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PROPTER HONORIS RESPECTUM

POLITICIZING THE CRIME AGAINST HUMANITY: THE FRENCH EXAMPLE

*Vivian Grosswald Curran**

C'est une lourde tâche, pour le philosophe, d'arracher les noms à ce qui en prostitue l'usage. Déjà Platon avait toutes les peines du monde à tenir ferme sur le mot justice contre l'usage chicanier et versatile qu'en faisaient les sophistes.¹

INTRODUCTION

The advantages of world adherence to universally acceptable standards of law and fundamental rights seemed apparent after the Second World War, as they had after the First.² Their appeal seems ever greater and their advocates ever more persuasive today. The history of law provides evidence that caution may be in order, however, and that the human propensity to ignore what transpires under the surface of law threatens to dull and silence the ongoing self-examination and self-criticism required in perpetuity by the law if it is to be correlated with justice.

* Professor of Law, University of Pittsburgh. I am grateful for their comments on earlier drafts to Professors Larry Backer, Pablo de Greiff, David Fraser, Christian Joerges and Matthias Mahlmann. Unless otherwise noted, translations are mine. Many thanks also to Professor Adolf Grünbaum for introducing me to Ignatieff's work on Lemkin.

1 ALAIN BADIOU, *L'ÉTHIQUE: ESSAI SUR LA CONSCIENCE DU MAL* 37 (1993) ("It is a burdensome task for a philosopher to wrest names from that which prostitutes their usage. Plato already had all the trouble in the world to hold tight on the word justice against the sophists' disingenuous and manipulative usage of it.")

2 See Nathaniel Berman, "*But the Alternative Is Despair*": *European Nationalism and the Modernist Renewal of International Law*, 106 HARV. L. REV. 1792, 1794 (1993) (describing "the interpretation . . . of the 'new world order' emerging from the Paris Peace Conference").

This Essay presents one side, the dark side, of the history of the crime against humanity. It discusses the undermining and subversion of legal concepts resulting from their politicization, as they become subject to juridical argument, legal procedure, and judicial decision-making. So much has been written to promote the adoption of universal legal standards and urge adherence to international tribunals that I do not undertake an overview of the crime against humanity in today's legal order that reflects those reasons and advantages, or that balances one side against the other.³ Rather, I undertake to highlight the role that politics and ideology inevitably play in law. That role is visible when one examines some aspects of the modern legal trajectory of the crime against humanity. It suggests the need for vigilance in safeguarding concepts and values ever subject to subversion as ideologies drift under the frozen surface of legal texts, of the immutable language that cloaks a mutable law, enabling the mutations to occur invisibly, and to escape examination.⁴

It is misleading to discuss law as being "politicized" inasmuch as this implies an *a priori* "un-politicized" concept of law. Such a concept is both inaccurate and incoherent because, although law and politics are not identical, they are inseparable. Their inseparability has proven to be one of a very few reliable universals of our world. To focus on the politicization of law therefore is to dichotomize law and politics, which in turn means to examine only one aspect of a dynamic that is mutually interactive. To discuss the politicization of crimes against humanity consequently will not paint the full picture. Such a topic nevertheless may be worth exploring because human aspirations for law often insist on an ideal for law of neutrality, objectivity, and independence from politics.⁵

Concentrating on the role of politics and ideology in law illuminates the challenges law must overcome in terms of the generally unrealistic hopes of neutrality and objectivity that still, contrary to human experience, persistently pervade human conceptions of law. It is not, then, in order to contradict the inherent inseparability of law

3 For a broad perspective of both goals and contemporary legal issues concerning genocide, see Diane Marie Amann, *Group Mentality, Expressivism, and Genocide*, 2002 INT'L CRIM. L. REV. 93.

4 The term "ideological drift" was coined by J.M. Balkin. See J.M. Balkin, *Ideological Drift and the Struggle over Meaning*, 25 CONN. L. REV. 869 (1993); J.M. Balkin, *The Footnote*, 83 NW. U. L. REV. 275, 309 (1989) (discussing the "ideology of democratic pluralism").

5 See William H. Simon, *Fear and Loathing of Politics in the Legal Academy*, 51 J. LEGAL EDUC. 175, 175 (2001) (discussing widespread opposition to accepting law as political).

from politics that I undertake this examination of law as politicized. Rather, it is, on the one hand, to explain what is at work in the failure of the crime against humanity, why it has not been implemented in accordance with its apparent substantive terms; and, on the other hand, to warn of the broader implications for the future that this signals.

The contemporary world is ever more ready to endorse and adopt what it describes as international legal standards, as though these were legal standards endowed with oneness in their intent and in their future applications, as though they will mean tomorrow what they mean today, and as though they will be impervious to subversion from within. On a smaller scale, the European Union engages in the same mentality, the consequences of which only the future will tell.⁶

The crime against humanity in modern legal history is entrenched in the legacy of Nazism.⁷ It arose as a reaction against Nazi crimes, from a determination to wrest law from political ideology and to invest it with neutrality, as well as to give a name and assign a punishment to particular brands of horror that Nazism perpetrated. No law can escape from the clutches of societal context, however, no matter how much the history of law testifies to human craving for law to be immune from the dual taints of the subjective and the contingent.⁸

A study of some aspects of the crime against humanity as it has wended its way from the 1940s to the present offers an opportunity to observe mechanisms intrinsic to and pervasive in law. Analyzing

6 This is not the first time that the world has seemed utterly oblivious to the pitfalls of its legal vision for the future, as Nathaniel Berman has compellingly shown. The similarities between his description of the interwar years and the contemporary international community, and, taken by itself, the European Union, are striking and blatant. See Berman, *supra* note 2; Vivian Grosswald Curran, *Romantic Common Law, Enlightened Civil Law: Legal Uniformity and the Homogenization of the European Union*, 7 COLUM. J. EUR. L. 63, 111–12 (2001).

7 See RENÉ CASSIN, *LA PENSÉE ET L'ACTION* 225–26 (1972) (discussing “the horrible crimes against humanity Hitler committed in addition to his so-called war crimes that elicited in the world so powerful a reaction”).

8 As I have stated elsewhere, about the best theory designed to deal with law as it is, without abandoning the goal of law’s capacity to correlate positively with justice, seems to me to be found in the life work of Hermann Kantorowicz, founder of the Free Law School, and often much misinterpreted after the Second World War. Kantorowicz does not offer a blueprint for success; he weaves into the amalgam of uncontrollable forces an injection of principles that offer at least a hope of finding some tolerable balance, an antidote to the consequences of what I call here “politicization.” See, e.g., GNAEUS FLAVIUS, *DER KAMPF UM DIE RECHTSWISSENSCHAFT* (Heidelberg 1906); see also Vivian Grosswald Curran, *Rethinking Hermann Kantorowicz: Free Law, American Legal Realism and the Legacy of Anti-Formalism*, in *RETHINKING THE MASTERS OF COMPARATIVE LAW* 66 (Annelise Riles ed., 2001).

crimes against humanity illuminates some of law's attributes in large part because such crimes catch law at an extreme point of rupture, as did Nazism, such that studying the trajectory of these crimes makes it possible to observe phenomena of law and society that, in less turbulent times, tend to be less amenable to detection. As Theodor Adorno put it, "He who wishes to know the truth about life must scrutinize its estranged form."⁹

This Essay does not offer a comprehensive study of the crime against humanity. It discusses the origins of the crime after the Second World War and explores its trajectory under French law through the national courts of France in order to signal how politicization 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. It also illustrates the altering effect of law's internal, unreflective logic, as procedural matters wield considerable influence on the substantive development of legal concepts.

This Essay does not urge a renunciation of international tribunals or a rejection of international legal standards. It seeks to signal the politicization that undermines and can destroy the possibility of neutrality in international (and other) legal concepts, and that informs the judgments of international (and other) tribunals. Even though law by its nature is a political phenomenon, among other things, such that it defies aspirations of objectivity and neutrality, a mitigated neutrality may be salvageable, but only if we recognize its contingent aspects or, in other words, only if we conceive of neutrality as (1) fragile and transitory; and (2) definable only in terms of alterable and altering societal conditions.¹⁰

The modern world is likely to suffer from politicization increasingly, not decreasingly, because the technologies producing globalization are augmenting the scope and intensity of dominant discourses,

9 THEODOR ADORNO, *MINIMA MORALIA: REFLECTIONS FROM DAMAGED LIFE* 15 (E.F.N. Jephcott trans., 1974).

10 See Arnold Brecht, *The Myth of Is and Ought*, 54 HARV. L. REV. 811, 825 n.43 (1941) (capturing Hermann Kantorowicz's vision of legal neutrality, by summarizing it as "neutral relativism"); see also LUDWIG WITTGENSTEIN, *LE CAHIER BLEU ET LE CAHIER BRUN* 90 (1965), translated in *CULTIVATING DIFFERENCES: SYMBOLIC BOUNDARIES AND THE MAKING OF INEQUALITY* 4 (Michèle Lamont & Marcel Fournier eds., 1992) ("In the domain of thought, certain important advances are comparable to the displacement of volumes from one bookstack to the next: displacements are accomplished even if nothing allows us to think that the new position will be the one that will remain.").

eliminating competing ones as the world transmutes into new onenesses.¹¹

Dominant discourses of world-wide proportions disguise their own assumptions, and lead to decisions of seemingly unassailable logic based on undisclosed, maybe unconscious, but contestable premises. Decisions will have less to do with concepts that motivated texts of the law they purport to embody than with contemporaneous ideologies that may subvert the very concepts they claim to promote.

The course of law always has been a function of contemporaneous contexts and perspectives, nor does the original intent of a legal text in and of itself justify its continued application despite societal changes over time. The problem of law's transmutations over time is not that it transmutes, but, rather, that the fixed nature of textual provisions hampers *detection* of substantive transmutations wrought by judicial interpretation and application. Heightened awareness of the process is desirable so that distortions can be understood on an ongoing basis, because they cannot be evaluated if they are not perceived.

Only a continuous, critical analysis has a chance of mitigating the subversion of values that the contemporary society still endorses. This undertaking is not the assessment of the current validity of a law's original intent. It is the measurement of whether the law in fact reflects the values it purports to promote, or whether legal rhetoric has entered the service of subverting those values imperceptibly. The dangers of undetected subversions are heightened greatly by univocality of discourse.¹²

I. THE MODERN IMPETUS FOR A CRIME AGAINST HUMANITY

The modern impetus for the crime against humanity arose not just from Nazi acts, but also from the extreme convergence of law with political ideology in Nazi Germany and Nazi-occupied states.¹³

11 As one scholar already put it more than forty years ago, "The various human communities are no longer merely in contact[, t]hey are in a state of mutual penetration." André Tunc, *Comparative Law, Peace and Justice*, in *TWENTIETH CENTURY COMPARATIVE AND CONFLICTS LAW: LEGAL ESSAYS IN HONOR OF HESSEL E. YNTEMA* 80, 83 (Kurt H. Nadelmann et al. eds., 1961).

