

# Paul Touvier and the Crime Against Humanity<sup>†</sup>

MICHAEL E. TIGAR<sup>††</sup>

SUSAN C. CASEY<sup>†††</sup>

ISABELLE GIORDANI<sup>††††</sup>

SIVAKUMAREN MARDEMOOTOO<sup>†††††</sup>

## SUMMARY

I. INTRODUCTION .....	286
II. VICHY FRANCE: THE BACKGROUND .....	286
III. TOUVIER'S ROLE IN VICHY FRANCE .....	288
IV. THE CRIME AGAINST HUMANITY .....	291
A. <i>The August 1945 Charter</i> .....	291
B. <i>The French Penal Code</i> .....	293
C. <i>The Barbie Case: Too Clever by Half</i> .....	294
V. THE TOUVIER LITIGATION .....	296
A. <i>The Events Surrounding Touvier's Capture and the Pretrial Legal Battle</i> ...	296
B. <i>Touvier's Day in Court</i> .....	299
VI. LEGAL ANALYSIS: THE STATE AGENCY DILEMMA .....	304
VII. CONCLUSION .....	309

---

<sup>†</sup> The idea for this essay began at a discussion of the *Touvier* trial with Professor Tigar's students at the *Faculté de Droit* at Aix-en-Provence, with the assistance of Professor André Baldous. Ms. Casey provided further impetus for it by her research assistance on international human rights issues, and continued with research and editorial work as the essay developed. Ms. Giordani researched French law and procedure and obtained original sources. Mr. Mardemootoo worked on further research and assisted in formulating the issues. The translations of most French materials were initially done by Professor Tigar and reviewed by Ms. Giordani and Mr. Mardemootoo. As we were working on the project, the *Texas International Law Journal* editors told us of Ms. Finkelstein's article, and we decided to turn our effort into a complementary piece that drew some slightly different conclusions.

<sup>††</sup> Professor of Law and holder of the Joseph D. Jamail Centennial Chair in Law, The University of Texas School of Law.

<sup>†††</sup> J.D. 1995, The University of Texas School of Law.

<sup>††††</sup> Doctoral student, University of Aix-Marseille III; Visiting Scholar, The University of Texas at Austin.

<sup>†††††</sup> *Maîtrise en droit*, University of Aix-Marseille III Faculty of Law; LL.M. 1995, The University of Texas School of Law.

## I. INTRODUCTION

The prosecution of Paul Touvier for crimes against humanity has consumed the attention of lawyers, scholars, and journalists.<sup>1</sup> In part, this is because many French people, including judges, have refused to face the truth of Vichy France collaboration with Hitler's atrocities during the Second World War. The *Touvier* case, and that of Klaus Barbie before him, have forced discussion of this issue and now tell a compelling story of the ways in which French political figures have struggled with the legacy of the German occupation and the resistance to that occupation. In addition, the opinions of the jurists in the case give some hint of the stark power of the "crime against humanity" as a revolutionary concept in international penal law and in the movement to vindicate and extend international human rights.

The case against Paul Touvier also teaches basic lessons to the legal community in general, for it illustrates the important maxim that the heart of a criminal case lies in the details of proof. Touvier's claims—to have been uninvolved, to have acted from good motives, to have been an honorable soldier—were stripped from him one by one through the quiet force of facts rather than by rhetoric, prosecutorial excess, or judicial overreaching. The *Touvier* case, therefore, is an instructive example in many realms—historical, political international, and legal—and can teach much to those who will study it.

This Article sets out some basic facts about the Vichy government and Touvier's involvement therein, continues by outlining the origins and development of the crime against humanity in international law and as adopted in France, and concludes by dealing specifically with the *Touvier* case. The Article is meant to complement the factual and legal analysis in Claire Finkelstein's *Changing Notions of State Agency in International Law: The Case of Paul Touvier*, also in this issue.<sup>2</sup>

## II. VICHY FRANCE: THE BACKGROUND

On May 15, 1940, Germany invaded France.<sup>3</sup> On June 14, 1940, German troops entered Paris by the Porte de la Vilette.<sup>4</sup> That night, SS-Obersturmführer Helmut

---

1. See, e.g., Ted Morgan, *The Hidden Henchman*, N.Y. TIMES, May 22, 1994, § 6 (Magazine), at 31, to which we cite below as being among the most accessible discussions of the facts; Catherine Grynfolgel, *Touvier et la justice, une affaire de crime contre l'humanité?*, REVUE DE SCIENCE CRIMINELLE, Jan.-Mar. 1993, at 62; Laurent Greilsamer, *Paul Touvier, un collaborateur dans l'Histoire—Flic et Devot*, LE MONDE, Mar. 17, 1994, Dossier spécial, at I; Laurent Greilsamer, *Paul Touvier, un collaborateur dans l'Histoire—50 ans de procédure*, LE MONDE, Mar. 17, 1994, Dossier spécial, at III [hereinafter *Touvier—50 ans de procédure*]; Thomas Ferenczi, *Un entretien avec Jean-Luc Nancy*, LE MONDE, Mar. 29, 1994, at 2.

2. Claire Finkelstein, *Changing Notions of State Agency in International Law: The Case of Paul Touvier*, 30 TEX. INT'L L.J. 261 (1995). The reader will find some overlap of factual and legal discussion, but we have tried to keep that to a minimum.

3. SUSAN ZUCOTTI, *THE HOLOCAUST, THE FRENCH, AND THE JEWS* 37 (1993).

4. PHILIPPE BOURDREL, *HISTOIRE DES JUIFS DE FRANCE* 339 (1974).

Knochen, the head of the Security Police in France,<sup>5</sup> installed himself and his command at the Hotel du Louvre.<sup>6</sup>

The French National Assembly met in disorder at Vichy. Under the influence of Vice-Premier Pierre Laval, the Assembly voted full emergency and constitution-making power to Premier Henri Phillipe Pétain, a war hero with the rank of Marshal. Within a few weeks, Pétain formed a government that promptly made peace with the Germans in exchange for nominal sovereignty and independence in a part of France.<sup>7</sup>

French law soon began to reflect the influence of Nazi Germany. On July 17, the Vichy government passed its first law regulating the freedom of “foreigners,” with major emphasis on Jews who were not French citizens.<sup>8</sup> Five days later, another new law provided a mechanism for revoking the naturalization of Jews who had obtained French citizenship after August 1927.<sup>9</sup> Certainly, the Vichy government did not automatically and completely heed the German will of formulating and executing genocidal policies, and some Vichy ministers were more compliant in this regard than others. At times, members of the Vichy government attempted to resist German importunities concerning the persecution, roundup, detention, execution, and deportation of Jews and other groups targeted by the Nazis. However, Pétain’s feeble efforts to control some of his ministers resulted in German counterpressure to which Pétain usually yielded. These efforts became feebler and less availing, however, after German troops entered Vichy territory in November 1942.<sup>10</sup> Laval, whom Pétain had removed from the government in 1940, rejoined the regime under German pressure.

In January 1943, a new military police detachment—the *Milice*—was established in the Vichy zone<sup>11</sup> under the command of the most virulently pro-Nazi members of the Pétain cabinet. Reporting directly to Darnand, Secretary of State for the Maintenance of Order, the *Milice* was a direct outgrowth of the Service of the Legionnaire Order, or SOL. The SOL celebrated its goals and functions in a theme song—a sort of “homage to Pétain”—the last stanza of which is as follows:

SOL, make pure France’s lot:  
Bolsheviks, freemasons, enemies  
Israel, ignoble rot  
Nauseated France vomits you out<sup>12</sup>

The *Milice* came to occupy an increasingly important role in the Vichy government during 1943 and 1944, right up to the liberation of Paris in August 1944. Its actions included the July 6, 1944 assassination of Georges Mandel,<sup>13</sup> a cabinet officer under the

5. The Security Police was a subdivision of the Reich Security Division of the *Schutzstaffel*, or SS as it was called. This organization is best known, however, as the infamous Gestapo. MICHAEL R. MARRUS & ROBERT O. PAXTON, *VICHY FRANCE AND THE JEWS* 78–79 (1981).

6. DAVID PRYCE-JONES, *PARIS IN THE THIRD REICH: A HISTORY OF THE GERMAN OCCUPATION, 1940–1944*, at 43 (1981). See also MARRUS & PAXTON, *supra* note 5, at 79.

7. See MARRUS & PAXTON, *supra* note 5, at 11–12.

8. BOURDREL, *supra* note 4, at 354–55; see also ZUCOTTI, *supra* note 3, at 53.

9. BOURDREL, *supra* note 4, at 354–55. The commission, headed by Jean-Marie Roussel, began its work quickly, resulting in further restrictions on Jews. *Id.* at 355.

10. See PAUL WEBSTER, *PÉTAIN’S CRIME: THE FULL STORY OF FRENCH COLLABORATION IN THE HOLOCAUST* 158 (1991) (describing German entry into Vichy in 1942).

