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Filling the Silence

A Study in Corporate Holocaust History
and the Nature of Corporate Memory

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The Auschwitz Institute for the Prevention of Genocide and Mass Atrocities

2 West 45th Street, Suite 1602

New York, NY 10036

info@auschwitzinstitute.org

www.auschwitzinstitute.org

Cover image: A group of SNCF apprentices pose with a train at the Nîmes learning center in 1938

Credit: SNCF Médiathèque SARDO

Contributors

Jean-Marc Dreyfus is a reader at the University of Manchester and Associate Researcher at the Centre of History, Sciences-Po Paris. He specializes in the economic and diplomatic aspects of the Holocaust and post-war reparations. His work also focuses on art that was looted during the Holocaust, including the unfinished restitution process. He is the author of six monographs, including *L'impossible réparation. Déportés, biens spoliés, or nazi, comptes bloqués, criminels de guerre* (The impossible réparation. Deportees, looted properties, Nazi gold, war criminals) [Paris, Flammarion, January 2015]. His most recent book, *Vollrath. D'Hitler à Adenauer. Un ambassadeur entre deux mondes* [Paris, Vendémiaire], was published in August 2020.

Ashley L. Greene is Associate Professor of Holocaust and Genocide Studies at Keene State College in Keene, New Hampshire, USA, and Academic Programs Associate, Africa and Transitional Justice at the Auschwitz Institute for the Prevention of Genocide and Mass Atrocities. Her research focuses on the relationship between history education and statecraft in conflict-affected societies, and on genocide and contemporary slavery. Her work has appeared in the *Journal of Peacebuilding and Development* and in several edited volumes, including *Historical Dialogue and the Prevention of Mass Atrocities* [Routledge, 2020]. She develops and teaches atrocity prevention curricula for policymakers in Burundi, the Central African Republic, Democratic Republic of Congo, Kenya, Tanzania, Uganda, and Zambia.

Owen Pell is Retired Partner of Counsel with White & Case LLP. He has represented governments, banks, and companies in complex, cross-border disputes relating to the interaction of multiple legal systems, the extraterritorial reach of US law, and issues under international human rights law, including historical reparations. He has handled major cases involving corporate social responsibility, including as to World War II and the Holocaust. Owen is President of the Board of the Auschwitz Institute for the Prevention of Genocide and Mass Atrocities.

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In considering those who helped Jews during the Holocaust, Elie Wiesel said:

These few evoke our profound respect and wonder. They challenge us to ask ourselves questions. Above all—Why were there so few? Was it that perilous to oppose evil? Was it really impossible to help? Was it really impossible to resist organized, systematized, legalized cruelty and murder by showing concern for the victims, for one victim? Let us remember: What hurts the victim most is not the cruelty of the oppressor but the silence of the bystander.¹

The problem of silence is particularly profound for corporations.

¹ Carol Rittner, Sondra Meyers, eds., "Foreword," *The Courage to Care: Rescuers of Jews During the Holocaust*, (New York: New York University Press, 1986), x.

Introduction

Ashley L. Greene

In 1938, 18 apprentices gathered around a train for a photograph at the Nîmes learning center in Southern France. They trained to become *cheminots* (the traditional French term for “railway workers”) for the country’s new, national railway – the Société Nationale des Chemins de Fer Français (SNCF). Forged through the merger of five private regional companies, SNCF represented the idea of a united and more equitable France.² Two years later, SNCF’s *cheminots* found themselves operating in a defeated, and subsequently occupied, country. These railway workers – and their company – were now central to the German war effort, including the Nazis’ plans to exterminate Europe’s Jews. Trains that had hitherto connected the country through networks for transportation now carried people to their deaths. The legacy of SNCF would never be the same.

Corporations occupy a nebulous place in the commission of genocide and mass atrocity crimes. As with individuals, the choices they face emerge from the broader contexts of the nations, legal systems, and conflicts in which they are embedded. Like individuals, they can make decisions – sometimes constrained or under difficult circumstances – to resist, ignore, or profit from violence. Unlike humans, however, corporations are fictional “persons,” which are, in reality, comprised of hundreds or thousands of actors at any given time. As such, they often act through many people, and the law does not automatically ascribe the acts of any given agent to the corporation as a whole. Unlike humans, corporations are enduring, with no natural lifespan. They do not have a single or collective *memory*, nor do they have one *mind*, requiring legal systems to wrestle with the question of when a corporation “knows” something and when the knowledge of any corporate director or officer can be ascribed to the corporation itself.