12 I have argued elsewhere for the continued need of multivocality in law, but believe that unification probably is inexorable, so I do not address that issue here. See Curran, *supra* note 6.

13 See BERND RÜTHERS, *DIE UNBEGRENZTE AUSLEGUNG: ZUM WANDEL DER PRIVATRECHTSORDNUNG IM NATIONALSOZIALISMUS* (1968) [hereinafter RÜTHERS, *UNBEGRENZTE AUSLEGUNG*]; BERND RÜTHERS, *ENTARTETES RECHT: RECHTSLEHREN UND KRONJURISTEN IM DRITTEN REICH* (1989) [hereinafter RÜTHERS, *ENTARTETES RECHT*]; Vivian Grosswald Curran, *Fear of Formalism: Indications from the Fascist Period in France*

Equally extreme was the peculiar degree of legalism of Nazism, the degree to which Hitler Germany's self-description, self-representation, and to a significant extent self-understanding, was as a nation under law, governed by law.¹⁴ By also placing jurisprudential concepts within Nazi law that were antithetical to traditional notions of law, however, the Nazi regime simultaneously rendered Nazi Germany and Nazi-occupied countries lawless, at least in one sense.

The propriety of describing that society as lawless has been a matter of hot dispute since the war.¹⁵ However one comes out on this dispute, and both sides make irrefutable points within it,¹⁶ at the least one may conclude that Nazi Germany and occupied countries such as France maintained a *mimicry* of law, such that fascist terror was visited upon people in the name of law, pursuant to apparently legal mechanisms, channels and structures, and not in an overt shunning or repudiation of law.¹⁷

and *Germany of Judicial Methodology's Impact on Substantive Law*, 35 CORNELL INT'L L.J. 101 (2002).

14 For an excellent portrayal of this complex issue, see Michael Stolleis, *Reluctance To Glimpse in the Mirror: The Changing Face of German Jurisprudence After 1933 and Post-1945*, in *THE DARKER LEGACY OF EUROPEAN LAW: PERCEPTIONS OF EUROPE AND PERSPECTIVES ON A EUROPEAN ORDER IN LEGAL SCHOLARSHIP DURING THE ERA OF FASCISM AND NATIONAL SOCIALISM AND ITS REMNANTS* (Christian Joerges & Navraj Singh Ghaleigh eds., forthcoming 2003).

15 See, for example, the debate between Professors Hart and Fuller. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958); see also H.L.A. HART, *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 73 (1983) (dealing also with Gustav Radbruch's natural law positions). For a summary of the legal literature in Germany, see Markus Dirk Dubber, *Judicial Positivism and Hitler's Injustice*, 93 COLUM. L. REV. 1807 (1993).

16 For my discussion of this debate, see Curran, *supra* note 13, at 134–41. See also David Fraser, "The Outsider Does Not See All the Game . . .": *Perceptions of German Law in the Anglo-American World, 1933–1940*, in *THE DARKER LEGACY OF EUROPEAN LAW: PERCEPTIONS OF EUROPE AND PERSPECTIVES ON A EUROPEAN ORDER IN LEGAL SCHOLARSHIP DURING THE ERA OF FASCISM AND NATIONAL SOCIALISM AND ITS REMNANTS* (Christian Joerges & Navraj Singh Ghaleigh eds., forthcoming 2003).

17 One might dispute this statement to the extent that Nazi Germany and occupied countries also had institutions that bypassed strictly legal ones. On the whole, however, scrupulous maintenance of the structures of law and use of the channels of law and legal institutions characterized Nazi Germany and Vichy France. See RÜTHERS, *UNBEGRENZTE AUSLEGUNG*, *supra* note 13; RÜTHERS, *ENTARTETES RECHT*, *supra* note 13. Michael Stolleis also captures what I mean above when he writes of the Nazi system as a "legal form in which injustice was *clothed*." Stolleis, *supra* note 14 (emphasis added) (pagination not yet available); see also RENÉ CASSIN, *UN COUP D'ÉTAT: LA SOI-DISANT CONSTITUTION DE VICHY* (1940) (arguing that French people's adherence to Vichy law was to principles they deeply reviled, but was made possible by the fact that an outward appearance of legality accompanied Vichy measures).

Raphael Lemkin was among the many whose reaction to Hitlerism after 1945 was to pin their hopes on depoliticizing law, with an underlying faith that law at its core is neutral and correlates positively with justice. Lemkin was a lawyer and law professor, originally from Poland, whose family was exterminated by Hitler because they were Jews. Lemkin coined the term “genocide” and drafted what became the U.N. Convention on Genocide,¹⁸ always in the capacity as a private individual, as he had no diplomatic or other governmental status.¹⁹

According to a recent article by Michael Ignatieff, among the many remarkable attributes of Lemkin was his understanding of Nazi genocide *from his reading of Nazi jurisprudence*, not from being privy to the critical facts of the Nazis’ actual genocide.²⁰ According to Ignatieff, at a time when others who *were* privy to those facts, such as Isaiah Berlin, Nahum Goldman and Chaim Weizmann (all of whom would have had every personal motive to believe the truth), could not bring themselves to believe them, Lemkin divined and believed the truth from his reading of Nazi jurisprudence in the absence of the sort of concrete, factual information that had reached Berlin, Goldman, and Weizmann.²¹

Already in 1933 at the League of Nations’s Fifth International Conference for the Unification of Penal Law, held in Madrid, Lemkin had proposed a new sort of crime, what later he would call the crime of genocide, though in 1933 he had not yet coined that term.²² In an article he wrote in 1947, Lemkin described his 1933 idea.²³ At that time he had formulated two new crimes for international law, the crimes of “barbarity” and of “vandalism,” which in 1947 he explained as follows, “[T]he present writer . . . envisaged [in 1933] the creation of two new international crimes: the crime of barbarity, consisting in the extermination of racial, religious or social collectivities, and the

18 Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277, *reprinted in* BARRY E. CARTER & PHILLIP R. TRIMBLE, *INTERNATIONAL LAW: SELECTED DOCUMENTS* 395 (1991) [hereinafter U.N. Convention on Genocide].

19 See WILLIAM KOREY, *AN EPITAPH FOR RAPHAEL LEMKIN* (Stephen Steinlight ed., 2001) (The Jacob Blaustein Institute for the Advancement of Human Rights of the American Jewish Committee) (pre-publication copy).

20 Michael Ignatieff, *The Danger of a World Without Enemies: Lemkin’s Word*, *NEW REPUBLIC*, Feb. 26, 2001, at 25, 26.

21 See *id.* at 26.

22 See Raphael Lemkin, *Genocide as a Crime Under International Law*, 41 *AM. J. INT’L L.* 145, 146 (1947) (discussing author’s 1933 proposal that “the destruction of racial, religious or social collectivities [should be declared] a crime under the law of nations (*delictum iuris gentium*)”).

23 See *id.*

crime of vandalism, consisting in the destruction of cultural and artistic works of these groups."²⁴ He had drafted his 1933 proposed crimes as follows:

Whosoever, out of hatred towards a racial, religious or social collectivity [sic], or with a view to the extermination thereof, undertakes a punishable action against the life, bodily integrity, liberty, dignity or economic existence of a person belonging to such a collectivity, is liable, for the crime of barbarity . . . unless his deed falls within a more severe provision of the given code.

Whosoever, either out of hatred towards a racial, religious or social collectivity, or with a view to the extermination thereof, destroys its cultural or artistic works, will be liable for the crime of vandalism . . . unless his deed falls within a more severe provision [sic] of the given code.

The above crimes will be prosecuted and punished irrespective of the place where the crime was committed and of the nationality of the offender, according to the law of the country where the offender was apprehended.²⁵

As enacted fifteen years later, Article I of the U.N. Convention on Genocide makes the crime against humanity, "whether committed in time of peace or in time of war[,] a crime under international law which [the Contracting Parties] undertake to prevent and to punish."²⁶ Pursuant to Article II,

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.²⁷

Lemkin was utterly unsuccessful in his first attempt in 1933. As William Korey describes it in his recent monograph, Lemkin was treated with derision and contempt in Madrid, especially because, by

²⁴ *Id.*

²⁵ *Id.* at 146 n.3.

²⁶ U.N. Convention on Genocide, *supra* note 18, art. I, reprinted in BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW: SELECTED DOCUMENTS 395 (1991).

²⁷ *Id.*, reprinted in BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW: SELECTED DOCUMENTS 395-96 (1991).

the time of the meeting in October 1933, Germany's delegates were already Nazis.²⁸

Lemkin escaped from Europe and became a law professor at a number of eminent U.S. law schools, including Duke and Columbia, but he left each of his university posts to devote his energy to the all-consuming task of drafting what was to become the U.N. Convention on Genocide, then to promoting its adoption, and, finally, to tireless efforts (unavailing during his lifetime) towards United States ratification of the Convention.²⁹ Lemkin lived to see the U.N. adopt his convention, with the title of "genocide" that he had given to the newly defined crime.³⁰ He had sacrificed his personal and professional life to this end, and he died alone, completely impoverished, and semi-starved.³¹

II. THE FRENCH LEGACY OF THE NEW CRIME

The hope Lemkin and many others cherished in 1945—namely, that formulating the crime against genocide would prevent future genocides—never was realized. Nevertheless, faith in the positive potential of international law and criminal tribunals appears unabated to date. Many urge universal submission to international tribunals that possess the power to adjudicate crimes against humanity.³² The history of the crime against humanity suggests that hope in the universalization of law is misplaced. It signifies perhaps, as Hans Morgenthau

28 See KOREY, *supra* note 19, at 9–13.

29 See *id.*

30 See *id.*

31 See *id.* For background information on the Universal Declaration of Human Rights, and a moving tribute to its drafters in an article offering far more optimism in the future than this Essay, see Mary Ann Glendon, *Knowing the Universal Declaration of Human Rights*, 73 NOTRE DAME L. REV. 1153, 1153–82 (1998). See also MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* (2001) (offering background on Eleanor Roosevelt's involvement in the drafting of the Declaration and an optimistic analysis of the Declaration's function and purpose).

32 René Cassin, drafter of the Universal Declaration of Human Rights, was one such person who understood that the Genocide Convention had failed to prevent genocide, but whose faith in international tribunals remained intact. He wrote that "the Convention against genocide is sterile. Genocides occur, alas!" but attributed this to the fact that "sanctions [for violating the Genocide Convention] are in the hands of judges of those countries that are totalitarian dictatorships or in a state of anarchy, rather than, as should be the case, in the hands of an international criminal court." CASSIN, *supra* note 7, at 160. For a thorough history of the origins of and connections between crimes against humanity, genocide and war crimes, in recent western legal history, see Georges Levasseur, *Les crimes contre l'humanité et le problème de leur prescription*, 93 J. DROIT INT'L 259 (1966).

put it, "an inveterate tendency to stick to . . . assumptions and to suffer constant defeat from experience rather than to change . . . assumptions in the light of contradictory facts,"³³ an attitude he also summarized as follows, "As the League of Nations was a failure, let us have another League."³⁴ The problem may be that "history is the best schoolmaster with the most inattentive pupils."³⁵

The first hope history dashed was that formulating the new crime of genocide and the crime against humanity would prevent those crimes from being committed in the future. But even beyond that, if one takes as a study sample the crime against humanity's treatment under French law, one sees a legal system prepared to reorient legal concepts so as to prevent unpleasant political issues and consequences deemed politically undesirable. Each nation's legal developments follow a course that has much to do with national phenomena of a legal, social, historical and cultural nature, so no example can pretend to universal applicability or generalization. The many twists and turns of events in France highlight, however, the politicization to which the crime against humanity is amenable and is likely to remain amenable.