11. PRYCE-JONES, *supra* note 6, at 180–81.

12. BOURDREL, *supra* note 4, at 504.

13. ZUCOTTI, *supra* note 3, at 48–49.

Third Republic and opponent of the Vichy France "reorganization."<sup>14</sup> Mandel's assassination was, according to the *Milice* "official version," in retaliation for the killing of Philippe Henriot, Vichy's virulently pro-Nazi Secretary of State for "information," by the Resistance on June 28, 1944.<sup>15</sup> There was also evidence, however, that Mandel was singled out for assassination because he was a Jew.<sup>16</sup> At Touvier's trial, some of the civil plaintiffs supported their theory that Touvier's crimes were ordered by the Gestapo by attempting to show that the *Milice* had killed Mandel on Hitler's orders.<sup>17</sup>

The assassination of Mandel, an eloquent and visible symbol of anti-Vichy and anti-German sentiment, symbolizes essential truths about the *Milice* and the Vichy government. Mandel was killed to avenge the death of Henriot. Henriot's important position within the Vichy establishment as the war drew to a close evidenced Vichy's alliance with the Reich and its avowed dedication to anti-Jewish and anti-leftist pogroms. In turn, the *Milice's* response to Henriot's death was evidence that it had become "the state," and that it felt free to apprehend, try, and punish people without the formality of a trial or even formal charges. And while Mandel was perhaps the *Milice's* most prominent target, he was not its first.

### III. TOUVIER'S ROLE IN VICHY FRANCE<sup>18</sup>

Among the first targets of *Milice* violence in the wake of Henriot's death were seven Jews rounded up and shot in the early hours of June 29, 1944, at a cemetery near the town of Rillieux-la-Pape.<sup>19</sup> This reprisal was conducted under the personal direction of Paul Touvier, and his role became the sole basis on which he was tried and convicted in Versailles in the spring of 1994.<sup>20</sup> Touvier's common law crime, if one credits the evidence against him, was a homicide aggravated by theft of the victims' goods.<sup>21</sup> Later, however, when his fugitive days were ended and he finally faced his accusers, he would claim that his actions at Rillieux-la-Pape had actually *saved* lives. The Germans, he insisted, had been so exercised about Henriot's death that they had commanded the assassination of dozens of Jews.<sup>22</sup> Touvier claimed that he had managed to pare the number down to just seven.<sup>23</sup>

This claim led to a minute examination not only of Touvier's actions, but of Vichy-Third Reich relations during this critical period and the *Milice's* role in the closing days of the war. This factual examination took place against the backdrop of the Charter of the International Military Tribunal that defined the crime against humanity, the French Penal Code provisions that codified that offense, and the earlier case of Klaus Barbie, the Gestapo

14. *Id.*

15. BOURDREL, *supra* note 4, at 507 & n.1.

16. *Id.* at 505-07.

17. See ARNO KLARSFELD, TOUVIER, UN CRIME FRANÇAIS 74-75 (1994).

18. Much of this account of Touvier's background and involvement in the executions at Rillieux-la-Pape is taken from Ted Morgan's *The Hidden Henchman*, *supra* note 1.

19. Scott Kraft, *Collaborator Testifies on Killings of Seven Jews*, L.A. TIMES, Mar. 30, 1994, at A7.

20. *Id.*; see Judgment of Apr. 13, 1992, Cour d'appel de Paris, 1992 Gazette du Palais [G.P.], No. 1, at 387, 392, 400 (Fr.) (dismissing other charges against Touvier for lack of evidence).

21. Morgan, *supra* note 1, at 33-34 (describing how Touvier looted stores belonging to executed Jews, and then handed out "gifts" to onlookers to make it appear that neighbors had done the looting). The son of one of the seven victims testified at Touvier's trial that "[t]he *Milice* came to my father's store with a moving van and took everything." *Id.* at 78.

22. Alan Riding, *Frenchman Convicted of Crimes Against the Jews in '44*, N.Y. TIMES, Apr. 20, 1994, at A3.

23. Morgan, *supra* note 1, at 32. Touvier invoked the "Schindler defense" in claiming that he saved twenty-three Jews by getting the number to be killed down from thirty to seven.

agent known as “the Butcher of Lyon.”<sup>24</sup> Our discussion must begin, however, with the story of Touvier himself.

In June 1944, twenty-nine year old Touvier was in command of intelligence for the *Milice* over an area in which four million people lived.<sup>25</sup> Touvier’s dignified, almost regal mien at trial obscured how he had achieved his position of power within the *Milice*. During the early Vichy years, he held a clerical job with the railroad and lived with a prostitute whose husband was in jail. He joined the *Milice* in October 1943 and quickly achieved a leadership position.<sup>26</sup> He wore fine clothes, drove a car “requisitioned” from a *Milice* target, and collected money and belongings from Jews and other targets of *Milice* hostility.

Touvier concedes that on the afternoon of June 28, he returned to Lyon from Vichy, some 150 kilometers away, and set in motion the assassination of seven Jews.<sup>27</sup> However, in his version, upon his return to Lyon he was told by Victor de Bourmont, the *Milice* chief for Lyon, that the German Gestapo chief for Lyon, Werner Knab, had demanded the assassination of one hundred Jews in reprisal for Henriot’s death.<sup>28</sup> De Bourmont, said Touvier, had bargained Knab down to thirty.<sup>29</sup> Touvier, according to his version, told de Bourmont that they should start with just seven, and see whether that would be enough. On Touvier’s orders, eight named men were found and arrested, seven of whom were in fact executed: Glaeser, Schusselman, Zeizig, Ben-Zimra, Prock, Kryzkowski, and one man whose name has never been established.<sup>30</sup> And, as Touvier told it, once the seven were killed, there were no more requests.<sup>31</sup> At his trial, Touvier could not recall the names of any of the seven men he ordered killed.<sup>32</sup>

The primary difficulty with Touvier’s version of events is that there is almost nothing to corroborate his story, even inferentially. Both Werner Knab and Victor de Bourmont, who could verify Touvier’s account, were dead by the time of Touvier’s trial. In addition, hundreds of Jews had been imprisoned in the area, which would have eliminated any need for Touvier to procure seven more from the streets for execution. Finally, although seven prisoners were killed, one was spared.<sup>33</sup> He was Louis Goudard, a Resistance member but not a Jew.<sup>34</sup> Although he was in custody, he was left behind when the group of seven Jews was taken out of the Lyon *Milice* headquarters in the Impasse Cathelin.<sup>35</sup> He testified at Touvier’s trial that Touvier had selected the seven to be killed and had then made

24. Guyora Binder, *Representing Nazism: Advocacy and Identity at the Trial of Klaus Barbie*, 98 *YALE L.J.* 1321, 1325 (1989).

25. Morgan, *supra* note 1, at 32.

26. *Id.* at 37 (describing Touvier’s rise to a position of leadership “where he had the power to make arrests and have people killed”).

27. See Marcus Marby, *Ripping Through the Veil*, *NEWSWEEK*, July 19, 1993, at 29.

28. Riding, *supra* note 22, at A3.

29. Morgan, *supra* note 1, at 32 (arguing that “this matter should be settled among Frenchmen”).

30. The seven were lined up against the wall of a cemetery outside of town, shot in the back with submachine gun bursts, and once more in the back of the skull after they fell. The bodies were then lined up and nametags were affixed to their jackets. According to Édmond Fayolle, Touvier’s aide-de-camp who was nicknamed *la puce* (the flea), Touvier said the nametags were “[t]o impress the population.” One tag fell off; the lone prisoner who was spared never knew the name of the victim to whom it had been attached. *Id.* at 34. The death total could easily have been nine. One Jew, while being transported to the Impasse Cathelin, convinced his arrestor, a business associate, that he was not Jewish; he would have been arrested long before if he were. Another Jew arrived at the *Milice* headquarters shortly after the van left, carrying the seven who were executed. *Id.* at 33–34.

31. See *id.*

32. KLARSBELD, *supra* note 50, at 47.

33. Morgan, *supra* note 1, at 34.

34. *Id.* at 32.