Absent an independent mind or soul, corporations have no inherent moral ethos. They are designed to act within the law, as they find it, and executives are generally protected from liability for their reasonable business judgments (even if negligent or financially harmful). Hence, the law effectively encourages companies to take risks that individuals would avoid, an attribute that has perhaps kept businesses from engaging seriously with their culpability in advancing and/or profiting from human rights violations. If a company is not acting illegally by simply going about its business, it may see no reason to be anything *other than* a bystander – even though companies may exacerbate gross human rights violations by doing

² The French Parliament voted to nationalize its railways in 1937, and SNCF became operational in January 1938.

business with those who perpetrate atrocity crimes. Companies also may see no corporate motivation to remember and analyze their decision to stand by (or profit) in the event of mass violence – even though failing to do so may impede efforts to advance transitional justice and stop future atrocities. But companies are comprised of individuals and, as such, have the capacity to develop collective ethos and practical policies that situate them at the forefront of responding to and preventing their involvement in atrocity crimes. They can, in a word, be more than the law requires.

At the time of writing, the Uyghur Forced Labor Prevention Act is pending in the US Congress. If passed, the bill (H.R. 6210) would “prohibit the import of all goods, wares, articles, or merchandise mined, produced, or manufactured, wholly or in part, by forced labor” from the Xinjiang Uyghur Autonomous Region (XUAR) of China.³ For several years, the region has been the site of documented atrocity crimes committed by the state against Uyghur and other Muslim minority groups. These crimes include arbitrary arrests, torture, sterilization, the forcible removal of children from their families (a crime that, by itself, can constitute genocide), and forced labor.⁴ The authors of the bill estimate that, since 2017, the Chinese government has arbitrarily detained as many as 1.8 million people in a “system of extrajudicial mass internment camps.”⁵ At least 1,200 in number, these government internment camps are “designed to erase ethno-religious identities” and serve as sources of forced labor for state-subsidized factories in the XUAR.⁶

If passed, the legislation would have legal and ethical implications for US companies producing an array of goods, from shoes and textiles to tea, hair products, and electronics.⁷ The bill would establish a rebuttable presumption that labor conducted in the XUAR, or anywhere in China, under “poverty alleviation” and other government programs, constitutes forced labor. This shifts the burden of proof to companies. Those whose supply chains intersect with China would have to provide “clear and convincing evidence” that imported goods were not made, wholly or in part, using forced labor.⁸ Evidence will likely have to include rigorous supply chain mapping, internal and third-party audits, as well as the ability to demonstrate the existence of established and measurable anti-forced labor policies, along with remediation plans for when those policies fail.⁹ Complicating all this is the reality that the due diligence processes necessary to ensure a slavery-free supply chain must take place within a state that is actively engaging in mass atrocity crimes.

³ H.R. 6210 (116th): Uyghur Forced Labor Prevention Act, Sec. 3(1) (hereafter H.R. 6210), <https://www.govtrack.us/congress/bills/116/hr6210/text>.

⁴ See: Article II(e) of the Convention on the Prevention and Punishment of the Crime of Genocide, available at <https://www.un.org/en/genocideprevention/genocide-convention.shtml>.

⁵ *Ibid.*, Sec. 2(1).

⁶ China’s government calls these internment camps “vocational training centers.” United States Trafficking in Persons Report, 2019, 143. The full report can be accessed online at <https://www.state.gov/wp-content/uploads/2019/06/2019-Trafficking-in-Persons-Report.pdf>.

⁷ “2019 Annual Report,” *The Congressional-Executive Commission on China (CECC)*, Workers’ Rights, 10; and Human Trafficking, 1, available at <https://www.cecc.gov/publications/annual-reports/2019-annual-report>. The CECC implicates the supply chains of household names including Badger Sportswear, Campbell Soup, Adidas, Kraft Heinz, Coca-Cola, and Gap.

⁸ Companies would provide this evidence to US Customs and Border Protection. H.R. 6210, Sec. 4(b).

⁹ See: “The Uyghur Forced Labor Prevention Act: How It Impacts Your Company”: International Alerts 10.29.2020, *Miller & Chevalier*, <https://www.millerchevalier.com/publication/uyghur-forced-labor-prevention-act-how-it-impacts-your-company>.

As the “Findings” section of the legislation highlights:

Audits and efforts to vet products and supply chains in the Xinjiang Uyghur Autonomous Region are unreliable due to the extent forced labor has been integrated into the regional economy, the mixing of involuntary labor with voluntary labor, the inability of witnesses to speak freely about working conditions given government surveillance and coercion, and the incentive of government officials to conceal government-sponsored forced labor.¹⁰

The House of Representatives passed the Uyghur Forced Labor Prevention Act in September 2020. Should it pass the Senate and be signed by the President, companies most equipped to handle the repercussions will be those with robust risk-based atrocity prevention policies and those prepared to remove some or all of their supply chain from the XUAR.

