemented by the criminals, thereby defeating the ‘impracticalities’ generated by evidentiary rules.

If the judgments on the crime of genocide handed down by the ICTR are numerous, the *Akayesu* case, as the first decision of the kind on the international scene, is of particular import. While it provided the Tribunal with an opportunity to define and interpret the applicable law, it is of the utmost interest in the context of the present analysis that the Trial Chamber gave a predominant place to the treatment of the human body as an integral part of the criminal *modus operandi*. This clearly stems from the testimonies heard by the Chamber in which the words ‘bodies’ and ‘corpses’ – used interchangeably – recur on many occasions. Dr Zachariah, then a member of Médecins Sans Frontières, notably reported the fate inflicted on the victims’ bodies:

He described in great detail the *heaps of bodies* which he saw everywhere, on the roads, on the footpaths and in rivers and, particularly, the manner in which all these people had been killed. At the church in Butare, at the Gahidi mission, he saw many wounded persons in the hospital who, according to him, were all Tutsi and who, apparently, had sustained wounds inflicted with machetes to the face, the neck, and also to the ankle, at the Achilles’ tendon, to prevent them from fleeing.⁴³

He likewise testified on the piles of bodies crowded along the roadsides:

All the way through we could see on the ... hillside, where there were communities, people ... being pulled out by people with machetes, and we could see piles of bodies. In fact the entire landscape was becoming spotted with *corpses*, with *bodies*, all the way from there until almost Burundi’s border.⁴⁴

Dr Alison Desforges told of the Tutsi victims’ bodies thrown into the river to ‘send the Tutsi back to their place of origin’.⁴⁵ Cameraman and photographer Simon Cox filmed the practice,⁴⁶ while journalist Lindsey Hilsum testified on what she saw at the morgue: ‘a big pile like a mountain of bodies outside and these were bodies with slash wounds, with heads smashed in, many of them naked, men and women’.⁴⁷

These testimonies, far from remaining dead letter, have been used by the Trial Chamber to prove the genocidal intent to destroy the Tutsis. In particular, the wounds to the Achilles’ tendon observed by Zachariah did not go unnoticed by the Chamber, which inferred from them ‘the resolve of the perpetrators of these massacres not to spare any Tutsi. Their plan called for doing whatever was possible

to prevent any Tutsi from escaping and, thus, to destroy the whole group.⁴⁸

Despite the fact that the qualification of genocide is a rarer occurrence at the ICTY, this does not mean it is non-existent. In its first finding of genocide, in the *Krstić* case, the ICTY Trial Chamber made a clear reference to the human body and its treatment by expressly recording the scientific analysis of the evidentiary elements related to the executions carried out in Srebrenica:

The extensive forensic evidence presented by the Prosecution strongly corroborates important aspects of the testimony of survivors from the various execution sites. Commencing in 1996, the Office of the Prosecutor (hereafter 'OTP') conducted exhumations of 21 gravesites associated with the take-over of Srebrenica.... Of the 21 gravesites exhumed, 14 were primary gravesites, where bodies had been put directly after the individuals were killed. Of these, eight were subsequently disturbed and bodies were removed and reburied elsewhere, often in secondary gravesites located in more remote regions. Seven of the exhumed gravesites were secondary burial sites.⁴⁹

In order to prove the crime of genocide, the Chamber then reported in detail the medico-legal analyses, thereby linking the treatment of the human body to the crime perpetrated. The Chamber was thus able to establish that the great majority of the victims were male; this was a decisive element in this case for the qualification of genocide, the men of Srebrenica having been targeted to ensure the extinction of the group as a whole:

The forensic evidence supports the Prosecution's claim that, following the take-over of Srebrenica, thousands of Bosnian Muslim men were summarily executed and consigned to mass graves. Although forensic experts were not able to conclude with certainty how many bodies were in the mass graves, due to the level of decomposition that had occurred and the fact that many bodies were mutilated in the process of being moved from primary to secondary graves by mechanical equipment, the experts were able to conservatively estimate that a minimum of 2,028 separate bodies were exhumed from the mass graves.

...