35. *Id.* Ordering the execution of only the Jews formed the basis for charging Touvier with crimes against humanity.

the decision to leave Goudard behind.<sup>36</sup> Indeed, the names of five of the seven men who were assassinated apparently were derived from a list of names that Touvier had supplied to the arresting *Milice* officers.<sup>37</sup> The reprisals, then, were to be taken against Jews rather than against a known Resistance member, despite the fact that the Resistance had assassinated Henriot.<sup>38</sup>

That Touvier's account of what happened at Rillieux-la-Pape was untrue is also reflected in numerous witness statements made by *Milice* members who said of Touvier:

I did not hear anything concerning this affair . . . I have only had echoes from which I remember this: contrary to the orders from Vichy that prohibited all reprisals for the death of P. Henriot, the regional chief had on his own authority ordered the execution of ten Israelites at Lyon.<sup>39</sup>

\* \* \*

From the time that Touvier became a member of the Service, arrests were more numerous, the chief himself took the decisions . . . The emptying of Ziezig's store was directed and ordered by Touvier.<sup>40</sup>

\* \* \*

I think this execution is the work of the *Milice*. On June 28th, 1944, I heard while I was on duty, information concerning a punitive operation undertaken as a result of the assassination of P. Henriot . . . I asked Touvier if I should stay at *Milice* headquarters. On his affirmative response, I stayed at Impasse Cathelin, waiting for further orders. The sun had not risen yet, it was about three o'clock in the morning, and I was walking on the sidewalk of Impasse Cathelin with Reynaud, when I saw the soldiers of the *Franc-Garde*<sup>41</sup> coming down the street with the prisoners. I had seen some of them the night before in the prisons of the *Milice* and I recognized among them the Jews that the Service had arrested several days before. I recognize in the pictures you are showing me the same faces that I saw then. Under the orders of these soldiers whose names I do not know, the prisoners were loaded into a closed van that was parked in front of the *Milice* garage . . . I saw and heard the chief, Touvier giving orders. I heard

---

36. Goudard's name was read along with the others, and he was taken out of the cell. Touvier saw Goudard and ordered him returned to his cell. *Id.* at 34. At Touvier's trial, Judge Henri Boulard interrupted Touvier's testimony with the following outburst: "Your men went into the big room where you kept your prisoners and told them to open their flies, and then checked their penises with the barrels of their guns to see if any were circumcised." *Id.* at 32.

37. Touvier's secretary, Gilberte Duc, now 75, testified that she recalled hearing Touvier say "Henriot is avenged—we killed seven Jews," and that Touvier kept a list of Jews to arrest. *Id.* at 35.

38. Some have speculated that Touvier's motive was one of convenience and not anti-Semitism. The Resistance was armed and would fight back; the Jews were unarmed and leaderless. *Id.* at 35. At his trial, Touvier denied choosing the seven merely on ethnic grounds. "Being Catholic, I cannot be anti-Semite. We never arrested a Jew because he was a Jew." *Id.* at 57.

39. Declaration of Arnaud, witness in the original *Touvier* trial and a member of the *Milice*, Lyon, France, Apr. 19, 1946, reprinted in KLARSFELD, *supra* note 50, at 50.

40. Interrogatory of Fayolle, witness in the original *Touvier* trial and a member of the *Milice*, Lyon, France, Apr. 11, 1946, reprinted in *id.* at 50-51.

41. The *Franc-Garde* was a military detachment of the *Milice*. See BOURDREL, *supra* note 4, at 503-07.

him distinctly ask if "the 'boxes' were ready . . ." Touvier left in a private car . . . I suppose that Touvier participated in the execution, since I saw him order the preparations . . .<sup>42</sup>

\* \* \*

Touvier gave the orders concerning searches [of the victims' property] and arrests. The fruits of these searches (money, jewels, furniture, etc.) were brought back to the *Milice* headquarters where they were seized by Touvier and sold or exchanged by him. Touvier also ordered many murders, including the execution of seven Jews at Rillieux (Ain) towards the end of the month of June 1944. Touvier was an authoritarian man without scruples and a true bandit.<sup>43</sup>

If there in fact had been a German order, from Knab to de Bourmont to Touvier, then someone at the time would have heard of it. Yet, as trial counsel pointed out, there was no trace of any such order. There was, however, evidence that the killings were specifically directed against Jews, and that they were carried out in a way that matched Touvier's method of operation. He had admitted personal participation, and the corroborated evidence of the orders he gave and the actions he took completed the chain of evidence to convict him of crimes against humanity.

#### IV. THE CRIME AGAINST HUMANITY

##### A. *The August 1945 Charter*

The 1945 London Treaty<sup>44</sup> that established the Nuremberg Tribunal also defined, in an annexed Charter,<sup>45</sup> the crime against humanity. As Ms. Finkelstein notes, the Charter empowered the Tribunal to "try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any"<sup>46</sup> of a number of crimes, including "crimes against humanity."<sup>47</sup> The crime against humanity was defined 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."<sup>48</sup>

The quoted portions of the Charter actually deal with four separate concepts which have been mixed up in later discussion. The first idea is the "competence," or jurisdiction, of the Tribunal in relation to persons: the Tribunal has power only over those persons who acted in the interest of the Axis powers during a certain time period.<sup>49</sup> This power is

---

42. Interrogatory of Fayolle, witness in the original *Touvier* trial and a member of the *Milice*, Lyon, France, Apr. 19, 1946, reprinted in KLARFELD, *supra* note 50, at 51-52.

43. Declaration of Badel, witness in the original *Touvier* trial and a member of the *Milice*, Lyon, France, May 15, 1946, reprinted in *id.* at 50.

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

45. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, Charter of the International Military Tribunal, 59 Stat. 1544, 1546, 82 U.N.T.S. 279, 284 [hereinafter *Nuremberg Charter*].

46. *Id.* art. 6.

47. *Id.* art. 6(c).

48. *Id.*

49. M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* 41 (1992).

termed competence *ratione personae*.<sup>50</sup> A similar definitional exercise can be found in the U.N. Security Council resolution establishing the international criminal court for trial of human rights violations in the former Yugoslavia.<sup>51</sup>

Second, the Charter defines the Tribunal's subject matter jurisdiction, or competence *ratione materiae*.<sup>52</sup> This competence extends to crimes against humanity, crimes against the peace, and war crimes.<sup>53</sup>

Third, the Charter provides a definition of specific offenses.<sup>54</sup> This task is obviously essential given that no international legislative body had passed statutes criminalizing the potential defendants' conduct. That is, there was no written norm in existence that defined a "crime against humanity"<sup>55</sup> when the Nazis took power in Germany. There were treaty provisions to which one might refer, but those provisions dealt primarily with war crimes and to a lesser extent with crimes against the peace.<sup>56</sup> The norms described in the Charter were not, however, drawn from thin air. They could be justified by international consensus as norms of customary international law, and perhaps as peremptory norms.<sup>57</sup> The drafters of the United Nations resolution on the former Yugoslavia faced a similar task of definition. That resolution speaks expressly of the principle *nullum crimen sine lege*, and the consequent need to "apply rules of international humanitarian law which are beyond any doubt part of customary law."<sup>58</sup>

Fourth, in defining the crime against humanity, the Charter authorizes prosecution whether or not the conduct violated the domestic law of the place where it occurred.<sup>59</sup> This principle has since been expanded. For example, the Yugoslavia resolution rejects the defense of superior orders for subordinates except in mitigation of punishment, and rejects any defense of official position or compliance with local law on the part of an official.<sup>60</sup> There is, of course, extensive literature on these issues in domestic and international criminal law.<sup>61</sup> For present purposes, however, it is important to note that the role of "official action" or "official policy" is defined by these "superior orders" provisions.<sup>62</sup>

50. The argument that the Charter defines crimes and persons subject to its jurisdiction as separate matters was made at the *Touvier* trial by Arno Klarsfeld, attorney for civil parties Association of Sons and Daughters of Jewish Deportees and certain family members of the victims. See KLARSFELD, *supra* note 50, at 94-101.

51. S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827, reprinted in 32 I.L.M. 1203 (1993).

52. Nuremberg Charter, *supra* note 45, art. 6.

53. See *The Nuremberg Trial*, 6 F.R.D. 69, 130 (1946). See generally EUGENE DAVIDSON, *THE TRIAL OF THE GERMANS* (1972).

54. Nuremberg Charter, *supra* note 45, art. 6.

55. BASSIOUNI, *supra* note 49, at 32 n.52.

56. *Id.* at 24.

57. The distinction between customary international law principles, which are not generally binding on a state without its consent, and peremptory norms (*jus cogens*) is discussed in, e.g., MARK W. JANIS, *AN INTRODUCTION TO INTERNATIONAL LAW* 62-66 (2d ed. 1993); Gordon A. Christenson, *The World Court and Jus Cogens*, 81 AM. J. INT'L L. 93 (1987); Ted L. Stein, *The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law*, 26 HARV. INT'L L.J. 457 (1985).

58. Report of the Secretary General Pursuant to Paragraph 2 of the Security Council Resolution 808, U.N. Doc. S/25704 (1993), reprinted in 32 I.L.M. 1159, 1170 (1993) [hereinafter Secretary General's Report].

59. Nuremberg Charter, *supra* note 45, art. 6(c).

60. Secretary General's Report, *supra* note 58, art. 6, ¶ 57; *id.* art. 7, ¶¶ 2-3.

61. See, e.g., LYAL S. SUNGA, *INDIVIDUAL RESPONSIBILITY IN INTERNATIONAL LAW FOR SERIOUS HUMAN RIGHTS VIOLATIONS* (1992); Thomas W. White, Note, *Reliance on Apparent Authority as a Defense to Criminal Prosecutions*, 77 COLUM. L. REV. 775 (1977).