In 1964, France's crime against humanity became "*imprescriptible*," or not subject to a statute of limitations.³⁶ The idea of imprescriptibility for crimes against humanity was implied in the Nuremberg Tribunal.³⁷ According to the Dalloz edition of the French Criminal Code, the "[f]oundation of imprescriptibility"³⁸ for crimes against humanity lies in their nature; "their imprescriptibility is inferred as much from

33 Hans J. Morgenthau, *Positivism, Functionalism, and International Law*, 34 AM. J. INT'L L. 260, 260 (1940).

34 *Id.*

35 Translated from "*Die Geschichte ist der beste Lehrmeister mit den unaufmerksamsten Schülern*," which was the "Quote of the Day" ("*Spruch des Tages*") of September 13, 2002, at the web site of the News Service for Historians (*Nachrichtendienst für Historiker*) at <http://www.nfhdata.de> (last visited Apr. 3, 2003).

36 Law No. 64-1326, J.O., Dec. 26, 1964, p. 11,788 ("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."); see also Vivian Grosswald Curran, *The Legalization of Racism in a Constitutional State: Democracy's Suicide in Vichy France*, 50 HASTINGS L.J. 1, 74 n.254 (1998).

37 C. PÉN. 1996-1997, at 153 (Dalloz 1996) [hereinafter C. PÉN. DALLOZ], citing Cass crim., Jan. 26, 1984, Bull. Crim., No. 34, J.C.P. 1984, II, 20197, note Ruzié, rapp. Le Gunehec & concl. Dontenwille; see also Cass. crim., Oct. 6, 1983, Bull. Crim., No. 239, Gaz. Pal. 1983, 2, pan. jurispr., 710, rapp. Le Gunehec, concl. Dontenwille (*L'arrêt Barbie*). Both *arrêts* are discussed in Cass. crim., Dec. 20, 1991, Gaz. Pal. 1993, 1, pan. jurispr., 281, 286, rapp. Guerder (Georges Boudarel) [hereinafter Boudarel].

38 C. PÉN. DALLOZ, *supra* note 37, at 153.

general principles of law³⁹ 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."⁴⁰

When a new French criminal code went into effect in 1994, it maintained the imprescriptible nature of the crime against humanity.⁴¹

The Charter of the International Military Tribunal at Nuremberg,⁴² to which the French crime against humanity was tied, defines "crimes against humanity" in Article 6 as

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.

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.⁴³

The French crime against humanity mirrors this definition, adopting many of its terms:

The deportation, enslavement ["*réduction en esclavage*"] or the massive and systematic practice of summary executions, kidnappings of persons followed by their disappearance, of torture or inhuman acts, for reasons of ["*inspirées par des motifs [de]*"] politics, philosophy, race or religion and organized in execution of a concerted plan against a civilian population group⁴⁴

The French crime against humanity also is based on the U.N. Convention on Genocide.⁴⁵

39 For a discussion of general principles ("*principes généraux*") under French law, see Curran, *supra* note 13, at 141-51.

40 C. PÉN. DALLOZ, *supra* note 37, at 153.

41 *Id.*

42 Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis of August 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279.

43 *Id.* art. 6, reprinted in BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW 1163-64 (3d ed. 1999).

44 C. PÉN. DALLOZ, *supra* note 37, at 150.

45 See Jacques Francillon, *Livre deuxième: Des crimes et délits contre les personnes*, in GABRIEL ROUJOU DE BOUBÉE ET AL., CODE PÉNAL COMMENTÉ 107 (1996).

Events after the Second World War created numerous thorny issues for France's post-war administrations and judicial system in cases alleging crimes against humanity. The first trial after imprescriptibility was that of the German Nazi, Klaus Barbie, who was just the sort of defendant for whom France's crime against humanity had been prolonged to reach, despite the passage of many decades between his crimes and his trial. The Barbie trial gave rise to an unexpected possibility that his defense attorney explicitly threatened: namely, if Barbie were convicted of crimes he had committed as part of the Nazi occupation on French soil, against French people, the analogy between his conduct and France's conduct in Algeria would result in *French* defendants being deemed to have committed crimes against humanity in Algeria in the name of France.⁴⁶

The French judicial response was to nullify this threat by redefining and delimiting the crime against humanity so as to avoid this previously unforeseen possibility. The *Cour de cassation*⁴⁷ thus stated that the crime against humanity would be limited to crimes committed "*in the name of a State practicing a policy of ideological hegemony.*"⁴⁸ France would not be subject to inclusion in that definition because its scope was deemed limited to fascist-totalitarian states.⁴⁹

No sooner had the French judiciary seemingly solved this problem than another, equally unpleasant, prospect arose out of the crime against humanity. This time the defendant was Paul Touvier, a Frenchman who had worked for the *milice* during the Vichy period. The *milice* was a paramilitary organization created by the Vichy government, which garnered the reputation of Gestapo-like cruelty for its

46 See Curran, *supra* note 36, at 77-78 ("Barbie's lawyer . . . the renowned Jacques Vergès, whose clients have included numerous Middle Eastern terrorists, raised the unpleasant specter of France's crimes in Algeria in the 1950s, suggesting that a guilty verdict for Barbie necessarily would augur by analogy the same result for those responsible for crimes of torture and murder committed in France's name during the Algerian war of 1954-1962.")

47 This court is the highest court in France for matters classified as private law. For the complicated status of criminal law in the private/public law distinction, see RENÉ DAVID, *FRENCH LAW: ITS STRUCTURE, SOURCES AND METHODOLOGY* 116-22 (Michael Kindred trans., 1972).

48 Cass. crim., Dec. 20, 1985, 1986 J.C.P. II G, No. 20,655, Barbie (emphasis added); see also Cass. crim., Jan. 23, 1997, J.C.P. 1997, III, No. 14, 22812, Papon [arrêt No. 502] (stating that Papon's acts were for an "Axis country practicing a policy of ideological hegemony" ("*pays de l'Axe pratiquant une politique d'hégémonie idéologique*")); Guyora Binder, *Representing Nazism: Advocacy and Identity at the Trial of Klaus Barbie*, 98 YALE L.J. 1321, 1329 (1989); Leila Sadat Wexler, *Reflections on the Trial of Vichy Collaborator Paul Touvier for Crimes Against Humanity in France*, 20 LAW & SOC. INQUIRY 191, 202 (1995).

49 See Curran, *supra* note 36, at 78.

torture and its murders.⁵⁰ The new challenge concerned how the judicial decision might implicate France for its collaborative acts during the Vichy years.⁵¹

The lower court dismissed the charges against Touvier pursuant to the limitation on crimes against humanity that the *Cour de cassation* had crafted in *Barbie*: namely, the judicial requirement that the crimes be committed by a state practicing “ideological hegemony.”⁵² The lower court in Touvier’s case ruled that Vichy France did not meet that criterion, so it dismissed the charges against Touvier *because* Touvier had worked for Vichy France, rather than for Nazi Germany.⁵³

Thus, the original limiting language of the *Barbie* decision, designed to immunize France from being judged for crimes against humanity based on its conduct in Algeria, was extended in the *Touvier* case to avoid a judicial confrontation with the nation’s past during the Vichy years. Paradoxically, this ruling represented a sea change in post-war France’s tenaciously promulgated mythology about Vichy. The *Touvier* decision signified a concession, never made before in official circles, that Vichy was not a German phenomenon, since crimes committed by Nazi Germany *were* within the purview of the crime against humanity, and Nazi Germany came within the scope of a state “practicing a policy of ideological hegemony.”⁵⁴ This implicit aspect of the court opinion contradicted the official claim, initiated by Charles de Gaulle and perpetuated since the time of France’s liberation, that Vichy never had been France, that it always was a German phenomenon, a puppet state set up by Germany and carried out with the complicity of only a few French henchmen, to the disagreement and resistance of essentially the entire occupied nation.⁵⁵

50 See, e.g., *id.*

51 The lower court decisions were unpublished; the initial Touvier indictment was on June 2, 1993, by the *Cour d’appel* of Versailles. The *Cour de cassation* denied his appeal of the indictment, Cass. crim., Oct. 21, 1993, and his trial conviction by the *Cour d’assises* of Yvelines occurred on April 20, 1994. See Wexler, *supra* note 48, at 192 n.3.

52 See Curran, *supra* note 36, at 78.

53 See *id.*; see also Leila Sadat Wexler, *The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again*, 32 COLUM. J. TRANSNAT’L L. 289, 344–51 (1994) (discussing the April 1992 *Touvier* decision of the *Cour d’appel*).

54 Cass. crim., Jan. 23, 1997, J.C.P. 1997, III, No. 14, 22812, Papon [arrêt no. 502].

55 See, e.g., CHARLES DE GAULLE, *MÉMOIRES DE GUERRE: L’UNITÉ 1942–1944* (1956); Dominique Rousseau, *Vichy a-t-il existé*, in 28 LE GENRE HUMAIN: JUGER SOUS VICHY 97, 103 (Maurice Olender ed., 1994).

In the end, public outcry led to a reversal of the lower court decision in *Touvier*.⁵⁶ While this reversal seems to have been deemed politically necessary to calm an indignant public,⁵⁷ the French judiciary still managed (as it has done to date) to avoid the issue of Vichy. It did this by introducing yet another limitation on the French crime against humanity, holding that the act must have been committed by a *European Axis power*, or by a perpetrator acting in complicity with an Axis power.⁵⁸ Henceforth, no inquiry as to whether Vichy had been an autonomous perpetrator of crimes against humanity could be legally cognizable, and France's judiciary would be spared the challenge of examining and defining historical meaning and the role of France in the Holocaust.⁵⁹

Touvier's conviction theoretically depended on the jury's finding that he had acted on behalf of Germany (or possibly Italy, a still less likely outcome), because the court required the act to have been done by or for a European Axis power. Because so much remains implicit and unarticulated in French court decisions, we are left to infer that since Touvier was found guilty, he somehow must have worked for Germany, rather than for France, even though his employer, the *milice*, was an official organization created by Vichy, with a French charter of its own, promulgated by Vichy.⁶⁰ The *Cour de cassation* did not address explicitly whether the lower court had erred in ruling that Vichy by its nature was autonomous, and therefore could not have committed crimes against humanity. The French Criminal Code pub-

56 See Wexler, *supra* note 53, at 349 (describing the decision not to prosecute Touvier as "provok[ing] an uproar").

57 The public's role was part of the complicated relation between the French executive and judiciary. The *parquet* (which is analogous to the prosecution in the United States) traditionally submitted to politically motivated orders from the executive. In the *Papon* case, the Minister of Justice, Jacques Toubon, "in a state of panic at the prospect of the public outcry likely to follow a second dismissal, asked the prosecutor to reverse its decision and to issue instead a *renvoi d'assises*, an order committing the case for trial at the trial court level." Eric Conan, *Le casse-tête juridique*, L'EXPRESS, Oct. 2, 1997, at 29. For the public's involvement in the *Touvier* case, see Curran, *supra* note 36, at 79.