No matter what happens with respect to this legislation, companies will face profound ethical questions. The bill has brought broad public attention to a situation that scholars and human rights activists have for some time decried as genocide. Even if the bill fails, companies will have to ask themselves whether maintaining supply chains with a potential XUAR nexus would render them participants or profiteers in mass atrocity crimes, and, if so, whether they have a moral responsibility to ensure that this is not the case.¹¹ Historically, this has been a more complex and contested question than one might presume. With the notable exception of a limited number of corporate executives tried by the Nuremberg Military Tribunals, corporations (and corporate executives) have rarely faced liability for profiting from mass atrocity crimes.

This legal lacuna surrounding corporate responsibility has largely left it to individual corporations and their executives to find answers to questions like:

- Do corporations have some form of collective responsibility beyond generating profits?
- How should corporations balance moral responsibilities with responsibilities to employees, shareholders, and consumers?
- How much resistance (or sacrifice) is required in the face of atrocity crimes?
- How should corporations remember – and/or confront – histories tainted by atrocity crimes and engage with demands (whether from victims and their families or the general public) for accountability and acknowledgement?

As Sarah Federman notes, contemporary corporate executives usually grapple with these questions in isolation and with little guidance, leaving them to focus on public relations and legal strategies rather than real moral leadership.¹²

¹⁰ H.R. 6210, Sec. 2(4).

¹¹ A question employees and customers of those companies might also ask.

¹² Sarah Federman, “Corporate Leadership and Mass Atrocity,” *Journal of Business Ethics* (2020), accessible at <https://doi.org/10.1007/s10551-020-04506-4>.

The collection of articles that follows aims to explore a framework and best practices for corporations interested in more intentionally confronting their past and current involvement in atrocity crimes using the case study of the SNCF, whose trains have become synonymous with memories of the Holocaust following the conclusion of WWII.

The French national railway has spent decades grappling with its involvement in the deportation of 75,721 Jews and others targeted by the Nazis to concentration and death camps in the East. The company's confrontations with its past have taken place in and outside courtrooms and have incorporated a diverse set of transitional justice mechanisms, including education initiatives, memorialization, historical inquiry, access to archives, and public dialogue. SNCF's story highlights the complexity of corporate responsibility, as distinctions such as "secondary" perpetrator or "neutral agent of annihilation" have become meaningful, both for the railway's conception of its WWII-era identity and for the victims and surviving family members who continue to pursue various forms of acknowledgement and reparation. As the authors demonstrate, the SNCF case study offers lessons – both positive and cautionary – for those who wish to think more deeply about the role of corporate actors in atrocity crimes. In particular, the authors highlight the ways in which corporations engage with transitional justice and atrocity prevention as they confront historical and ongoing legacies of mass violence. An emphasis is also placed on the roles – both good and bad – that litigation and legislative processes may play in framing corporate responses to atrocity crimes.

In the first article, Jean-Marc Dreyfus provides an historical review of scholarly knowledge pertaining to SNCF and its activities in German-occupied and Vichy France. He synthesizes key research findings and discusses the insights provided by survivor testimonies found in memoirs and archival holdings such as the Visual History Archives of the USC Shoah Foundation. Dreyfus also confronts the silences and questions rendered by incomplete archives. The collection's second article features Dreyfus dealing directly with SNCF's efforts to confront its past and to develop its own politics of memory in response to French and US lawsuits. He frames SNCF's initiatives within the field of transitional justice and weighs their successes and shortcomings when it comes to the company's public image, its ongoing global business interests, and its interactions with victims and their families.

In the third and final piece of the collection, Owen Pell provides an analysis of how US litigation against SNCF and proposed US legislation – the Holocaust Rail Justice Act (HRJA) – framed a narrative of SNCF's wartime activities at odds with the historical record. Pell illustrates the important role that judicial and legislative processes can play in shaping societal responses to genocide and other mass atrocity crimes, while also underscoring their problematic ability to skew historical understandings of events through their narrow framing of the past. He juxtaposes the historical narrative created by the HRJA with the contextual realities experienced by SNCF in exploring the question of organizational "independence" in the face of government action and direction – issues that often arise in the context of assessing corporate responsibility for mass atrocity crimes. Pell ends his article with a question resonant of the collection's broader aim: How can we develop principals of historical responsibility and processes of transitional justice that help corporations better understand their responsibility to remember and to prevent atrocity crimes, and, in so doing, avoid becoming participants in genocide and mass violence?