62. Nuremberg Charter, *supra* note 45, arts. 7-8.



## B. *The French Penal Code*

In 1964, as the result of agitation led by Holocaust survivors and Resistance groups, the crime against humanity was added to the French Penal Code and made imprescriptible—that is, not subject to the statute of limitations.<sup>63</sup> The 1964 statute did not “create” the crime as a matter of French law; rather, it simply recognized that “crimes against humanity” had been created and defined in the United Nations resolution of February 13, 1946 and in the Charter of the Nuremberg Tribunal.<sup>64</sup> In fact, since 1810, French law had provided that torture and barbarity were aggravating circumstances in the commission of any offense.<sup>65</sup>

The offense definition of the 1964 statute was clarified in 1992. Its most pertinent provisions are as follows:

Article 211-1. Genocide is an action, according to a concerted plan, directed at the total or partial destruction of a national, ethnic, racial or religious group, or of any particular group defined according to any other arbitrary criteria, through commission or causing others to commit, towards the members of such group, any of the following acts:

- an intentional attempt against human life;
- grave assault against physical or psychic integrity;
- submission to conditions of existence of such a nature as to cause the total or partial destruction of the group;
- measures designed to prevent births;
- forced transportation of children.

Genocide is punishable by life imprisonment. . . .

Article 212-1. Deportation, enslavement, or massive and systematic summary executions, kidnapping of persons followed by their disappearance, torture or inhuman acts, inspired by political, philosophical, racial or religious reasons, and organized according to a concerted plan against a group within the civilian population, are punished by life imprisonment. . . .

Article 212-2. When committed in time of war, according to a concerted plan, against those who fight the ideological system in the name of which crimes against humanity are perpetrated, acts included within Article 212-1 are punishable by life imprisonment. . . .

Article 212-3. Participation in a group formed or in an association established in order to prepare for commission of the crimes defined by Articles 211-1, 212-1 and 212-2, when such participation is manifested by commission of one or more material facts, is punishable by life imprisonment. . . .

---

63. Finkelstein, *supra* note 2, at 5 n.20.

64. CODE PÉNAL [C. PÉN.] as amended by Law No. 64-1326 of Dec. 26, 1964 (Fr.). Ms. Finkelstein recognizes that international law is fully binding on French tribunals by virtue of a constitutional “supremacy clause.” Finkelstein, *supra* note 2, at 266.

65. This provision is currently codified as C. PÉN. art. 303. Its historical antecedents are discussed in MICHEL VÉRON, *DROIT PÉNAL SPÉCIAL* 108-09 (3d ed. 1988).

Article 213-5. Public action relative to the crimes defined in the present article, as well as any penalties duly imposed, are not subject to any statute of limitation.<sup>66</sup>

Both natural and juridical persons may be prosecuted for these offenses.<sup>67</sup> The imprescriptibility provision means not only that prosecution is not barred by a statute of limitations, but also that a judgment of conviction will not lapse if the defendant is a fugitive. Under French law, most criminal judgments lapse if not carried out within twenty years.<sup>68</sup>

It is important to note that, unlike the Nuremberg Charter, nothing in the text of these statutes requires proof that the defendant acted on behalf of the state, much less that he was in the service of an Axis power. In addition, French courts are free to apply the statutes in accordance with their text, rather than as limited by previous judicial decisions.

### C. *The Barbie Case: Too Clever by Half*

In 1985, four years before Paul Touvier was even arrested, former German citizen Klaus Barbie was convicted of crimes against humanity in France based on his having presided over the murder and deportation of Jews and Resistance members.<sup>69</sup> The litigation over these charges provides essential background information to the *Touvier* case. Barbie had joined the SS in 1935.<sup>70</sup> In 1942, he became head of the Gestapo in Lyon,<sup>71</sup> and as such was responsible for repression and reprisals against the Resistance, Communists, and Jews. During Barbie's tenure in the Gestapo, he earned the title "Butcher of Lyon."<sup>72</sup> At the war's end, Barbie became a fugitive.<sup>73</sup> After being employed by the American Counter Intelligence Corps as an anticommunist expert,<sup>74</sup> Barbie later took refuge in Bolivia, where his skills proved useful to a series of rightist governments.<sup>75</sup> Two historic forces came together to bring him to trial in France for crimes against humanity. First, François Mitterrand's government became willing to seek Barbie's return to France so that he might be investigated and tried.<sup>76</sup> The persistent efforts of groups such as the Association of Sons and Daughters of Jewish Deportees in France, which was headed by Serge and Beate Klarsfeld, had gradually worn down resistance to Barbie's prosecution.<sup>77</sup> Second, a new Bolivian government was willing to permit Barbie's deportation.<sup>78</sup>

---

66. C. PÉN. arts. 211-1, 212-1 to 212-3, & 213-5.

67. See C. PÉN. art. 213-1 (listing penalties for natural persons guilty of crimes against humanity); *id.* art. 213-3 (listing penalties incurred by juridical persons for crimes against humanity).

68. "Punishments pronounced for a crime become barred twenty years from the date on which the judgment of conviction becomes definitive." C. PÉN. art. 133-2.

69. Judgment of Dec. 20, 1985, Cass. crim., 1985 Bull. Crim., No. 407, at 1038 (Fr.).

70. LADISLAS DE HOYOS, *KLAUS BARBIE* 14 (Nicholas Courtin trans., 1985).

71. ALAIN FINKIELKRAUT, *REMEMBERING IN VAIN: THE KLAUS BARBIE TRIAL AND CRIMES AGAINST HUMANITY* 3 (Roxanne Lapidus & Sima Godfrey trans., 1992).

72. See DE HOYOS, *supra* note 70, at 11.

73. Nicholas R. Doman, *Aftermath of Nuremberg: The Trial of Klaus Barbie*, 60 U. COLO. L. REV. 449, 450 (1989).

74. *Id.*

75. See Binder, *supra* note 24, at 1327.

76. *Id.*

77. *Id.*

78. *Id.*

In Barbie's case, the examining magistrate<sup>79</sup> rejected charges involving members of the Resistance, because these victims were militarily opposed to the Nazis, and thus were not noncombatant victims.<sup>80</sup> This decision was reviewed and corrected by the court of appeals, and then by the *Cour de cassation*, which set the standards under which Barbie was to be judged. The *Cour de cassation* decided that the crime against humanity should be defined in terms of victims and actors: Victims might include not only the direct objects of systematic racial or religious persecution, but also those who opposed such persecution by any means.<sup>81</sup> Thus, Resistance members, as soldiers fighting Nazism, also could be deemed victims of crimes against humanity.<sup>82</sup>

Not every persecutor would be guilty, however. The *Cour de cassation* stated that the perpetrator of the crime against humanity should have acted within the framework of his "affiliation with a state practicing a policy of ideological hegemony" such as the Third Reich's National Socialist ideology.<sup>83</sup> Under this definition, Barbie could be prosecuted

---

79. This phase-by-phase sketch of the French judicial system in criminal cases may assist the reader in following the discussion: The "instruction" is held, after initial police inquiries, under the direction of an examining magistrate, the *juge d'instruction*. This magistrate questions the accused and witnesses, and collates all the evidence to determine whether to send the matter for trial. For more serious offenses, the examining magistrate will send the case for a second level of instruction to the chamber of accusation of the *Cour d'appel* before proceeding to trial in the *Cour d'assises*. The examining magistrate does not participate in the trial itself, however, since the functions of instruction and judgment are separate.

There are three criminal courts of first instance, the choice being based on the seriousness of the offense charged. Minor offenses are tried by a single judge in a *Tribunal de police*. Misdemeanor-type offenses are heard by three judges in a *Tribunal correctionnel*. Serious crimes are heard by a panel of three professional judges and nine laypersons (for a total of twelve), constituting the *Cour d'assises*.

The *Cour d'appel* is designed to weed out errors of both law and fact, and will reweigh the evidence in cases coming from the *Tribunaux de Police* and *Tribunaux Correctionnels*. However, it may not reconsider factual determinations by a "jury," that is, by the *Cour d'assises* with its lay members. Legal arguments directed against a *Cour d'assises* judgment may be heard by the *Cour de cassation*.

The *Cour de cassation* is the supreme court of the ordinary court hierarchy, although the *Conseil constitutionnel* has certain powers with respect to the constitutionality of legislation. The *Cour de cassation* hears civil and criminal appeals on points of law from the *Cour d'appel* and (in serious criminal cases) from the *Cours d'assises*. As the supreme court, the *Cour de cassation* has a particular role in ensuring the uniform interpretation and application of the law throughout France, thereby upholding the constitutional principle of the equality of all citizens before the law.

Appeals in criminal matters on the ground that the lower court's decision was contrary to law are governed by *Code de procédure pénale*, art. 591. Article 593 specifies that a decision will be quashed if it is not reasoned, or if the reasons are insufficient to enable the *Cour de cassation* to exercise its control and determine whether or not the law has been respected.

If the *Cour de cassation* concludes that the lower court correctly applied the law, it will reject the appeal. If not, the decision of the lower court will be quashed. However, the *Cour de cassation* cannot substitute its own decision for the decision that it has quashed. It therefore usually refers the matter back for reconsideration, not to the court from which the appeal originated, but to a different court of the same type and level of hierarchy.