The forensic examinations of the gravesites associated with Srebrenica reveal that only one of the 1,843 bodies for which sex could be determined was female. Similarly, there is a correlation between the age distribution of persons listed as missing and the bodies exhumed from the Srebrenica graves: 26.4 percent of persons listed as missing were between 13–24 years and 17.5 percent of bodies exhumed fell within this age group; 73.6 percent of persons listed as missing were

over 25 years of age and 82.8 percent of bodies exhumed fell within this age group.⁵⁰

The Chamber was thus able to observe that:

Overall the Trial Chamber finds that the forensic evidence presented by the Prosecution provides corroboration of survivor testimony that, following the take-over of Srebrenica in July 1995, thousands of Bosnian Muslim men from Srebrenica were killed in careful and methodical mass executions.⁵¹

The Chamber turned to the medico-legal analysis carried out on the cadavers to determine the sex of the victims but also to be able to classify the victims as civilian members of a group destined for destruction – another requirement of the crime of genocide:

The results of the forensic investigations suggest that the majority of bodies exhumed were not killed in combat; they were killed in mass executions. Investigators discovered at least 448 blindfolds on or with the bodies uncovered during the exhumations at ten separate sites. At least 423 ligatures were located during exhumations at 13 separate sites. Some of the ligatures were made of cloth and string, but predominately they were made of wire. These ligatures and blindfolds are inconsistent with combat casualties. The Prosecution also relied on forensic evidence that the overwhelming majority of victims located in the graves, for whom a cause of death could be determined, were killed by gunshot wounds. The exhumations also revealed that some of the victims were severely handicapped and, for that reason, unlikely to have been combatants.⁵²

The Chamber, here demonstrating a particular interest in the treatment of cadavers and especially their concealment, further confirmed the non-combatant character of the victims:

Most significantly, the forensic evidence presented by the Prosecution also demonstrates that, during a period of several weeks in September and early October 1995, Bosnian Serb forces dug up many of the primary mass gravesites and reburied the bodies in still more remote locations.... The reburial evidence demonstrates a concerted campaign to conceal the bodies of the men in these primary gravesites, which was undoubtedly prompted by increasing international scrutiny of the events following the take-over of Srebrenica. Such extreme measures would not have been necessary had the majority of the bodies in these primary graves been combat victims.⁵³

The significance of the treatment of the human body in the establishment of evidence in the context of genocide was later reiterated

in the judgment when the Chamber explicitly linked the fate inflicted on the victims' bodies with the crime perpetrated:

One hundred and fifty bodies were recovered from the mass grave and the cause of death for 149 was determined to be gunshot wounds. All were male, with a mean age from 14 to 50 and 147 were wearing civilian clothes. Forty-eight wire ligatures were recovered from the grave, about half of which were still in place binding the victims' hands behind their backs. Experts were able to positively identify nine of the exhumed bodies as persons listed as missing following the take-over of Srebrenica. All were Bosnian Muslim men.⁵⁴

It is noteworthy in this respect that the Chamber devoted an entire part of its decision to the reburials,⁵⁵ with the consideration that:

The forensic evidence presented to the Trial Chamber suggests that, commencing in the early autumn of 1995, the Bosnian Serbs engaged in a concerted effort to conceal the mass killings by relocating the primary graves to remote secondary gravesites.⁵⁶

Thanks to its consideration of the human bodies of the victims, the Trial Chamber 'concluded that almost all of those murdered at the execution sites were adult Bosnian Muslim men and that up to 7000–8000 men were executed'⁵⁷ and that '[a] crime of extermination was committed at Srebrenica'.⁵⁸ Most interestingly, it also inferred genocidal intent from the treatment of the bodies:

Finally, there is a strong indication of the intent to destroy the group as such in the concealment of the bodies in mass graves, which were later dug up, the bodies mutilated and reburied in other mass graves located in even more remote areas, thereby preventing any decent burial in accord with religious and ethnic customs and causing terrible distress to the mourning survivors, many of whom have been unable to come to a closure until the death of their men is finally verified.⁵⁹

The International Criminal Tribunals have thus been able to take into account the destruction of and treatment inflicted on the victims' bodies not only to characterize the massacre as such, but also to qualify it legally. The subsequent identification of the bodies conducted thanks to medico-legal analyses made it possible to establish whether those victims belonged to a civilian population targeted for crimes against humanity or to a group destined for genocide. More fundamentally, the judicial consideration and scientific analysis of the bodies brought the victims back into the sphere of the 'have-been-alive',⁶⁰ and endowed them with a humanity they had in reality never lost.