58 Cass. crim., Nov. 27, 1992, J.C.P. 1993, II, 21977, Michel Dobkine.

59 Touvier ultimately was convicted, but this conviction implicitly signified that he must have been carrying out German instructions, even though no evidence of that was introduced. See Curran, *supra* note 36, at 78-79. For a more positive interpretation of the French judicial redefinition of the crime against humanity as an effort to *de-politicize* it, see LAWRENCE DOUGLAS, *THE MEMORY OF JUDGMENT: MAKING LAW AND HISTORY IN THE TRIALS OF THE HOLOCAUST 195* (2001) (arguing that France's courts were seeking to "preempt[] the tendentious use of the incrimination to challenge every unpopular act by any government").

60 Curran, *supra* note 36, at 78-79.

lished by Dalloz refers to the *Touvier* case as follows in the section of explanatory notes following the code's Article 212-1:

The French national who, upon the instigation of a responsible party from a criminal Nazi organization, orders the assassination of persons chosen by him exclusively by reason of their belonging to the Jewish community, knowingly participates, on behalf of a European Axis power, in the concerted plan of extermination and persecution of that community effectuated by the German National Socialist government, and renders himself a party to crimes against humanity. . . . Even if they were perpetrated on the occasion of, and in reprisal for, the assassination of a member of the French Milice [as was the case with respect to the *Touvier* murders], such assassinations, committed under such conditions, are part of [*s'intègrent à*] that concerted plan and constitute a crime against humanity.⁶¹

Although the *Touvier* trial was surrounded by a media blitz that equated it with the trial of Vichy France, the charges against the defendant concentrated solely on his personal decision to murder Jewish hostages, impeding any connection between his acts and the Vichy government. As one French legal scholar has put it, "by tying Touvier's conduct to Nazi Germany and not to the French State,⁶² the *Cour de cassation* skirted the true debate."⁶³

The issue of Vichy's role seemed much more difficult to avoid, however, in the subsequent collaborator trial of Maurice Papon. Second in command of the police in the Gironde, the Bordeaux area, Papon had ordered the arrest and deportation of some 1700 Jews pursuant to orders of his superiors in the Vichy French government. In Papon's case, the defendant's acts were state acts, and could not be reduced to personal acts as the Court had done in Touvier's case.⁶⁴ Consequently, it seemed as though the *Papon* court would have to address directly the issue of whether Vichy had been autonomous, or if it had been a puppet government of Germany. The *Cour de cassation* managed once again to avoid the issue, however.⁶⁵ The Court wrote that Papon had been "fully cognizant of the Vichy government's antisemitic policies,"⁶⁶ but then characterized Papon's acts as having

61 C. PÉN. DALLOZ, *supra* note 37, at 151 (citing Cass. crim., Oct. 21, 1993, Bull. Crim., No. 307) (emphasis added).

62 The term used here is "*l'État français*," the name by which the Vichy government was known, in contrast to the *République française*.

63 ROUJOU DE BOUBÉE ET AL., *supra* note 45, at 111.

64 See Curran, *supra* note 36, at 80.

65 Cass. crim., Jan. 23, 1997, J.C.P. 1997, II, No. 14,22812, Papon.

66 See *id.*

been performed to further Germany's plans for genocidal extermination:

[The] illegal arrests, imprisonments and internments, carried out at the request of the German authorities, particularly of the *Kommando der Sicherheitspolizei und der Sicherheitsdienst (SIPO-SD)*, lending its services to the Bordeaux branch of the *Reichssicherheitshauptamt (RSHA)*, the Reich security organization, [the above illegal acts] were accomplished with the active assistance of Maurice Papon, at the time the Secretary General of the *préfecture* of the Gironde, who, by virtue of the wide delegation of power accorded him by the regional *préfet* [i.e., the head of the *préfecture*], exercised authority equally over the [several] services of the police, as well as over the running of the Mérignac camp and services emanating from the war, such as that of Jewish Questions [i.e., an organization set up by Petain to accomplish the elimination of Jews from French public and professional life and from property ownership]

[Further, Papon] fully assisted the German leadership at all stages of the operations; namely, in preparing the arrests and in the practical organization of the convoys; . . . Maurice Papon himself, from July, 1942 to May, 1944, delivered orders for the arrest, internment and transfer of persons to [the] Drancy [camp]; . . . the service which he led always sought to ensure maximum efficiency in the anti-Jewish measures that were in his jurisdiction—such as the updating of files on Jews, or regular communication with the [German] SIPO-SD to provide information about Jews—and sometimes even without waiting for instructions from the central authorities of the Vichy Government, where he requested the same [from Vichy] or from the occupier.⁶⁷

The *Cour de cassation* then further redefined the crime against humanity by holding that, contrary to the Statute of the International Military Tribunal, under French law, French courts can convict a defendant of crimes against humanity even if the defendant personally and individually had *not* adhered to the “policy of ideological hegemony.” The court remained silent as to whether Vichy possessed or lacked an ideology of hegemony.⁶⁸

67 *Id.*

68 But the *Conseil d'État* opinion of April 12, 2002, *see infra* note 78, appears for the first time to be a judicial characterization of Vichy as possessing culpability and responsibility for acts for which the *Cour de cassation* convicted Papon. (Having to date read only the *Conseil d'État's* opinion, without accompanying *doctrine*, I draw this unconfirmed inference with hesitation, because the French *doctrine* (i.e., legal scholarly commentary of French judicial decisions) can be so influential as to constitute a definitive interpretation of a case's meaning.)

The highly political nature of the Court's rulings reflects more than judicial aversion to confronting the issue of national history, memory and collaboration. It also resulted from the control that France's executive branch traditionally has exerted over the judiciary, control that stems, in part, from the intentional relegation by the political system of the judiciary to a position of inferiority around the time of the French Revolution,⁶⁹ and reinforced by the power de Gaulle was able to infuse into the executive branch in post-war French government.⁷⁰

The turns and twists of Papon's trial were endless and too numerous to recount here.⁷¹ They were buffeted on the one hand by the

69 See, e.g., John Henry Merryman, *The French Deviation*, 44 AM. J. COMP. L. 109 (1996) (discussing the limitations placed on the judiciary in post-Revolutionary France).

70 See *La Constitution de 1958: Loi constitutionnelle du 3 juin 1958*, in LES CONSTITUTIONS DE LA FRANCE DEPUIS 1789, at 424–52 (Jacques Godechot ed., Garnier Flammarion 1995) (1979).

71 I discuss in detail those that occurred before 1998 in Curran, *supra* note 36. In the latest twist, on July 24, 2002, as this Essay was being written, the European Court of Human Rights (ECHR) condemned France for “*procès inéquitable*,” unfair trial, for having denied Papon his right of appeal. Papon had filed appeal of his conviction to the *Cour de cassation*. The court had notified him that he needed to appear on October 21, 1999. This requirement, known as the “*mise en état*,” obliged the defendant to become a prisoner on the night before the court reviewed his or her appeal, a rule that dated to the reign of Francis I and that has since been abolished (due to an ECHR ruling in a French case preceding Papon's case but still in effect when Papon's *Cour de cassation* hearing was due to occur.) For a discussion of *mise en état* and the criminal law reforms of 2000, see Jacqueline Hodgson, *Suspects, Defendants and Victims in the French Criminal Process: The Context of Recent Reform*, 51 INT'L & COMP. L.Q. 781, 783 (2002). Papon requested dispensation from this requirement. The *Cour de cassation* denied Papon's request. Instead of turning himself over to the court, however, Papon fled to Switzerland. After Papon was captured and returned to France, the *Cour de cassation* declared his appeal of conviction void due to his willful failure to comply with the court's earlier order of *mise en état*. Papon appealed to the ECHR, and the ECHR condemned France, finding that Papon had been deprived of his fundamental right to appeal his criminal conviction, requiring the *Cour de cassation* now to meet in plenary session to adjudicate Papon's *renvoi* (appeal). For a detailed account of the entire chronology of the Papon case to date by the ECHR, see the ECHR decision, Hudoc reference REF00019903, *Papon v. France*, Nov. 15, 2001, at http://hudoc.echr.coe.int/Hudoc2doc2/HFDEC/200111/54210da_chb1_15112001_f.doc (last visited Apr. 3, 2003). Some two months later, on September 18, 2002, the Paris Court of Appeals (*Cour d'appel de Paris*) freed Papon from prison for reasons of health and age. (He is now ninety-two years old and allegedly in poor health.) See Isabelle Tallec, *La libération de Maurice Papon*, L'EXPRESS EN LIGNE, Sept. 18, 2002, at <http://www.lexpress.fr/Express/Info/France/Dossier/papon/dossier.asp> (last visited Apr. 3, 2003). His freedom still is not assured, as, according to the *New York Times*, the prosecutor declared that the state would not appeal, see Elaine Scolino, *French Free Top*

executive branch's wish to delay and ultimately avoid trials that risked involving a retrospective spectacle of France's crimes during Vichy and, on the other hand, by the winds of public opinion, including an erupting, irrepressible curiosity about Vichy and its national significance to French youth. Governmental delay tactics in not bringing Papon to trial for many years had given way eventually to the public's clamor to see Papon stand trial, but the decades-long nature of the delays meant that almost everyone of relevance to the matter, other than Papon himself, was dead, including Sabatier, Papon's supervisor, who had proclaimed shortly before he died that it was he who had had full responsibility for the crimes now being attributed to Papon.⁷²

One of the many consequences of lengthy delays in prosecuting the defendants has been a *reductio ad absurdum* in the charges. Professor Binder estimates in the case of Klaus Barbie that the paucity of viable evidence meant Barbie could not be tried for more than 750 of the 12,000 victims for which he was known to be responsible.⁷³

Moreover, those who testified against Barbie, Touvier and Papon tended to be aged Holocaust survivors with memories dim and testimony so confused as to diminish their credibility.⁷⁴ Finally, in Papon's case, even the civil-party plaintiffs⁷⁵ indirectly acknowledged that the defendant had committed crimes that may not have met the

Civilian Official Jailed for War Crimes, N.Y. TIMES, Sept. 19, 2002, at A3, only to be ordered the next day by the government (of President Chirac) to appeal, for fear of tarnishing France's image with antisemitism. See Elaine Sciolino, *French Government To Seek Return of Nazi War Criminal to Prison*, N.Y. TIMES, Sept. 20, 2002, at A12. Because this decision is separate from the ECHR proceeding, however, it would not seem to eliminate the need for the *Cour de cassation* to meet on the issue of Papon's fundamental trial and appeal rights (the "*procès inéquitable*" finding of the ECHR).