When a case is referred down in such a manner, usually in practice to a court of appeal, the latter will retry the case on both facts and law in respect of the issues raised by the *Cour de cassation*. Indeed, the parties may even raise new arguments. It should be noted that the court retrying the case is not bound to apply the interpretation of the law set out in the decision of the *Cour de cassation*. This may, of course, lead to a second appeal which will be heard by the *Cour de cassation* sitting more formally (plenary meeting). If it again decides to quash the decision of the lower court on the same grounds as before, the matter will be sent to a third court of equivalent status, which this time, although still accorded liberty in respect of its appreciation of the facts, is bound to implement the interpretation of the law as set out by the *Cour de cassation*.

This brief sketch provides some idea of the procedural complexity involved in interpreting and applying the relatively controversial legal provisions at issue in the *Touvier* and *Barbie* cases.

80. Binder, *supra* note 24, at 1337.

81. Judgment of Dec. 20, 1985, Cass. crim., 1985 Bull. Crim., No. 407, at 1038, 1053 (Fr.).

82. Binder, *supra* note 24, at 1337-38.

83. Judgment of Dec. 20, 1985, 1985 Bull. Crim. at 1053.

because he was a Nazi officer and his victims were opponents of Nazism. Interestingly, Barbie's defense counsel, the leftist lawyer Jacques Vergès, had also sought to broaden the definition of the crime against humanity to one that would theoretically encompass French colonial atrocities. Vergès had thereby hoped to turn the trial into a demonstration that France's vaunted adherence to "the rights of man" and humanitarian principles was a charade.<sup>84</sup> The *Cour de cassation* well understood this goal, however, and its decision was seen as foreclosing attacks on French colonial misconduct.<sup>85</sup> While the language of the *Cour de cassation* does not explicitly preclude prosecution of French officials for their conduct in colonial areas, the major focus is clearly on Barbie as an adherent of Nazi Germany. Indeed, the prosecutor's theme at Barbie's trial was that Barbie's crimes stemmed from Nazi ideology.<sup>86</sup>

With the precise contours of the crime against humanity still unsettled by the *Cour de cassation's* 1985 judgment in the Barbie matter, the proceedings against Touvier, which had been pending in a desultory way, began in earnest.

## V. THE TOUVIER LITIGATION

### A. *The Events Surrounding Touvier's Capture and the Pretrial Legal Battle*

The same political forces that had demanded the trial of Klaus Barbie agitated for charges to be brought against Touvier. A formal accusation of crimes against humanity had been issued against Touvier in 1973, but a team of officers to execute the warrant was not formed until 1988.<sup>87</sup> Touvier had been a fugitive for most of the years since the war.<sup>88</sup> He was finally arrested in May of 1989, at the monastery of a breakaway Catholic sect.<sup>89</sup>

Among the most telling documents at Touvier's trial were his diaries and scrapbooks, annotated with his thoughts during his long years in hiding. Arno Klarsfeld,<sup>90</sup> one of the civil advocates at the trial, noted that:

On July 3rd, while Klaus Barbie was listening to the presiding judge Cerdini pronouncing, in the name of the French nation, the penalty of perpetual imprisonment, Paul Touvier, cloistered in an underground life he had deliberately chosen, was commenting in a green schoolboy's notebook on the torments and misfortunes of his alter ego of former days.

Not long before that verdict, inspired by a premonition, Paul Touvier wrote in his notebook this phrase of Ernest Hemingway: "Never ask for whom the death knell tolls, it tolls always for you."<sup>91</sup>

Yes, this phrase of Hemingway was surely a premonition, for two years later, adjutant Mathy and commandant Recordon tolled the bell of the priory of

---

84. Binder, *supra* note 24, at 1337-38.

85. *Id.*

86. *Id.* at 1339.

87. Morgan, *supra* note 1, at 56-57.

88. See TED MORGAN, AN UNCERTAIN HOUR: THE FRENCH, THE GERMANS, THE JEWS, THE KLAUS BARBIE TRIAL, AND THE CITY OF LYON, 1940-1945, at 320-21 (1990).

89. *Id.*

90. Arno Klarsfeld is the son of Beate and Serge Klarsfeld, activists who had worked tirelessly to secure passage of legislation on the crime against humanity and to bring alleged offenders to trial.

91. All translations from trial materials are by the authors. We know that the original Hemingway phrase—in English—is different. We have left it in a literal translation because Klarsfeld is making a play on words, using in succession the different French words for carillon bell, doorbell, and death knell.

Saint-François at Nice, the death knell of Paul Touvier's long escapade, because of the past that the holy waters of all the monasteries where he had taken refuge were not able—and would never know how—to purify.<sup>92</sup>

\* \* \*

In September 1944, as the Allied forces entered Lyon, Touvier became a fugitive, knowing that he was sought for his role in the *Milice*.<sup>93</sup> During this time, he was sheltered by *Milice* friends and sympathetic churchmen. In 1946 and again in 1947, Touvier was actually declared a fugitive by French tribunals and sentenced to death for treason and assisting the enemy.<sup>94</sup> Under French law, a criminal sentence lapses if it is not carried out within twenty years,<sup>95</sup> and Touvier's sentences thus lost their effect in 1966 and 1967. Touvier nevertheless remained a fugitive until 1989, even causing a fake report of his death to be published.<sup>96</sup>

Although not carried out, the judgments of conviction against Touvier did carry collateral consequences, such as preventing property ownership.<sup>97</sup> Touvier therefore could not take title to his dead father's house. But after an intensive lobbying campaign by Touvier's friends in the church, President Pompidou's staff came to believe Touvier's version of events and advised Pompidou to accord a pardon, which he did on November 23, 1971.<sup>98</sup> And although pardons and amnesties are granted much more frequently in France than in the United States, it is interesting to note that the only recorded comment on Touvier made by Pompidou's mentor, Charles DeGaulle, was "Touvier? Twelve bullets in his hide."<sup>99</sup>

DeGaulle's sentiment apparently was more widespread than Touvier and his supporters had imagined. Pompidou's pardon of Touvier therefore had the perhaps unintended effect of inflaming public opinion and focusing renewed attention on Touvier's case; the controversy that ensued probably contributed not only to new charges being filed against Touvier, but also to strengthening the movement to define and punish the crime against humanity under French law. In June 1972, a leading French newspaper uncovered news about the pardon and published an article.<sup>100</sup> More publicity followed. Touvier was charged with crimes against humanity<sup>101</sup> as defined in the Charter of London and recognized under French penal law since the addition of the charge to the Code in 1964.<sup>102</sup>

Appellate procedures in the case dragged on while Touvier remained a fugitive. A Paris *Chambre d'accusation* found that the charges against Touvier were legally insufficient because the state had failed to prove that the accused acted on behalf of a regime dedicated to racial or religious hegemony; that tribunal refused to hold that Vichy was such a regime.<sup>103</sup> The *Chambre d'accusation* judges, it seemed, were unwilling to issue a forth-

---

92. KLARSFELD, *supra* note 50, at 46–47.

93. MORGAN, *supra* note 1, at 37.

94. See MORGAN, *supra* note 88, at 320.

95. C. PÉN. art. 133-2 (Fr.).

96. *Paul Touvier, un collaborateur dans l'Histoire: Chronologie*, LE MONDE, Mar. 17, 1994, Dossier spécial at III.

97. See C. PÉN. art. 213-1(4) (Fr.).

98. MORGAN, *supra* note 1, at 56. See also Scott Kraft, *Frenchman on Trial for Crimes Against Humanity*, L.A. TIMES, Mar. 18, 1994, at A11.

99. *Touvier—50 ans de procédure*, *supra* note 1, at 2.

100. See MORGAN, *supra* note 88, at 320.

101. *Id.*

102. C. PÉN. arts. 211-1 to 212-3 (Fr.).

103. Judgment of Apr. 13, 1992, Cour d'appel de Paris, 1992 G.P., No. 1, at 387, 412 (Fr.).

right denunciation of the Vichy regime, even as it had operated after the *Milice* had achieved power and the Germans had abandoned the pretense that Vichy was independent. Instead, the court apparently accepted one party's argument that the Vichy government was a "constellation of good intentions."<sup>104</sup>

On November 27, 1992, the *Cour de cassation* quashed the appellate court's decision.<sup>105</sup> However, it also took a narrow view of the crime against humanity, going beyond the decision that had upheld charges against Barbie to reaffirm judicial approval of the Vichy government. The judges reasoned as follows:

Whereas [the judges] observe that besides the criminal intent that must exist to form a common law crime, crimes against humanity must form part of the execution of a concerted plan, and be accomplished in the name of a State systematically practicing a policy of ideological hegemony; the crime must also be committed against people because they belong to a particular racial or religious group or because they belong to a group that opposes this policy of ideological hegemony.