Conclusion

Robert Antelme wrote in his moving testimony:

All of us are here to die. That's the objective the SS have chosen for us. They haven't shot us, they haven't hanged us; but, systematically deprived of food, each of us, whether it be sooner or later, must become the dead man they have aimed at. So each of us has as his sole aim to prevent himself from dying. The bread we eat is good because we are hungry. But while it assuages hunger, we also know, we also sense that with bread life maintains itself in our bodies. The cold is painful, but the SS want us to die from the cold, and we have to protect ourselves from it, because death is what's in the cold. Work is exhausting and – for us, it is absurd – but its effect is to wear, and the SS want us to die from work, and so it is that when we work we must be sparing of ourselves, because death is what's in the work. And then there's time. The SS believe we'll end up dying from not eating, or from working; the SS believe they'll get us through weariness – that is, through time. Death is what's in time.⁶¹

'Life maintains itself in our bodies' ... the perpetrators of mass violence, crimes against humanity, and genocides, know it, so much so that it is this full awareness of this life, of this humanity of their victims which drives them to destroy their bodies. Mass violence and the 'destructiveness of bodies' (*destructivité des corps*), to adopt the expression of Jacques Sémelin,⁶² are intrinsically bound. As this chapter has attempted to demonstrate, the destruction of the human body is the proof of the perpetration of mass violence; it is also its essential corollary, since it is this destruction that renders mass violence possible. Sémelin has perfectly identified the 'destructiveness of bodies' as 'the means by which the perpetrators create for themselves a radical *psychic distance* from their victims, to convince themselves that they are not, that they are no longer human beings'.⁶³ He explains that:

The practice of massacre confirms a *contrario* one of the strongest affirmations of the philosopher Emmanuel Levinas, namely that recognition of our shared humanity necessarily comes through the face to face encounter. Even if the enemy is depicted by propaganda under hideous and threatening traits, he retains a terribly human face. Hence, this is why the perpetrator of the massacre must as speedily as possible 'disfigure' this other likeness to fend off any risk of identification. To be able to kill him implies dehumanizing him, no more 'solely' by the make-believe of the propaganda, but now through acts: cut his nose or ears, for immediate reassurance that he no longer has a human face.

The cruelty is truly a mental operation on the body of the other aimed at smashing his humanity....

This spiral of destructiveness of the bodies may be pursued even after death. The bodies, even deprived of life, may still resemble those of the living. So they must be scalped, shrivelled, crushed so that they no longer resemble anything.⁶⁴

If it is true that the international criminal norm has a lacuna in this respect, if it is true that the very concept of 'human body' is only subsidiary in the definitions of the crimes and if it is equally true that the treatment of the victims' bodies by the criminals is not subject to specific legal provisions, it is also true that international criminal justice has no less integrated 'body' into its language and has explicitly regarded the fate inflicted on the victims' bodies as a means of proving crimes against humanity and genocides. If the impact of the terminology used by the International Criminal Tribunals and by the ICC remains difficult to evaluate and if their use of the word 'body' may simply respond to a purely narrative purpose of window-dressing, the value of the contribution of the case law on the treatment of the human body is more easily measurable. It clearly corresponds to a judicial effort aimed, if not at making the law evolve, at least at better grasping the very essence of mass violence, and perhaps at attempting to comprehend the incomprehensible.

Notes

- 1 The text of this chapter was translated from the author's French by Cadenza Academic Translations.
- 2 That is not to say that the crimes are systematically deprived of all economic, patrimonial or cultural dimensions. For instance, the crime of persecution 'may manifestly encompass various forms and does not require a physical element'. ICTY, *Prosecutor v. Kupreškić* (case no. IT-95-16), Judgment, Chamber II, 14 January 2000, para. 568. For confirmation, see ICTY, *Prosecutor v. Vasiljević* (case no. IT-98-32-T), Judgment, Chamber II, 29 November 2002, para. 246, and ICTR, *Prosecutor v. Semanza* (case no. ICTR-97-20-T), Judgment and sentence, Chamber III, 15 May 2003, para. 348. The crime of 'persecution' encompasses not only bodily and mental harm and infringements upon individual freedom but also acts that appear less serious, such as those targeting property, so long as the victimized persons were specially selected on grounds linked to their belonging to a particular community. ICTY, *Prosecutor v. Blaškić* (case no. IT-95-14-T), Judgment, Chamber I, 3 March 2000, para. 233. Yet, the individual human being