⁷² See Curran, *supra* note 36, at 73–94. Indeed, it is one of the more bizarre judicial twists of this story that at one point the court decided to dismiss all charges against Papon, not because it deemed him innocent, but solely because it had been a mistake not to have indicted Sabatier also. See *id.*

⁷³ See Binder, *supra* note 48, at 1325, 1327–28.

⁷⁴ For this pervasive problem in all of the trials that depended on imprescriptibility, see Curran, *supra* note 36, at 93 (discussing with respect to Papon's trial that "[t]he permanence the witnesses achieved for their narrative, by virtue of its judicial molding, necessarily rested on historical distortion, deformation and reductionism"); LUCIEN LAZARE, *LE LIVRE DES JUSTES: HISTOIRE DU SAUVETAGE DES JUIFS PAR DES NON JUIFS EN FRANCE, 1940–1944* (1993).

⁷⁵ Under French law, individuals may be plaintiffs in criminal actions, and may initiate them. CODE DE PROCÉDURE PÉNALE art. 1–3 [hereinafter C. PR. PÉN.]. Such civil-party actions for crimes against humanity benefit from the same exemption from statutes of limitation as those brought by the State. See ROUJOU DE BOUBÉE ET AL., *supra* note 45, at 133 & n.3. The Code of Criminal Procedure also provides that anyone alleging to have been harmed by a crime may become a civil party. C. PR. PÉN. art. 85.

requirements of crimes against humanity.⁷⁶ Maître Klarsfeld, the attorney for many of the civil-party plaintiffs, urged the court to consider recognizing (i.e., creating) a lower rank of crime within the crime against humanity. He could not urge a classification of Papon's acts as crimes falling under any rubric other than the crime against humanity, because no claim could survive the statute of limitations if not asserted pursuant to crimes against humanity, but he seemed to fear the jury might acquit Papon entirely if the charge did not introduce some nuance into the traditional conception of crimes against humanity.

The court rejected the proposal of a new, lower-ranked crime against humanity, and convicted Papon of complicity in crimes against humanity, the initial charge, but only sentenced him to ten years. The sentence alone testifies to the paradoxical nature of the affair, as ten years would seem an utterly insufficient penalty for acts so heinous as to constitute complicity in crimes against humanity.⁷⁷

French official reactions to Vichy have undergone numerous vicissitudes, including President Jacques Chirac's reversal of position in 1995 by declaring that Vichy was French after all. Moreover, the issues of property expropriated or "spoliated" under confiscatory Aryanization laws, which recently were the basis of class action lawsuits initi-

76 See Eric Conan, *Procès Papon: Il faut en finir!*, L'EXPRESS, Jan. 22, 1998, at 10, 15; Curran, *supra* note 36, at 82 & n.286.

77 After convicting Papon, the court refused to imprison him before his appeal was heard, on the grounds that he was old and reputedly in poor health. The court further refused the plaintiffs' request that Papon at least be deprived of his passport. Passport intact, he fled to Switzerland, leaving behind a statement that he was obliged to go into exile like Victor Hugo before him. The public outcry was considerable and the media attention incessant. High French government officials, including the Minister of Justice, personally went on national television to declare their commitment to finding him. He was found within a few days, and returned to France and prison. One is left to speculate that Papon may have calculated incorrectly that he still had enough friends in high places who would see to it that he was not discovered or extradited. The paradox of a penalty too low to fit the heinous nature of the crime has haunted the French crime against humanity since its inception, and has been attributed to the legislature. See ROUJOU DE BOUBÉE ET AL., *supra* note 45, at 108, 131-32; see also George P. Fletcher, *Liberals and Romantics at War: The Problem of Collective Guilt*, 111 YALE L.J. 1499, 1539 (2002) (urging the introduction of a collective aspect to guilt in cases of crimes against humanity, such that the individual perpetrators of national crimes can be held criminally liable without excessively harsh punishment, and so that the collective nature of the crime can be imputed to the collectivity as well as to the individual perpetrator). For a discussion of the European Court of Human Rights's ultimate vindication of Papon, see *supra* note 71. From his trial onwards, Papon and his lawyer made it clear that if Papon were convicted, France would be convicted in the European arena, a position with which many French legal scholars agreed, and which proved to have been an accurate prediction.

ated in U.S. courts, further intensified France's attention to its past. The problem of Vichy is far from over. It is clear that Vichy will not go away, no matter what the courts do, and French society as a whole is becoming more receptive to self-examination.⁷⁸ Less clear is whether the courts can offer the appropriate forum for France's coming to terms with its own history.⁷⁹ It is perhaps preferable that the debate take place in a wider arena.⁸⁰

The specter of Algeria, cleverly raised by Jacques Vergès, Barbie's defense lawyer, also would not "go away." Both Vichy and Algeria are like palimpsests, texts smothered by superimposed layers of history and rewritten accounts, but slowly and inexorably penetrating through all of the smothering sheets to surface after all, in a writing that must be decoded by new generations. Perhaps not coincidentally, the two periods are linked by the person of Vichy collaborator Maurice Papon. His career under Vichy was a prelude, not an impediment, to future professional successes and eminence. Papon eventually became a cabinet minister under François Mitterrand.⁸¹ Before then, in the 1960s, he rose to become *préfet de police* in Paris.⁸² During that tenure, he ordered the torture and massacre of Algerians in France.⁸³

On a legal level, despite the judicial contortions of the crime against humanity that would have seemed to have removed France

78 On April 12, 2002, the *Conseil d'État* issued an opinion concerning Papon's demand that the French government be required to pay the amount for which he had been held liable to the civil-party plaintiffs. *Décision du Conseil d'État: Le Conseil d'État statuant au contentieux, sur le rapport de la 1ère sous-section de la Section de contentieux, No. 238689, Séance du 5 avril 2002, lecture du 12 avril 2002—M. Papon*, at http://www.conseil-etat.fr/ce/jurispd/index_ac_ld0205.shtml (last visited Apr. 3, 2003). The *Conseil d'État* partly agreed with Papon, deciding that a portion of the responsibility for his crimes was attributable to the State. This "State" was Vichy France. The *Conseil d'État* ordered the French government to pay the civil-party plaintiffs for that portion, thus implicitly ruling that the French government of today is a successor government to Vichy France. My analysis stems from the text of the court's decision that appears on the Internet without any legal commentary as to its significance. I therefore have not yet had the benefit of what may be critical accompanying explanatory commentary. On the differences between civil- and common-law concepts of criminality, see Fletcher, *supra* note 77, at 1538–39 & n.163 (citing GEORGE P. FLETCHER, BASIC CONCEPTS OF CRIMINAL LAW 190–94 (1998)).

79 See Curran, *supra* note 36, at 73–96.

80 For the view that trials are appropriate and effective instruments of historical pedagogy, see Douglas, *supra* note 59, at 195.

81 See Curran, *supra* note 36, at 75.

82 See *id.*

83 See 2 PIERRE VIDAL-NAQUET, MÉMOIRES: LE TROUBLE ET LA LUMIÈRE 1955–1998, at 150 (1998); JEAN-LUC EINAUDI, OCTOBRE 1961: UN MASSACRE À PARIS (2001).

from the potential onus of crimes against humanity, France's conduct in Algeria erupted into scandal last year with the publication of a book by General Paul Aussaresses, *Services spéciaux: Algérie 1955–1957*.⁸⁴ The General recounts in detail that he tortured Algerians as part of France's military policy in Algeria. The book sports a prominent band with an unofficial subtitle added by the publisher: "My Testimony on Torture" (*Mon témoignage sur la torture*). A dual scandal has raged in France since its publication. On the one hand, the book recounts in detail what the general French media reports to have been known for decades, but had not been documented so irrefutably before. On the other hand, the author is not revealing his own conduct in order to indict France; on the contrary, he is completely unrepentant.⁸⁵

Official response has been ambiguous. President Chirac immediately withdrew General Aussaresses's *Légion d'honneur*. Whether that act signified repudiation of the torture, or rather, of the *telling* about the torture, is an issue of interpretation. A recent editorial in *Paris Match* put it this way: "What are we indignant about? About the confession of the old General Aussaresses about torture in Algeria. Or about the public exhibition of those crimes. Is it the torture that repels or its revelation that scandalizes?"⁸⁶

On the one hand, President Chirac's office issued a statement that he was "'horrified by General Aussaresses' declarations and condemns the atrocities, torture and summary executions and murders that may have been carried out during the war in Algeria.'"⁸⁷ On the other hand, Chirac

rejected calls for a formal apology over France's use of torture during the Algerian war of independence.

In a television interview, Mr Chirac said he would do nothing to detract from the honour of those French soldiers who'd fought in the conflict.

84 PAUL AUSSARESSES, *SERVICES SPÉCIAUX: ALGÉRIE 1955–1957* (2001).

85 *See id.* Aussaresses has declared his endorsement of torture verbally in numerous interviews and public appearances since the publication of his book, a number of which I have seen on the television channel that France exports, "TV-5." *See also* Brigitte Vital-Durand, *Le Procès du général Aussaresses: Un tortionnaire jugé pour ses mots*, LIBÉRATION, Nov. 26, 2001, at 16.

86 Alain Genestar, *Torture, la fin de la quarantaine*, PARIS MATCH, May 17, 2001, at 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 révulse ou sa révélation qui scandalise?").

87 *Chirac Condemns Torture General*, BBC NEWS, May 4, 2001, at <http://news.bbc.co.uk/1/hi/world/europe/1312556.stm> (last visited Apr. 3, 2003) (quoting a press release issued by French President Chirac's office).

He said it was important not to reopen old wounds and he urged both countries to continue along the path of reconciliation.⁸⁸

Predictably, part of the French public is clamoring to try General Aussaresses for crimes against humanity.⁸⁹ As with Papon, it is the only serious crime which would not be dismissed, because all others would violate a statute of limitations.⁹⁰ *Judicial Diplomacy* reported Pierre Mairat, an attorney for the Movement Against Racism and for Friendship Among Peoples (*le Mouvement contre le racisme et pour l'amitié entre les peuples* ["MRAP"]), as saying that there should be "judgement of Aussaresses for crimes against humanity."⁹¹

The MRAP accordingly filed a lawsuit for crimes against humanity against Aussaresses on May 9, 2001.⁹² While human rights groups so far have not succeeded in having Aussaresses prosecuted either for crimes against humanity or for war crimes, the British Broadcasting Corp. correctly reported that "the mood in France is increasingly one of atonement for atrocities committed in the former colony, and the [Aussaresses] book . . . has struck a very raw nerve."⁹³ On the other hand, although the suits based on a theory of crimes against humanity that have been resolved so far have resulted in dismissal,⁹⁴ the issue still is pending. The MRAP suit was dismissed in July of 2001, but the MRAP appealed.⁹⁵ Judgment was rendered against the MRAP by the appellate court in December, 2001,⁹⁶ but the MRAP has appealed that

88 *Algeria: Chirac Rejects "Torture Apology"*, BBC NEWS, Dec. 15, 2000, at <http://news.bbc.co.uk/1/hi/world/europe/1071504.stm> (last visited Apr. 3, 2003).