Considering that, to determine whether the actions charged against Touvier formed part of such a concerted plan, the judges, by means of the facts reported above, analyze the ideology of both the established government of the French State and that of the *Milice*, an organization set up by the so-called law of January 30, 1943; based on a "significant amount of bibliography," they are drawn to the conclusion that the "Vichy State" did not practice a policy of ideological hegemony, considering that its policy of collaboration with the National Socialist State of Germany was essentially pragmatic; that despite the anti-Semitic measures taken, it "never proclaimed, as did Germany, that the Jew was the enemy of the State"; that finally, the *Milice*, which was one of the organs of the "French State," and did have hegemonic ambitions and had among its aims the fight "against the Jewish leper for French purity," did not succeed in transforming the authoritarian State into a totalitarian State;

Whereas, the decision [under review] reports the statements made by Touvier, who, without denying his participation in the decision to execute the hostages, has always stated that this decision had been taken jointly with de Bourmont, then regional chief of the *Milice* of Lyon, after meeting with Knab, chief of the local Gestapo, who wanted to organize massive reprisals against the Jewish population after the assassination of Philippe Henriot; and that de Bourmont and Touvier had succeeded in reducing the number of victims that the accused had been ordered to see executed;

....

Considering, however, in conclusion that while Article 6 of the Statute of the International Military Tribunal of Nuremberg says that the authors or accomplices of crimes against humanity are punished only if they have acted for a State belonging to the European Axis, the *Chambre d'accusation* could not, without contradicting itself, declare that the assassinations in this case were not a crime against humanity, while at the same time pointing out that they were

---

104. *Id.*

105. Judgment of Nov. 27, 1992, Cass. crim., 1992 Bull. Crim., No. 394, at 1082, 1116 (Fr.).

committed at the instigation of a leader of the Gestapo, an organization declared criminal because it acted for a State that practiced a policy of hegemonic ideology. . . .<sup>106</sup>

The *Cour de cassation* remanded the parties to the *Chambre d'accusation* of the *Cour d'appel* of Versailles, which then formulated the charges Touvier faced at trial in the *Cour d'assises* in Versailles.<sup>107</sup>

### B. *Touvier's Day in Court*

Touvier's trial was an extraordinary spectacle. Touvier was confronted not only by the public prosecutor, but also by thirty-four civil lawyers, representing victims and victim groups. And while this unification of civil and criminal liability in the same trial is the norm in France,<sup>108</sup> the sheer number of such *parties civiles* is unusual.

The exceptional nature of these proceedings is striking indeed; to best recapture their spirit, therefore, we have translated portions of the courtroom testimony and summation eloquently delivered by Arno Klarsfeld. These excerpts will provide pertinent factual background in addition to illuminating the fascinating historical event that Touvier's trial became.

As noted previously, Touvier never denied his part in the killings, but he added to his claim that he had actually spared lives:

"The dead of Rillieux were not simply hostages chosen among the population because they were Israelite, but because of their 'anti-national activities,' in accordance with the laws of that time . . . It is even more scandalous to accuse me, considering that I did everything I could to save human lives, and in doing so took very grave risks."

. . . .

"I insist on reiterating that a hunt against Jews was never unleashed after the assassination of Philippe Henriot. Moreover, I recall that the dossier establishes that some of the Jewish victims had already been arrested several days before."<sup>109</sup>

In the sequence that follows, Klarsfeld recounts what he deems to be the absurdity of Touvier's assertion that he had saved lives on that now infamous day in 1944:

But even admitting that [Touvier] had chosen deliberately to omit to tell others of his "tragic combat" (these are his words) directed at diminishing the number of victims: do you sincerely think, members of the jury, that it could be possible that the agitation, the confusion, the number of comings and goings between his office and that of de Bourmont, that all of this stirring that he described in his interrogatories, could have passed unseen by the *Milice* at the Impasse Cathelin? Do you believe that if there had been an order from the Germans these *Milice* members would have known absolutely nothing about it?

---

106. *Id.*

107. *Id.*

108. See ANDREW WEST ET AL., *THE FRENCH LEGAL SYSTEM* 229 (1992).

109. Touvier, *quoted in* KLARSFELD, *supra* note 50, at 77-78.

That passes the limits of understanding.

How in the world can one believe in such blindness among the *Milice's* Second Service: the information service of the *Milice!*

Of information!!

These *Milice* members were supposed to be the source of information of the Vichy regime. These *Milice* members were supposed to be on alert, on the look-out for the least bit of information. Would they have let such an important item of information get by?

But perhaps Touvier tried to keep this information secret, not from modesty, but for another reason? His defense counsel will certainly not fail to make such a claim. But when he does, ask yourself why? Why would Touvier want to keep such information secret? Then ask yourselves: is that plausible?

Close your eyes, ladies and gentlemen of the jury. You are in the summer of 1944, not far from the place where the Saône and the Rhône come together. You are at Impasse Cathelin, at the corner of St. Hélène street, quite near to the Perrache train station [Lyon's main train terminal]. Touvier goes to see his second in command Reynaud and says: "We need seven Jews."

You heard him, as he repeated this phrase fifty years later, here, in this proceeding, in front of you.

Under these conditions, what would Reynaud's normal answer be?

"Seven Jews, but what for, Paul?"

This is the question that Reynaud or other *Milice* members, facing Paul Touvier's request must have asked.

But now, supposing that there really had been a German demand, ask yourself whether Touvier could have answered: "Take care of it, Reynaud, I need seven Jews to execute. Go, run, hurry and bring back seven Jews!"

How is it that Paul Touvier could possibly have responded in such terms, he so attentive to his image, he who changed suits several times a day, a substitute for not being able to change his conscience. (And you recall what a suit cost at that time, ladies and gentlemen of the jury. You recall the testimony of M. Jeanblanc who told you the shock he felt when he saw his own suit on a *Milice* member who had stolen it from him during what Touvier called, according to the hearings, a "loan" or a "search." At that time, M. Jeanblanc told you that it was necessary to save for more than a year in order to afford a suit.)

And so, why would someone like Paul Touvier, so concerned about his image, have let it be degraded by failing to respond to Reynaud, *in case there had really been* a German demand:

"No, these seven unfortunate Jews, I need them in order to save ninety-three of their brethren!"

Oh yes, *if there had been a German demand*, then Touvier would not have failed to answer in such a way as to justify his order [to Reynaud] and to not look like an assassin in others' eyes.



And if he had answered in such a way, the *Milice* members interrogated after the war would not have failed to give this information to the instructing judges who interrogated them about the massacre of Rillieux, so as to attenuate their own responsibility.<sup>110</sup>

Klarsfeld went on to attack Touvier's story by comparing Touvier's actions at the time with his later writings and the historical facts surrounding the incident:

Because as you very well know, it is less serious to kill seven Jews when you have been asked for a hundred, than to kill seven when you have been asked for none.

But the problem is that Touvier did not say: "Reynaud, go and request the presence of seven unfortunate Jews here at the Impasse Cathelin." No!

No!

He said: "Reynaud, go and find me seven bits of Jew garbage." This is how Touvier knows so well to describe them in his writings after the war.

That is what has been said. Because there never was the slightest order or even the slightest demand from the Germans.

But have I not left out here another demonstrative? Would he not have said: "Go and find me *these* seven pieces of Jew garbage," linking action to words by holding out for Reynaud or somebody else a list of names of Jews to be arrested?

Certainly. Otherwise, how can one explain the long time—*almost ten hours*—that was necessary to find seven Jews in a city where dwelt at least fifteen thousand? In fact, it was not seven, but five Jews that were necessary, because two Jews were already in the jail at Impasse Cathelin.

What, ten hours for five indeterminate Jews? That's indeed slow for a *Milice* member as skilled as Paul Touvier. It's indeed slow for a service that had a card file of Jews!

But all this can easily be explained if these were particular Jews for whom they were searching.

In fact, just like at Mâcon there was a list. But while at Mâcon the names mentioned on the list were there by virtue of their sympathy with the Resistance, Paul Touvier had made out the list at Rillieux because they were born Jews.

The birth certificates of these seven Jews were also their death certificates.<sup>111</sup>

The version of events supported by this argument also was corroborated by the testimony of Max Roxencwaig, a Jewish barber who was arrested at about 3:00 a.m. on June 29; Roxencwaig did not arrive at the Impasse Cathelin until about fifteen minutes after the truck carrying the other seven had left, and was therefore spared.<sup>112</sup>

Klarsfeld's argument resumes by citing additional support for the proposition that Touvier's motives were anything but humanitarian in nature:

---

110. *Id.* at 55–58.

111. *Id.* at 58–60.

112. See Morgan, *supra* note 1, at 34.

Because they were Jews, of course, but also because Paul Touvier knew that he could achieve pecuniary gain. A gain for the *Milice*, but also for himself. To the crime against humanity is added the common law crime. That, for sure, is barred by the statute of limitations, Jacques Trémolet!