primarily benefits from legal protection. The judicial processes conducted by the Allied Powers Under Control Council Law No. 10 in Germany clearly show that the human being – and not property – was regarded as the potential victim of the acts recognized as crimes against humanity. See notably *United States v. Flick et al.* (the ‘Flick case’), case no. 5, Military Tribunal IV, 1947, in *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10* (Washington, US Department of the Army, Government Printing Office, 1946–49), vol. 6, p. 1215. This aspect became even more evident with the definition of the crime of genocide, which exclusively protects the individual as a member of the group and excludes any economic, patrimonial or cultural consideration. Targeting groups is the characteristic of this crime, as the *travaux préparatoires* of the Convention on the Prevention and Punishment of the Crime of Genocide and the debates on the possible inclusion of cultural genocide therein clearly indicate. Polish lawyer Raphaël Lemkin, who coined the term ‘genocide’, had identified ‘genocide in the cultural field’ as ‘the prohibition or the destruction of cultural institutions and cultural activities, of the substitution of education in the liberal arts for vocational education, in order to prevent humanistic thinking, which the occupant considers dangerous because it promotes national thinking’. R. Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Washington, DC: Carnegie Endowment for International Peace, Division of International Law, 1944), pp. xi–xii. The initial text of the Genocide Convention – that of the human rights division of the Secretariat – included cultural genocide among the acts of genocide and defined it as the destruction of the specific characteristics of the groups persecuted via various methods, such as enforced exile, prohibition of the use of national language, destruction of books and similar acts. Draft Convention, UN Doc. A/AC.10/41 and UN Doc. A/362 (appendix II). The subsequent text of the ad hoc Committee had addressed the issue of cultural genocide in its article III. Nevertheless, in addition to its arguable lack of definitional clarity, this clause was far from gaining unanimous support. The majority of representatives felt that including cultural genocide would weaken the Convention, whose aim was to prevent and punish mass murder. As the ICTY trial observed in the *Krstić* case, ‘Although the Convention does not specifically speak to the point, the preparatory work points out that the “cultural” destruction of a group was expressly rejected after having been seriously contemplated’. *Prosecutor v. Krstić* (case no. IT-98–33), Judgment, Chamber I, 2 August 2001, para. 576. See also *Prosecutor v. Brđanin* (case no. IT-99–36–T), Judgment, Chamber II, 1 September 2004, para. 694. The Genocide Convention excludes cultural genocide from its ambit to maintain the focus on the protection of the individual and the only reference to this form of genocide is found in the criminalization of the enforced transfer of children, which effectively constitutes a direct threat to the cultural survival of the group.

- 3 Article 7 of the Rome Statute of the ICC, 17 July 1998, UN Doc. A/CONF.183/9.
- 4 Article 6 of the Rome Statute.
- 5 It may be noted that judgments make interchangeable use of the words 'body' and 'corpse', even if it is generally understood that 'corpse' refers to a dead body.
- 6 Translation by the author. The original version reads: 'In der Todesdrohung, die ich zum erstenmal in voller Deutlichkeit beim Lesen der Nürnbergergesetze verspürte, lag auch das, was man gemeinhin die methodische 'Entwürdigung' der Juden durch die Nazis nennt. Anders formuliert: der Würdeentzug drückte die Morddrohung aus.' J. Améry, *Jenseits von Schuld und Sühne: Bewältigungsversuche eines Überwältigten* (Munich: Szczesny, 1966), p. 137.
- 7 Article 7 of the Rome Statute.
- 8 Article 7 of the Rome Statute also prohibits 'severe deprivation of physical liberty'. Emphasis added.
- 9 Report of the Preparatory Commission for the International Criminal Court, Part II: Finalized draft text of the 'Elements of Crimes', 2 November 2000, PCNICC/2000/1/Add.2, in *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First Session, New York, 3–10 September 2002* (United Nations publication, sales no. E.03.V.2 and corrigendum), part II.B (henceforth 'Elements of Crimes'), article 7-1-k. Emphasis added.
- 10 Ibid., Article 7-1-f-1.
- 11 Ibid., Article 7-1-g-4-1.
- 12 Ibid., Article 7-1-g-5-1. Emphasis added.
- 13 Ibid., Article 7-1-a.
- 14 Ibid., Article 7-1-b.
- 15 ICTR, *Prosecutor v. Akayesu* (case no. ICTR-96-4-T), Judgment, Trial Chamber I, 2 September 1998, paras 201–10, 277, 280, 288, 290, 297, 304, 307, 322.
- 16 ICTR, *Prosecutor v. Kamuhanda* (case no. ICTR-99-54A-T), Judgment and sentence, Trial Chamber II, 22 January 2004, para. 345. Emphasis added.
- 17 ICC, *Prosecutor v. Bemba Gombo* (case no. ICC-01/05-01/08), Decision pursuant to article 61(7)(a) and (b) of the Rome Statute on the charges of the prosecutor against Jean-Pierre Bemba Gombo, Pre-Trial Chamber II, 15 June 2009, para. 132. Emphasis added.
- 18 Ibid.
- 19 Ibid.
- 20 'Elements of Crimes', articles 7-1-c-1 and 7-1-g-2-1.
- 21 ICTY, *Prosecutor v. Kunarac et al.* (case nos IT-96-23 and IT-96-23/1-A), Judgment, Appeals Chamber, 12 June 2002, para. 117. Emphasis added.
- 22 'Elements of Crimes', article 7-1- i-1-a.
- 23 Ibid., article 7-1-g-1-1. Emphasis added. See also ICTR, *Prosecutor v. Akayesu*, note 15, paras 596–7 and 686–8; ICTY, *Prosecutor v. Furundžija* (case no. IT-95-17/1), Judgment, Trial Chamber II, 10 December 1998, paras 174, 176 and 181.