89 See Genestar, *supra* note 86 ("La notion de crime contre l'humanité est à manier avec précaution. L'envie, immédiate, est de juger le général Aussaresses pour ses crimes.").

90 The courts did find another criminal violation, and Aussaresses has undergone the first proceeding. See *infra* notes 115–24 and accompanying text.

91 Arnaud Grellier, *General Aussaresses Sentenced*, DIPLOMATIE JUDICIAIRE, Jan. 25, 2002, at <http://www.diplomatiejudiciaire.com/UK/Aussaresses4.html> (last visited Apr. 3, 2003). *Agence France-Presse* reports that the prosecution did not even open an investigation when the LDH filed a complaint against Aussaresses for crimes against humanity. See *Aussaresses: Pas de poursuites pour "crimes contre l'humanité"*, AGENCE FRANCE-PRESSE, Dec. 14, 2001.

92 See *Paul Aussaresses, Général de brigade de l'armée française: Le général Paul Aussaresses a été reconnu coupable d'apologie de ses crimes commis pendant la guerre d'Algérie*, DIPLOMATIE JUDICIAIRE, Jan. 25, 2002, at <http://www.diplomatiejudiciaire.com/Aussaresses.hum> (last visited Apr. 3, 2003) [hereinafter *Paul Aussaresses*].

93 Hugh Schofield, *French General Charged over Algeria*, BBC NEWS, June 15, 2001, at <http://news.bbc.co.uk/1/hi/world/europe/1391234.stm> (last visited Apr. 3, 2003).

94 See Grellier, *supra* note 91.

95 *Paul Aussaresses*, *supra* note 92.

96 *Id.*

decision to the *Cour de cassation*.⁹⁷ Moreover, two other suits were filed by civil parties, asserting crimes against humanity—one by a victim of torture in Algeria, and the other by two sisters of an Algerian FLN leader allegedly murdered in the presence of Aussaresses.⁹⁸ As of January 18, 2002, the suit of the sisters was dismissed.⁹⁹

The move to prosecute Aussaresses for war crimes also failed because to date even war crimes are subject to a statute of limitations in France. Although France has signed the European Convention of January 25, 1974, on the imprescriptibility of war crimes,¹⁰⁰ France's Parliament has not ratified the Convention.¹⁰¹ In addition to the European Convention, the United Nations Convention of November 26, 1968, also makes war crimes imprescriptible.¹⁰² However, the French law of 1964 that took crimes against humanity outside the scope of limitations periods "clearly limited imprescriptibility solely to crimes against humanity, to the exclusion of war crimes."¹⁰³ Indeed, Professor Roujou de Boubée notes that, unlike prior law, the 1964 text no longer explicitly linked imprescriptibility to the nature of the crime.¹⁰⁴ While he concludes that this does not mean that there is no

97 *Id.* As far as I have been able to ascertain, the case is pending as of this writing.

98 *Id.*

99 See Philippe Bernard, *Guerre d'Algérie: L'impossible anniversaire*, LE MONDE, Jan. 24, 2002, at 18 (indicating that an appeal of the dismissal was likely).

100 European Convention on the Non-Applicability of Statutory Limitations to Crimes Against Humanity and War Crimes, opened for signature Jan. 24, 1974, Europ. T.S., No. 82, reprinted in 13 I.L.M. 540.

101 ROUJOU DE BOUBÉE ET AL., *supra* note 45, at 108 n.7; Eric Conan, *Aussaresses: Plaintes en souffrance*, L'EXPRESS, May 24, 2001, at 22. On the distinction between crimes against humanity and war crimes, see Levasseur, *supra* note 32, at 260, 271.

102 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, Nov. 26, 1968, 754 U.N.T.S. 73.

103 Boudarel, *supra* note 37, at 284 (citing Jacques Francillon, *Jurisque Pénal Annexes*, Fasc. 410, no. 140, and sources cited therein). In section 3 of part III.A., the source continues:

La loi du 26 décembre 1964, en constatant l'imprescriptibilité des 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 [sic] du 8 août 1945", a clairement restreint l'imprescriptibilité aux seuls crimes contre l'humanité, à l'exclusion des crimes de guerre.

Id. To translate,

The law of December 26, 1964, in declaring the imprescriptibility of crimes against humanity "as they are defined by the U.N. Resolution of February 13, 1946, defining crimes against humanity as they figure in the Charter of the International Tribunal of August 8, 1945," clearly restricted imprescriptibility solely to crimes against humanity, to the exclusion of war crimes.

104 See ROUJOU DE BOUBÉE ET AL., *supra* note 45, at 128.

connection left between imprescriptibility and the nature of the offense,¹⁰⁵ severance of a *necessary* linkage between the nature of crime and imprescriptibility has emerged.¹⁰⁶

In *Boudarel*,¹⁰⁷ another French war crimes case in which the plaintiffs asserted crimes against humanity, and one that followed on the heels of the *Touvier* case, a legal commentator of the *Touvier* decision of November 27, 1992, noted that the court had "formally distinguished the Vichy régime from the Rome-Berlin Axis powers; namely, Germany and Italy (to which it perhaps is apposite to add their European allies, Hungary, Bulgaria, Romania)."¹⁰⁸ In *Boudarel*, the *Cour de cassation* interpreted *Touvier* not only as categorically limiting crimes against humanity under French law to acts committed by or for a European Axis power, but also, and more specifically, as excluding acts committed in the far east.¹⁰⁹

The *Boudarel* case was to reach France's highest court, but it involved alleged crimes against humanity committed during France's conflict in Vietnam. Boudarel was a Frenchman who had deserted the French army in Vietnam, proceeding to join the Communist Viêt-Minh, and to torture French prisoners of war, participating and often directing their systematic starvation and political brainwashing.¹¹⁰ The rapporteur of the *Cour de cassation* opinion in *Boudarel* concluded that the *Touvier* decision of 1992 had limited "the field of application of the Nuremberg Charter to the Axis powers and their accomplices."¹¹¹ The Dalloz edition of the French Criminal Code mirrors the case law in excluding acts committed in Vietnam as outside the scope of the crime against humanity:

The provisions of the law of December 26, 1964, and of the statute of the Nuremberg International Tribunal, appended to the London Charter of August 8, 1945, involved only acts committed on behalf of European Axis powers; moreover, the Charter of the Tokyo International Military Tribunal, neither ratified nor published in France, and which did not figure in the intended scope [*qui n'est pas entrée*

105 *Id.*

106 This result may not be attributable to the text of the law, however, because judicial interpretation has been crucial in defining the modern French crime against humanity.

107 *Boudarel*, *supra* note 37.

108 *Id.* at 284 ("Ainsi le régime de Vichy a été distingué formellement des puissances de l'Axe Rome-Berlin, c'est-à-dire l'Allemagne et l'Italie (auxquelles il convient peut-être d'ajouter leurs alliés européens, Hongrie, Bulgarie, Roumanie).").

109 *Id.*

110 *Id.*

111 *Id.* ("Le champ d'application de la charte de Nuremberg a été limité aux puissances de l'Axe, et à leurs complices.").

dans les prévisions"] of the law of December 26, 1964 or of the United Nations' resolution of February 13, 1946, addresses, in its Art. 5, only abuses committed by Japanese war criminals or their accomplices; thus, the persecutions and inhuman treatments inflicted on prisoners of the Viêt-Minh, after the Second World War, by a French national, are not amenable to being considered as crimes against humanity and necessarily come within the scope of Article 30 of the law of June 18, 1966, granting amnesty with respect to all crimes linked to the events arising from the Vietnamese insurrection.¹¹²

The *Boudarel* case suggests that the French judiciary will not try Aussaresses for crimes against humanity because only crimes against humanity committed in the course of the Second World War, and excluding the Orient, can come within the scope of imprescriptibility.¹¹³ Moreover, in the excerpt quoted above, the *Boudarel* court further held that, even if the nature of the crimes committed by Boudarel did qualify as crimes against humanity, they were not cognizable because all acts arising out of the Vietnam conflict had been amnestied pursuant to Article 30 of the law of June 18, 1966.¹¹⁴

This last reason also would seem determinative for Aussaresses inasmuch as a similar amnesty law was passed with respect to all acts committed during the Algerian conflict.¹¹⁵ Indeed, in two previous decisions, *Yacoub*¹¹⁶ and *Lakdar-Tourni*,¹¹⁷ the *Cour de cassation* already had ruled that the Algerian amnesty barred a lawsuit in which the plaintiff had alleged crimes against humanity in connection with that conflict.

In the closely knit relation of law to politics, France's courts have sought to appease the most recent public outcry, arising from the Aussaresses situation, by hauling General Aussaresses and his publisher into court, not for crimes against humanity, but for a little used code violation falling under legal infractions by the press ("*délit de presse*").¹¹⁸ The author and his publisher were charged with and con-

112 C. PÉN. DALLOZ, *supra* note 37, at 150.

113 See Boudarel, *supra* note 37, at 289-90.

114 *Id.* at 290; see also *supra* text accompanying note 112.

115 See Ordonnance No. 62-248 of Aug. 14, 1962; Loi No. 68-697 of July 31, 1968, discussed in Boudarel, *supra* note 37, at 288-89.

116 On *Yacoub*, see Cass. crim., Nov. 29, 1988, appeal no. 87-80/566, Dalloz 1991, discussed in Boudarel, *supra* note 37, at 288-89.

117 On *Lakdar-Tourni*, see Dalloz 1991, Chron. at 231, text of decision appended to Mme Poncela, *L'humanité, une victime peu présentable*, cited in ROUJOU DE BOUBÉE ET AL., *supra* note 45, at 129 n.1.