There were other reactions from the *Milice* members, perhaps less guarded than those they admitted to in their postwar interrogations. These were provided to us by M. Goudard, on April 6. The reactions followed the news of Philippe Henriot's death: "Bastards!" they said, addressing the six people already in the jail cell. "You are all going to die!" This did not surprise Louis Goudard who already had let slip a "we're all screwed" when he heard of Henriot's death. This "we're all screwed" referred to the reprisals conducted by the *Milice*, not those conducted by the Gestapo.<sup>113</sup>

This assertion is supported by a 1970 government report authored by investigator Jacques Delarue that documented Touvier's actions:<sup>114</sup>

On June 28, the death of Philippe Henriot—struck down by the Resistance—having been announced, Touvier decided to avenge his death by instituting a set of reprisals. A "Jew hunt" was immediately undertaken by the Second Service; this involved rounding up seven shopkeepers who had not already been arrested. On the 29th of June at daybreak, they were brought to Rillieux (a suburb of Lyon), lined up along the wall of the cemetery and struck down. During the course of that day, their stores were completely pillaged.<sup>115</sup>

Delarue later took inconsistent positions in various judicial proceedings, however, at one time testifying that "[t]he Germans could not have cared less about Philippe Henriot at that time, because they had other preoccupations," and at another time maintaining that the Rillieux assassinations were the result of a German initiative.<sup>116</sup>

Touvier's claims were further undermined by the fact that Gestapo chief Knab's supposed vehemence to avenge the death of Henriot was not reflected in any contemporary documents, including a detailed report of a dinner hosted by Knab on the evening of Henriot's death.<sup>117</sup> Arno Klarsfeld noted this point in his summation:

Ah yes, in this report there is not a single word about the death of Philippe Henriot. How is it that someone like Knab, who several hours before reportedly wanted to massacre one hundred Jews by way of reprisals after the death of Philippe Henriot, had by that same night forgotten everything?

The theme of this dinner and its *raison d'être* were above all the political situation in France.

Moreover, in the Knab dossier, which my opponent knows very well, having devoted many mornings to it, there is a telegram in which Knab informs Oberg, the chief of SIPO-SD in France, his irritation that Henriot had not submitted to the Germans the text of a speech made after the attack at the Glières plateau. This same Oberg, interrogated in 1946 concerning Henriot, affirmed: "I met

---

113. KLARSFELD, *supra* note 50, at 60–61. Jacques Trémolet de Villers was Touvier's lawyer.

114. *Id.* at 65.

115. *Id.*

116. *Id.* at 66–67.

117. *See id.* at 70–71.

Philippe Henriot at the German embassy where he was present at a reception following his return from the Reich. I saw him again once or twice in various public gatherings, notably some time before his death. *I never had any sort of dealings with him, he never visited my home, and I never visited his.*"

It appears from these documents that Knab, chief of the SIPO-SD of Lyon, not only failed to evoke the name of Philippe Henriot the same day of his execution when the dinner discussion centered on the situation in France, but that in addition [Henriot] had irritated him by not submitting the text of his speech to the occupying power.

As for Oberg, Knab's superior, he treated Henriot with indifference. As a crime of passion, this court of assizes has already seen better!<sup>118</sup>

Klarsfeld also documented, by contrast, the *Milice* reaction to Henriot's death, further bolstering the claim that Touvier and his *Milice* associates were prime movers in the reprisals:

We set the scene with the help of a report from the Commissioner of the Interior:

"Black tapestries were hanging in the hall of the *Progrès*<sup>119</sup> [the new headquarters of the information service of the *Milice* in Lyon] in memory of Philippe Henriot; a coffin, a flame, guarded by *Milice* members, stood at the center. Men who had forgotten to remove their hats, or who perhaps were observed to have a slight smile in seeing all of this, were forced by the *Milice* members to remain for hours on their knees in front of the coffin (and certain of them were required to hold their hands behind their backs)."<sup>120</sup>

Francis Bout de l'An wrote in the *Milice* journal, *Combats*:<sup>121</sup>

"The *Milice* member Philippe Henriot is dead and it is our responsibility to safeguard his memory, to strike at those who, from nearby or far, prepared the crime. I know that he did not like bloodshed, I know that he did not like to see us multiply vengeance or reprisals, but I know also that he would not understand a curiously indulgent society only giving a few years imprisonment to such criminals."<sup>122</sup>

Indeed, the reprisal execution of Georges Mandel seems independently attributable to the *Milice*, and not the Germans. There is evidence that even senior Vichy government officials thought that the *Milice* had gotten out of hand in killing Mandel.<sup>123</sup> Similarly, it now seems clear that Touvier—via the *Milice* vehicle—also acted independently in ordering the assassination of the seven men at Rillieux-la-Pape on June 29, 1944. His actions, whatever their motivation, did not mitigate the violence that day. Rather, Paul Touvier was the primary instigator of that violence.

118. *Id.* at 71–72.

119. *Progrès* is a local newspaper still existing in the northeast part of France.

120. KLARSFELD, *supra* note 50, at 72–73.

121. *Combats* was the principal newspaper under the Vichy regime.

122. *Id.* at 73.

123. See MORGAN, *supra* note 88, at 290–92.

## VI. LEGAL ANALYSIS: THE STATE AGENCY DILEMMA

Two fundamental questions emerged from the evidence presented at Touvier's trial: First, who gave the initial order for the killings? Second, in June 1944, was there sufficient relationship between Touvier's actions and some government to satisfy any state actor requirement that might be found to exist? In examining the first question, it seems clear that there was no German order of the kind Touvier described. Thus, Touvier's claim that he had saved lives by some grim utilitarian calculus could not be sustained. Even if the existence of a German order had been proved, the presiding judge expressed skepticism at such a claim, asking why Touvier could not have either sought help from the Vichy government itself or simply refused to carry out the orders.<sup>124</sup> In any event, a defense of superior orders is not even available in crimes against humanity prosecutions, although it may be considered in mitigation of punishment.<sup>125</sup>

The second question was more difficult to answer and requires detailed examination. When one parses the text of the London Charter by subject matter, it seems clear that the crime against humanity does not require that the actor have been an agent of state power; he or she need simply have intentionally<sup>126</sup> committed the proscribed act with the proscribed motivation or effect. The majority of the prohibited acts can most readily be committed by those possessing state power. However, such inhumanities have been committed, and are being committed, by members of nominally private groups as well.<sup>127</sup>

The limitation in the London Charter to agents of Axis powers defined the competence or jurisdiction of the Nuremberg Tribunal, not the elements of offenses it was to try.<sup>128</sup> Thus, unlike Ms. Finkelstein, we do not find a "state agency" requirement in the text of the London Charter. We recognize that, as illustrated by the *Barbie* and *Touvier* cases, the French courts have persisted in finding such a requirement; however, French judicial opinions are not binding precedent even in France, where judges are free to interpret statutes according to their text and evident purpose rather than in accordance with prior judicial interpretation.<sup>129</sup>

Many writers have remarked that a state actor requirement exists for some or all crimes under international law, but such assertions rest upon the idea cited by Ms. Finkelstein that "international law governs relations among states, rather than among individuals."<sup>130</sup> It would perhaps be more precise to say that traditionally, nations rather

124. Morgan, *supra* note 1, at 32.

125. C. PÉN. art. 213-4 (Fr.).

126. The intent requirement should be interpolated to save the provision at issue from an attack on grounds of vagueness and to ensure that persons who were not aware of these nonstatutory norms are not punished. See generally Michael E. Tigar, "Willfulness" and "Ignorance" in *Federal Criminal Law*, 37 *CLEV. ST. L. REV.* 525 (1989) (discussing this principle in the context of domestic law).

127. Examples would include Afrikaner groups in South Africa seeking to destabilize the existing government, Ku Klux Klan and Nazi groups in the United States, death squads in El Salvador and Guatemala, and similar entities in other parts of the world.

128. Nuremberg Charter, *supra* note 45, art. 6. In fact, this article falls under title II of the Charter, entitled "Jurisdiction and General Principles."

129. WEST ET AL., *supra* note 108, at 57.

130. See Finkelstein, *supra* note 2, at 270. It is true that such eminent authorities as M. Cherif Bassiouni have argued that the concept of state action should be maintained as an ingredient of crimes against humanity; Bassiouni, however, does not give a systematic reason why this particular international crime should develop along different lines than international penal law generally, which focuses increasingly on individual responsibility. See BASSIOUNI, *supra* note 49, ch. 6, reviewed by Benjamin B. Ferencz in 88 *AM. J. INT'L L.* 204 (1994). Cf. SUNGA, *supra* note 61.

than individuals were regarded as the bearers of rights and obligations under international law.<sup>131</sup>

It is necessary, however, to define exactly what is meant by "traditional." An even older view of humanitarian international law recognized that individuals possessed rights that all national sovereigns were bound to respect.<sup>132</sup> The contrary view may be traced to the late 18th century, coinciding with Jeremy Bentham's coining of the word "international."<sup>133</sup>

Whatever may have been traditional prior to World War II, in the period since, there has been an increasing recognition that individuals have rights and obligations under international law.<sup>134</sup> The "rights" side of this picture is the clearer of the two, for the recognition of crimes against humanity, and of "international human rights," presupposes that individuals are direct beneficiaries of legal rules. But many have also recognized that individuals may have obligations under international law.<sup>135</sup> Such a view is implicit in the rejection of the defense of superior orders, for this rejection posits a duty that does not arise from national citizenship or allegiance, but rather is found on a higher, international or metanational plane.