- 24 ICC, *Prosecutor v. Katanga and Ngudjolo Chui* (case no. ICC-01/04-01/07), Decision on the confirmation of charges, Pre-Trial Chamber I, 30 September 2008, para. 438. Emphasis added.
- 25 Ibid., para. 442. Emphasis added. Both the FNI (Front des Nationalistes et Intégrationnistes; Front of Nationalists and Integrationists) and the FRPI (Force de Résistance Patriotique en Ituri; Ituri Patriotic Resistance Force) refer to armed militias.
- 26 Ibid., para. 351. Emphasis added.
- 27 ICC, *Prosecutor v. Bemba Gombo*, note 31, para. 165. Emphasis added. The MLC (Mouvement de Libération du Congo; Movement for the Liberation of Congo) is a political party in Democratic Republic of the Congo presided by Jean-Pierre Bemba Gombo.
- 28 ICTR, *Prosecutor v. Niyitegeka* (case no. ICTR-96-14-T), Judgment and sentence, Trial Chamber I, 16 May 2003, paras 463 and 465. Emphasis added.
- 29 Ibid., para. 460.
- 30 ICTR, *Prosecutor v. Kajelijeli* (case no. ICTR-98-44A-T), Judgment and sentence, Trial Chamber II, 1 December 2003, para. 936. Emphasis added.
- 31 Article 6 of the Rome Statute.
- 32 'Elements of Crimes', article 6-b-1.
- 33 ICTR, *Prosecutor v. Kayishema and Ruzindana* (case no. ICTR-95-1-T), Judgment, Trial Chamber II, 21 May 1999, para. 109. Emphasis added. For confirmation, see ICTY, *Prosecutor v. Krstić*, note 2, para. 510.
- 34 See 'Elements of Crimes', article 6-c-4. See also ICTR, *Prosecutor v. Akayesu*, note 15, paras 505–6; ICTR, *Prosecutor v. Kayishema and Ruzindana*, note 35, para. 116.
- 35 D. Rousset, *L'Univers concentrationnaire* (Paris: Les Editions de Minuit, 1965).
- 36 A. Frossard, *Le Crime contre l'humanité* (Paris: Editions Robert Laffont, 1987), p. 42.
- 37 A. Kalfa, *La Force du Refus: philosopher après Auschwitz* (Paris: L'Harmattan, 2004), pp. 138–9. Translation by the author. The original version reads: 'Ce qui est nouveau et spécifique aux camps de concentration est le fait que des êtres humains soient transformés en cadavres-vivants. La frontière entre la vie et la mort n'étant plus identifiable, l'homme perd toute dignité.... L'anonymat de la mort à Auschwitz, l'impossibilité de distinguer si un prisonnier était mort ou vivant, tout cela est pire que la mort, et fait basculer le prisonnier dans la "sous-humanité" à laquelle le nazisme le destinait.'
- 38 H. Piralian, *Génocide et transmission* (Paris: Editions L'Harmattan, 1994), pp. 33–4. Translation by the author. The original version reads: 'ce que le génocide rend impossible et détruit c'est, répétons-le: la Mort même, c'est-à-dire la possibilité de symbolisation de la mort, celle d'un ayant-été-vivant qui, après avoir fait partie de la communauté des vivants, ferait partie de celle des morts permettant que, pour ses enfants, sa mort et son deuil soient possibles et qu'ainsi ils puissent lui succéder, comme c'est le destin de tout humain'.