118 See C. PÉN. DALLOZ, *supra* note 37, art. 23 (L. no. 72-546 du 1er juill. 1972), at 1679.

victed of “complicity for apologizing for war crimes” by the *tribunal correctionnel de Paris*.¹¹⁹ Among the civil parties were the MRAP, the League of Human Rights (*la Ligue des droits de l'homme* [“LDH”]) and the Association of Christians for the Abolition of Torture (*l'Association des chrétiens pour l'abolition de la torture* [“ACAT”]).¹²⁰ Each of the civil-party plaintiffs was awarded one euro in damages.¹²¹

The judge expressed indignation about Aussaresses’s endorsement of torture and murder, but the three-day court proceedings did not address national responsibility or guilt or the relation of Aussaresses’ conduct to national policy. The focus, rather, was on whether the book “incited readers to reach a favorable moral judgment” about the matters Aussaresses recounted.¹²² The court noted in particular that the general’s lack of remorse was not constitutive of the criminal code violation at issue. Rather, his commentary at the beginning of his book was a “statement of principle [that] valorized in advance the acts set forth in the rest of the book” and “removed from the eyes of the reader the moral turpitude inherent in actions condemned without reserve by the international community.”¹²³

This may serve the expiatory function of the trial in the manner the scholar René Girard believes to be the primary function of trials: the institutionalization of a cathartic channeling for popular emotions that otherwise would threaten a polity’s stability.¹²⁴ A French publisher summarized the case against Aussaresses, and more particularly the fact that his publisher received a stiffer penalty than Aussaresses,

119 See *id.* art. 24 (L. no. 92-1336 du 16 déc. 1992), at 1684. This is a “*délit de presse*,” a violation of the press. See *id.* art. 23, at 1679.

120 See Paul Aussaresses, *supra* note 92.

121 See Franck Johannès, *Le général Aussaresses a été condamné à 7 500 euros d'amende pour "apologie de crimes de guerre"*, LE MONDE, Jan. 27–28, 2002, at 6. Note that the award of one euro is the legal idea that used to be known as “*le franc symbolique*,” a judicial award aiming to convey moral vindication.

122 Franck Johannès, *100 000 francs d'amende requis contre le général Aussaresses et ses éditeurs*, LE MONDE, Nov. 30, 2001, at 14.

123 Both quotes appear in French in Marie-Estelle Pech, *Le général Aussaresses condamné à 7 500 euros d'amende*, LE FIGARO, Jan. 26, 2002, at 8. (As of this writing, I have not been able to get the court opinion of January 25, 2002.) See also Marie-Estelle Pech, *Le général Aussaresses de retour devant les tribunaux*, LE FIGARO, Feb. 21, 2003, at 9 (reporting that Aussaresses’s sentence was upheld before an appeals court in Paris).

124 See RENÉ GIRARD, *LA VIOLENCE ET LE SACRÉ passim* (1972); see also James Q. Whitman, *Jhering parmi les Français, 1870–1918*, in *LA SCIENCE JURIDIQUE FRANÇAISE ET LA SCIENCE JURIDIQUE ALLEMANDE DE 1870 À 1918*, at 151, 156 (Olivier Beaud & Patrick Wachsmann eds., Presses Universitaires de Strasbourg 1997) (discussing Professor Whitman’s rendition of Jhering’s view that “the modern court’s task is to produce a fight, to imitate ancient vengeance”).

as signifying that the crime itself was less important than its publication.¹²⁵

The judicial setting was devoid of legal and political consequences for the French government or, indeed, for anyone but the publishers and an individual defendant reviled by every side, whether because he had “spilled the beans” on France’s murderous practices in Algeria, or, for the other side, because he personally and unrepentantly had committed torture and murder. The judiciary oversaw a discussion of France’s practices in Algeria so confined by the delimitations of the criminal charge that had been brought, that no argument connected to crimes against humanity was legally cognizable within it. The *tribunal correctionnel de Paris* decided that Aussaresses’s infraction lay in the book’s justifying the methods used in Algeria, and that one does not have the right to say everything in the name of freedom of expression.¹²⁶ France’s role in Algeria and towards Algerians was not an issue; only its metatext was an issue—namely, Aussaresses’s commentary on it, and the publisher’s publication of it.

Politicizing and distorting the crime against humanity has not been the sole province of the courts. While on the one hand the courts continually have redefined the crime against humanity for the reasons discussed above; on the other hand, parties do the same for reasons of a different motivation. Plaintiffs urge redefinition so as to allow their claims to be heard, to be judicially cognizable (“*recevables*”). They allege crimes against humanity where the plaintiffs otherwise would be barred from asserting any claims. Similarly, for their own purposes, defendants cast the issues in legal contexts likely to displace the original focus. General Aussaresses’s lawyer, for example,

125 See Olivier Le Naire, *Qui veut bâillonner l'édition?*, L'EXPRESS, Apr. 11, 2002, at 46. The noted French feminist attorney and author, Gisèle Halimi, is reported as having said that the 7500 euro fine the court imposed on Aussaresses was so minimal a penalty as to make his conviction “futile.” See Emilie Grangeray, *Gisèle Halimi ou le choix des mots*, LE MONDE, Mar. 1, 2002, at X. Indeed, the penalty of the publishers Perrin, a subsidiary of Perrin and Plon, was 15,000 euros each, twice the amount Aussaresses was ordered to pay, raising questions of freedom of expression. See, e.g., Alain Salles, *Le livre et la justice*, LE MONDE, Mar. 5, 2002, at 17.

126 I am translating almost word for word from a November 29, 2001, French TV-5 broadcast of a program on which I took notes. For the French view on the limitations appropriate to freedom of expression, see ALICE KAPLAN, *THE COLLABORATOR: THE TRIAL AND EXECUTION OF ROBERT BRASILLACH* 227–29 (2000); PHILIP WATTS, *ALLEGORIES OF THE PURGE: HOW LITERATURE RESPONDED TO THE POSTWAR TRIALS OF WRITERS AND INTELLECTUALS IN FRANCE* (1998).

defines the trial of his client simply as an issue of state censorship of expression.¹²⁷

French legal scholars today appear to have no qualms in assessing the function of legal proceedings as including an important component of political strategy. Professor Maistre du Chambon's recent commentary on statutes of limitations in French law goes so far as to refer to "social appeasement" as a recognized purpose of statutes of limitation.¹²⁸ His commentary underscores also the powerful, however much unintended, potential of procedure to affect substantive law. Professor Maistre du Chambon explains that a primary basis for statutes of limitation in public law proceedings is to punish prosecutorial inertia ("*la volonté de sanctionner l'inertie du Parquet*").¹²⁹ However one assesses the value of such a goal in and of itself, when contextualized, it necessarily places criminals beyond prosecution and crimes beyond justice where the state has been guilty of inertia.¹³⁰

The social appeasement factor in the Aussaresses prosecution appears to have fallen short of fulfillment. The latest and no doubt least expected consequence of the Aussaresses debacle has been the filing of a complaint on August 30, 2001 against France for crimes against humanity, not by the Algerians whom France's military tortured, but by the opposite camp: the Harkis, a pro-French Algerian group, allied with France during the war in Algeria, claiming to have been tortured by the nationalist FLN Algerians after France pulled out of Algeria pursuant to the Evian accords in 1962. They are suing France in a Paris court, the *tribunal de grande instance de Paris*, on the argument that, when France pulled out of Algeria, it became complicit in the ensuing massacre of Harkis because it knew or should have known that the FLN Algerian nationalists would massacre the Harkis.¹³¹ It is estimated that between 30,000 and 150,000 of them were murdered.¹³²

127 His lawyer was quoted as saying that this was "the first censorship of the history of France that men lived . . . in pain and in honor." Fabien Novial, *Le général Aussaresses condamné pour ses confessions sur la torture*, AGENCE FRANCE-PRESSE, Jan. 25, 2002. Nor is this by any means a specious contention. The defendant publishers, Perrin and Plon, make a similar, still stronger case for this position.

128 Patrick Maistre du Chambon, *L'hostilité de la Cour de cassation à l'égard de la prescription de l'action publique*, J.C.P. 2002, II, 10075, at 934 (May 22, 2002).

129 *Id.* at 931.

130 It should be noted in this context (as indeed Professor Maistre du Chambon does note) that the French judicial response to statutes of limitations in criminal matters has been one of hostility. *See id.*

131 *See* Laurent Chabrun et al., *La plainte des harkis est-elle justifiée?*, L'EXPRESS, Aug. 30, 2001, at 12.

132 *See id.*; *see also* *Les harkis*, in CHAMPS ÉLYSÉES 2-4 (2001).

Under a strict jurisprudential analysis, the Harki claim should fail due to the amnesty of Algerian conflict crimes; the inapplicability of the imprescriptibility criminal code provision to war crimes; and, finally, the fact that the allegations themselves do not accuse the French of the act of murder.¹³³ Rather, the complaint alleges that crimes against humanity are legally *attributable* to France even though France's enemies, the FLN Algerians, committed them, not Frenchmen and not persons acting under orders from, or on behalf of, France.

On the other hand, the public outcry to expand the crime against humanity beyond acts of the Second World War is considerable. In the *Boudarel* case, the *Cour de cassation* left the door open to this possibility by suggesting that amnesty laws may not apply to crimes that qualify in substantive nature as crimes against humanity.¹³⁴ In May of 2000, however, the court confirmed *Yacoub*,¹³⁵ ruling in a new case that crimes against humanity arising out of the Algerian conflict could not constitute the basis of legally cognizable claims because they were governed by the law of July 31, 1968, amnestying those events.¹³⁶

The plaintiffs in the May 2000 case had asserted civil-party status claims for crimes against humanity alleged to have been committed against pro-Algerian demonstrators in Paris on October 17, 1961.¹³⁷ The plaintiffs had argued that a national law granting amnesty cannot supersede a criminal violation of international law.¹³⁸ The academic commentator to the court opinion, as published in *La Semaine juridique*, noted critically of the *Cour de cassation* decision that French law contravened international law to the extent that a French perpetrator of a crime against humanity benefited from amnesty under French law.¹³⁹

On the other hand, another scholarly evaluation of the French crime against humanity is that legislative intent, long before judicial

133 See CHAMPS-ÉLYSÉES, *supra* note 132; Chabrun et al., *supra* note 131.

134 See Boudarel, *supra* note 37, at 289–90; Jacques-Henri Robert, *Note 38: Amnistie.—Crimes contre l'humanité—Prescription*, LOIS PÉNALES ANNEXES, J.-CL. PÉNAL ANNEXES 9 (1994).

135 See *supra* note 116.

136 Cass. crim., May 30, 2000, *reprinted in* 27 LA SEMAINE JURIDIQUE 1328 (July 4, 2001); *accord* Lakdar-Tourni, Cass. crim., Nov. 29, 1998, *cited in* ROUJOU DE BOUBÉE ET AL., *supra* note 45, at 129 n.1.

137 This was the massacre of Algerians conducted under the auspices of Papon in reaction to a demonstration by Algerians in Paris on that date. See *supra* note 83 and accompanying text.

138 See Jean-François Roulot, *Note: Un État peut-il amnistier des actes constitutifs de crimes internationaux*, in 27 LA SEMAINE JURIDIQUE 1329 (July 4, 2001).