- 39 Kalfa, *La Force du Refus*, note 39, pp. 139–40. Footnote omitted. Translation by the author. The original version reads: ‘La production industrielle de la mort où les individus sont désindividualisés, la subjectivité anéantie, montre que la mort est devenue tout autre. Car, que peut signifier le fait de transformer des individus en cadavres vivants, et des êtres humains vivants en cendre et en fumée? Que peut signifier le fait d’effacer toutes les traces, “le souvenir et le chagrin des personnes” qui ont aimé ceux qui sont morts? Quel est le sens de la censure du terme de “mort” ou de “victime”, et du fait d’imposer celui de “Figuren” comme substitut, si ce n’est la mise à mort de la mort, ce qui n’est pas une métaphore, ni une figure de style, mais l’anéantissement physique de l’existence de millions de personnes et par la même de l’idée d’humanité.’
- 40 Piralian, *Génocide et transmission*, note 40, p. 33. Translation by the author. The original version reads: ‘Le morcellement des corps en morceaux innommables, c’est-à-dire non identifiables, non attribuables fait que ces morceaux ne peuvent être réunis en un corps nommable d’un “ayant-été-vivant” à qui pourrait être rendue une histoire. *Ce morcellement est un des pivots du génocide en ce qu’il est mise en place concrète de la pulvérisation des identités, excluant celui qui en est l’objet de l’ordre de l’humain comme de toute possibilité pour lui de descendance. Ce dont il s’agit est donc, bien au-delà de l’incorporation d’un être cher dont le deuil aurait été rendu (à cause des avatars de son histoire familiale) impossible pour un sujet, la pulvérisation et la destruction du lien même qui unit un sujet à ses êtres aimés puisqu’en place des êtres chers de chacun ne reste plus qu’un corps anonyme, le même pour tous, fait de ces morceaux disparates qui jonchent les chemins de déportation.* Sous le poids de cette violence, de cette volonté de destruction, c’est alors tout le lien généalogique personnel des sujets qui se trouve brisé et hors d’atteinte et le lien total au passé emporté. Autrement dit, *c’est l’éparpillement des corps rendus ainsi méconnaissables qui rend impossible la constitution des liens identificatoires.*’ Original emphasis.
- 41 Ibid., p. 52. Translation by the author. The original version reads: ‘cette disparition des morts qui consiste à faire en sorte qu’il n’y ait pas mort de vivants mais que ceux-ci n’ayant jamais existé ne puissent être morts, éclairer d’un jour nouveau la brûlante polémique autour du nombre des morts d’un génocide, puisqu’en ce cas, réduire le nombre des morts, c’est réduire le nombre des vivants ayant existé, soutenir leur disparition et non inscrire leur mort. La réduction du nombre des morts ne serait plus alors à entendre comme le paramètre d’un désastre plus ou moins grand mais bien comme une manière détournée de continuer à faire disparaître le plus de personnes possibles des ayant-été-vivants pour qu’elles disparaissent également des mémoires. Car comment pourrait-on se souvenir de personnes n’ayant jamais existé et comment celui qui n’a pas d’antécédent pourrait-il exister à son tour? D’où viendrait-il? ... En ce sens, le déni du nombre des morts fait bien partie du projet génocidaire, puisqu’en prenant ainsi le temps à rebours, c’est bien d’une tentative d’effacement des origines mêmes dont il s’agit.’

- 42 ICC, *Prosecutor v. Bemba Gombo*, note 18, paras 133–4. Footnotes omitted. Emphasis added.
- 43 ICTR, *Prosecutor v. Akayesu*, note 15, para. 115. Emphasis added.
- 44 Ibid., para. 158. Emphasis added.
- 45 Ibid., para. 120. Emphasis added.
- 46 Ibid., para. 161.
- 47 Ibid., para. 160.
- 48 Ibid., para. 119. See also J. Sémelin, *Purify and Destroy: The Political Uses of Massacre and Genocide* (trans. C. Schoch) (New York: Columbia University Press, 2007), p. 357.
- 49 ICTY, *Prosecutor v. Krstić*, note 2, para. 71.
- 50 Ibid., paras 73–4.
- 51 Ibid., para. 79.
- 52 Ibid., para. 75.
- 53 Ibid., para. 78.
- 54 Ibid., para. 202. See also paras 208–24, 222–3, 229–30, 237–8, 250.
- 55 Ibid., paras 257–61.
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- 61 R. Antelme, *The Human Race* (trans. J. Haight & A. Mahler) (Evanston: Marlboro Press/Northwestern, 1992), pp. 39–40.
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