139 *Id.* at 1330.

interpretation, made it a matter of French internal law, independent of international law.¹⁴⁰ Under this reasoning, national amnesty both does and should preclude prosecution of crimes against humanity. Among those who espouse this reasoning are some who concede that it has the potential to trivialize the crime against humanity as it exists in its international legal context.¹⁴¹

The *Semaine juridique* legal commentator deflected attention from the domain of law by noting that France's acts in Algeria were part of a "burning national debate that the judges clearly have not wanted to enter."¹⁴² Reflecting, among other things, the traditional civil-law system's privileging of the legislature over the judiciary, the commentator concluded that "if there is to be a debate, it should not be decided by judges alone, however eminent they may be, but before elected assemblies."¹⁴³

In fact, there has been at least one attempt to shift the locus of action to an "elected assembly." On January 22, 2002, France's National Assembly approved a bill to make March 19, the date of the Algerian cease-fire, a yearly date of national remembrance for the victims of Algeria, but the government announced that the bill would not be submitted to the Senate.¹⁴⁴ Moreover, close to five hundred indignant generals signed a manifesto to "rehabilitate the action of the [French] army in Algeria in the face of generalized defamation."¹⁴⁵ They are among what appears to be a small minority in France today that believes France's war in Algeria had legitimate and just goals, and refuses to yield the entire terrain of victimhood to Arab Algerians, just as, some forty years ago, Albert Camus steadfastly refused to yield that terrain to Jean-Paul Sartre.

CONCLUSION

The legacy of Nazism was to spawn in its immediate aftermath, as a reaction to it, the concept of crimes designed to prevent future Nazisms, such as the crime of genocide, and the crime against humanity. The stronger legacy of Nazism has been something different: the

140 ROUJOU DE BOUBÉE ET AL., *supra* note 45, at 108–09.

141 *See id.*

142 Roulot, *supra* note 138, at 1330 ("[U]n débat national brûlant dans lequel les juges n'ont manifestement pas voulu entrer.").

143 *Id.* ("[S]i débat il y a, ce dernier ne doit pas être tranché par les seuls juges, aussi éminents soient-ils, mais devant les assemblées élues.").

144 Jean-Dominique Merchet, *Guerre d'Algérie: 500 généraux montent en ligne*, LIBÉRATION, Jan. 23, 2002, at 14.

145 *See id.* (quotation translated from the original French).

politicization of law. Nazism did not cause this, but its occurrence enables us to recognize it more easily.

From the acts of Nazi collaborators to those of Algerian torturers, the crime against humanity has been handled by the courts of France with every attention to the political message and political consequences of the adjudications. In France today, the question of whether an accused person committed an act that substantively meets the definition of a crime against humanity has become virtually irrelevant except under the extremely limited set of circumstances discussed above.

The French courts' limitations and distortions of the crime against humanity have a sort of technical, legalistic basis inasmuch as the Nuremberg Charter refers to crimes arising from the Second World War, and the French national law is based on that charter.¹⁴⁶ On the other hand, the text of France's criminal code provision evokes a crime of a substantive nature, defined explicitly in terms of acts and motivations not circumscribed by any particular setting or event, and indeed with every apparent applicability to any act that otherwise meets the definition of the contemplated act and motive. No limitation to any specific military conflict or geographical location exists in the French code provision. Moreover, as even Professor Roujou de Boubée has emphasized, despite his approval of a French internal legal definition of the crime, France's crime against humanity purports to reflect universal values inspired by natural law.¹⁴⁷

The *Harki* suit underscores another aspect of the contemporary politico-legal context for crimes against humanity. France's actions in Algeria are under scrutiny for crimes committed as part of France's colonialist history. In the clamor for recognition that France committed crimes against humanity, violating national and international humanitarian and legal standards, there is no space allotted to crimes committed by any but the French. France is portrayed as the criminal perpetrator even, as in the *Harki* case, where the plaintiffs themselves allege that Algerians committed the criminal acts.

The chaotic uproar over France's conduct does not extend to an uproar over Algeria's acts, to similar demands for recognition that Algerians, in the name of Algeria, committed crimes against humanity. Thus, on one level, national courts have eviscerated a national crime against humanity through judicial processes. On another level, the

146 Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1546, 82 U.N.T.S. 284, *reprinted in* 2 SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL LAW 61 (Gabrielle Kirk McDonald et al. eds., 2000).

147 See ROUJOU DE BOUBÉE ET AL., *supra* note 45, at 103.

politics of application so far have immunized another nation and its individual perpetrators from judicial pursuit or moral opprobrium, as the anti-colonialist discourse has refused to cede space for victimhood to any but victims of colonialism.

French historian Henry Rousso has put it as follows:

The face of the hero little by little is fading away in favor of that of the victim, and the confrontation of former adversaries no longer concerns the question of knowing to what extent each side led a war of just aims—albeit with methods and consequences that rarely were [just]—but, rather, [the issue has become] their ability to present themselves as victims.¹⁴⁸

Ultimately, the perpetrators' acts themselves, which one might have supposed and hoped to be the dominant legal issue, have become a small and generally insufficient attribute of legal cognizance in France today. Moreover, even the selection of defendants does not depend solely on the actual identity of the actors, but also on political and social ideology. When one thinks of the faith Raphael Lemkin placed in law, perhaps one should be glad that he died shortly after what he still was able to experience as a moment of triumph, presaging, as he saw it, a future of definitive justice under law.¹⁴⁹

The crime against humanity has not changed in nature, nor has it changed in textual definition, but its judicial application is at the mercy of the politics of those who interpret it. The French example offers a view of judicial mechanisms that affect powerful substantive changes in law “under the cover of interpreting the law.”¹⁵⁰

148 Henry Rousso, *La guerre d'Algérie et la culture de la mémoire*, LE MONDE, Apr. 5, 2002, at 17. For an abstract and philosophical discussion relevant to this issue, see BADIOU, *supra* note 1, at 13 (“In his capacity as tormentor, man is an animal abjection, but we need to have the courage to say that, as a victim, in general he isn't any better.”).

149 See Professor Glendon's tribute to “the men and women [who were engaged in promoting the United Nations Universal Declaration of Human Rights of 1948] who, after two world wars which gave them every reason to despair about the human condition, did what they could to help make the world a better and safer place.” Glendon, *supra* note 31, at 1155. As Glendon also stated, “For them, the elusiveness of the goal did not mean it was not worth pursuing with all one's might and main.” *Id.* at 1174.

150 I take this expression from the French treatise that so describes the practice of the French judiciary to disguise its ulterior motives: “*sous le couvert de l'interprétation de la loi.*” JACQUES GHESTIN & GILLES GOUBEUX, *TRAITÉ DE DROIT CIVIL: INTRODUCTION GÉNÉRALE* 318 (1977). For a portrayal of the common-law mechanisms of unobtrusive change in judicially created law, see EDWARD H. LEVI, *AN INTRODUCTION TO LEGAL REASONING* 6–19 (1949).

The obstacles to assessing the contemporaneous status of underlying legal principles and values are steep at any time. They are likely to grow steeper in coming years, however, and to become one of the inevitable costs of globalization. Society is the context for law and for law's meaning, and, as our world unifies ever more, and as rival perspectives and understandings diminish and disappear, "a certain type of discourse dominates the public debates to the point of preventing the multitude from hearing any point of view which would not share the assumptions and the formal structure of that dominant discourse."¹⁵¹ If those assumptions themselves become incompatible with fundamental principles of human rights, legal concepts such as the crime against humanity will not be adjudicated to serve humanity, and eventually even may justify crimes against humanity by masking and mischaracterizing them.

As Byron Kaldis points out, "peace and justice . . . wrongly [are] supposed to be somehow pursued independently of the kind of actors responsible for bringing [them] about. That is, such an end is wrongly expected to be accomplished with the help of the existing actors, themselves remaining unaltered . . ." ¹⁵²

A paradox of our time is that law's degeneration in Nazi- and Stalin-dominated countries in the first half of the twentieth century has spawned at the dawn of the twenty-first century a bewildering faith in law, rather than an abiding concern about its potential for rank politicization and consequent legitimation and perpetration of injustice.¹⁵³

151 Yves Citton, *Circularism and the Tyranny of Demand* (unpublished manuscript, on file with author). See BADIOU, *supra* note 1, at 76 ("Each time one absolutizes the power of a truth, one organizes an evil."). On our society's decreasing tolerance for conflicting perspectives of the good, see George P. Fletcher, *The Case for Tolerance*, 13 SOC. PHIL. & POL'Y 229-34 (1996).

152 Byron Kaldis, *World Justice, Global Politics and Nation States: Three Ethico-Political Problems*, 7 EUR. LEGACY 167, 171-72 (2002).

153 In a recent interview with Robert Badinter, former Minister of Justice, about the International Criminal Tribunal, the *Express* news magazine asked Badinter when he thought the international court would materialize, putting it as follows: "when will utopia become reality?" ("*Quand l'utopie deviendra-t-elle réalité?*"). The question was understood and answered without comment as to its dubious assumption. Diane Galliot & Vincent Hugueux, "*Interdire l'impunité*": *Les chantiers de la Cour pénale internationale vus par Robert Badinter*, L'EXPRESS, July 4, 2002, at 19. The United States has a long tradition of reluctance to be bound by universal laws. René Cassin described U.S. refusal of the League of Nations's distinction between wars of aggression and defense as emanating from the "Anglo-Saxon mentality" that refuses rigidity. CASSIN, *supra* note 7, at 22. Then, as now, the United States expressed its position as based on the danger that nations might manipulate the written law so as to wage wars of aggression disguised as wars of defense. See *id.* What Cassin described as an Anglo-Saxon

Raphael Lemkin understood the truth of Nazi jurisprudence, but he forgot its most profound truth. The political philosopher Ernst Cassirer understood it better. In 1946, in *The Myth of the State*, Cassirer wrote that legal concepts and legal texts “have no real binding force, if they are not the expression of [what] is written in the citizens’ minds. Without this moral support the very strength of a state becomes its inherent danger.”¹⁵⁴ His words apply also to supranational and international legal orders, and we would do well to heed them today.

mentality may have its roots in the deeply entrenched skepticism in common-law legal culture towards the law qua text, what Professor Farnsworth has called the common law “mistrust” of legislation. See E. Allan Farnsworth, *A Common Lawyer’s View of His Civilian Colleagues*, 57 *LA. L. REV.* 227, 233 (1996). One might also think in this context of Karl Popper’s reminder that “it is we who must distinguish between the true prophets and the false prophets.” 1 K.R. POPPER, *THE OPEN SOCIETY AND ITS ENEMIES: THE SPELL OF PLATO* 66 (5th ed. rev. 1966).

154 ERNST CASSIRER, *THE MYTH OF THE STATE* 76 (1946); see also POPPER, *supra* note 153, at 115 (“[T]he strength of the laws does not lie in the sanctions, in the protective power of the state which enforces them, but in the individual’s readiness to obey them, i.e. in the individual’s moral will.”); Glendon, *supra* note 31, at 1176. Glendon observed,

The flaws in the human rights enterprise are less in its documentary landmarks than in the human person—with all our potential for good and evil, reason and impulse, trust and betrayal, creativity and destruction, selfishness, and cooperation. [T]he framers [of the Universal Declaration of Human Rights] staked their faith, in Article 1, on “reason and conscience.”

But they were under no illusions about the precariousness of that wager.

Glendon, *supra* note 31, at 1176.