The concept of individual obligation under international law is not entirely new. The Soviet scholar G.I. Tunkin has spoken of "responsibility of individuals for crimes against humanity."<sup>136</sup> As Ms. Finkelstein recognizes, piracy has long been known as an individual crime against the law of nations.<sup>137</sup> Engaging in the slave trade might also fall into the same category.<sup>138</sup>

The Genocide Convention expressly mandates punishment of "private individuals" who violate its terms.<sup>139</sup> The United States has responded to its obligations under the Convention by enacting 18 U.S.C. § 1091, making genocide a crime. The statutory definition requires that the offense be committed in the United States by an American national, but contains no requirement that the defendant have acted on behalf of a government.<sup>140</sup> Thus, while to date the prosecution of crimes against humanity has focused on state actors, there seems no reason that they should be the only ones susceptible of being charged with such offenses.<sup>141</sup>

131. THOMAS BUERGENTHAL, *INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL* 2-3 (1988).

132. This was the view of Grotius, for example, who thought that innate human characteristics and fundamental values about human development had a superior claim to our adherence than positive laws that had no basis in history or enlightened social thought. HUGO GROTIUS, *ON THE LAW OF WAR AND PEACE* 13 (Francis W. Kelsey trans., 1925).

133. Bentham's work is usually taken as marking the beginning of a "positivist approach" to international law. See JANIS, *supra* note 57, at 227-35.

134. *Id.* at 250. See also THOMAS BUERGENTHAL, *PUBLIC INTERNATIONAL LAW IN A NUTSHELL* 116-27 (1990).

135. SUNGA, *supra* note 61, at 34-35.

136. GRIGORI I. TUNKIN, *THEORY OF INTERNATIONAL LAW* 244 (William E. Butler trans., 1974) (1970). At another point, he speaks of "the criminal responsibility of physical persons" for such crimes. *Id.* at 412.

137. Finkelstein, *supra* note 2, at 262. See also 1 *INTERNATIONAL CRIMINAL LAW* 23 (M. Cherif Bassiouni ed., 1986).

138. *INTERNATIONAL CRIMINAL LAW*, *supra* note 137, at 21-22.

139. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. IV, 78 U.N.T.S. 277; see BASSIOUNI, *supra* note 49, at 224-25 (quoting the Genocide Convention).

140. 18 U.S.C. § 1091(d)(1)-(2) (1988).

141. Americans may be accustomed to thinking of crimes against humanity as a broader version of criminal violations of civil rights under the federal criminal laws. See *United States v. Guest*, 383 U.S. 745 (1966); *United States v. Price*, 383 U.S. 787 (1966) (construing 18 U.S.C. §§ 241-242). Such offenses under United States case law require that the accused be, or be in concert with, a state actor. This requirement springs from the notion that constitutional rights are valid against "state" and not "private" action. See, e.g., *Moose Lodge No. 107 v. Irvis*, 407

Limiting criminal responsibility to state actors might cause difficulty in a time of fragmented public authority and genuine dispute over who is exercising state power in fact and in law. The state actor inquiry in the *Touvier* case illustrates this problem. The *Milice* surely was an agent of the Vichy government, yet *Milice* members had loyalties to the Nazis that surpassed those of many Vichy officials, as well as aspirations for their own future role in a reconstituted Europe.<sup>142</sup> The same sort of ideology dominates a number of the most violent groups whose actions implicate the interests protected by the prohibition on crimes against humanity. Examples include death squads, disappearance squads, and other sorts of paramilitary groups that exist on the fringes of formal state power.

Therefore, the correct answer to the state actor inquiry in *Touvier's* case was that the political ideology and military organization of the *Milice* made the crimes committed by its organized force sufficiently different from ordinary homicide to constitute crimes against humanity. However, the tribunal was operating under a requirement that it find some more formal link to Nazi Germany. In this respect, the judgment of the *Cour de cassation* was controversial, although it no doubt prompted relief among those who wished to preserve a certain image of the Vichy government, as well as among those who did not wish to see the crime against humanity expanded in ways that could lead to prosecutions of French officials for their conduct in France's colonial wars. But however a future court may interpret the statute, *Touvier* could not be convicted at his trial without proof that he was a Nazi accomplice.

Here, then, was a puzzle. The *Cour de cassation* had said that the Vichy government was not itself an arm of the Axis powers; therefore, *Touvier* could not be guilty solely by virtue of this elevated position within the Vichy police hierarchy. Furthermore, he could not be guilty based on an order from the Nazi *Knab* if there were no such order.

There was a third possibility, however: *Touvier* could be guilty of crimes against humanity if he carried out his plan in order to serve the Nazi interest and to forestall the impending Nazi collapse. Under familiar principles of criminal law, one can be an accomplice without prior agreement.<sup>143</sup> In systems that punish conspiracy, the crime consists essentially of an agreement to commit an offense. If an offense is actually committed, it is by prearrangement.<sup>144</sup> However, one may become an accomplice to crime by a voluntary action to aid the principal offender without the command or even the consent of the principal.<sup>145</sup> For example, if *A* sees *B* in the act of robbing *X*, and helps out in the hope or expectation of gaining part of the loot, *A* is *B's* accomplice regardless of whether *B* agrees to *A's* participation. It is even possible to imagine a scenario in which *B* is unaware of *A's* help, as where *A* keeps a lookout for any approaching police and is ready to sound the alarm, provided, of course, that *A* has the proscribed intent.<sup>146</sup>

*Touvier* was convicted on the theory that he was in fact aiding Nazi German interests by his crime, and intended to do so.<sup>147</sup> Whatever marginal moderation that Vichy had shown in carrying out Nazi wishes, *Touvier* in particular and the *Milice* in general were fully imbued with Nazi ideology.

---

U.S. 163 (1972).

142. MARRUS & PAXTON, *supra* note 5, at 335.

143. *E.g.*, JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 30.08 (1987).

144. *See id.* § 29.04.

145. *Id.* § 30.08.

146. *See id.*

147. Judgment of Nov. 27, 1992, Cass. crim., 1992 Bull. Crim., No. 394, at 1082 (Fr.).

Advocates at the trial traced the *Milice's* increasing influence over the Vichy government. The excerpt that follows describes this influence with arresting clarity:

The complicity of the *Milice* with the Gestapo in the concerted plan called the "Final Solution of the Jewish Question" is obvious.

When, under cover of German pressure on the Vichy government, as recalled by all the historians who gave evidence before you, Joseph Darnand seized the levers of power of the state police by becoming Secretary General of the *Maintien de l'Ordre*<sup>148</sup> [paramilitary police organization], Jews of French nationality were sheltered from massive police arrests. Bousquet, Laval and Pétain had loaned the French police to the Germans in order to arrest Jewish aliens and their children; but they had refused to turn over French Jews.

On November 20, 1943, Colonel Knochen wrote to Bousquet:

"The security police and the SD at Limoges asked to examine the list of Israelites established by the city's regional prefect. He refused to cooperate with the Police Chief's demand. He justified this refusal by declaring that, according to information given to him by the competent French authorities, the German authorities could only look at the list of foreigners, and not the list of French Israelites, in conformity with an agreement concluded between the General Secretary of the French Police and the Commander in Chief of the SS and the German police."

On November 22, Bousquet responded to Colonel Knochen:

"On November 12, 1943, I did indeed receive a communication from the regional prefect of Limoges telling me that the regional Chief of the Security Police-SD had asked him for authorization to check the lists set up by the prefectures concerning the Israelites. I indicated to him that it would be impossible to satisfy that demand. Again recently, the same demand had been presented at the request of the German authorities to the chief of government by the General Commissioner on the Jewish Question, and I had to emphasize once again the point of view of my administration, which has been formally approved by the French government.

"As far as the French police and administration are concerned, the fact of being an Israelite does not constitute a presumption of liability, either in a political sense or as a matter of law. This fact cannot even constitute an aggravation of such liability if a Jew is prosecuted for a crime or tort punished by our penal legislation. Moreover, the German laws are applicable only in the occupied zone.

"Consequently, the attitude of the French administration cannot be different than it is and there can be no question of modifying the instructions that I have given in order to assure compliance with our legislation. I am sure that you will have

---

148. The *Maintien de l'Ordre* (MO) was a paramilitary police organization.

the good grace to transmit to your services all instructions that may be necessary to avoid similar requests to the French authorities who can do nothing but refuse to honor them.”

On December 4, 1943, Hitler demanded of Marshal Pétain that “Laval be ordered to reorganize without delay the French cabinet in a manner acceptable to the German government such that collaboration is guaranteed. This cabinet shall enjoy the complete support of the Head of State.”

This is how Darnand and Henriot came to enter Vichy government.

On January 10, 1944, when the Bordeaux Gestapo demanded that the Prefecture of Bordeaux begin the arrest of French Jews in the region, the regional prefect responded “Without some contrary indication from the Vichy government, the operation could only be executed by the German police itself.”

The Bordeaux Gestapo then alleged that Darnand had already given his approval to the operation; the Prefect declared that “he would stick to the decision taken by the head of the government.” At the end of the evening, Darnand called the Prefect on Laval’s behalf, and informed him “that it is advisable not to delay any longer the execution of this operation.”

The operation took place during the night and brought to Drancy, and then to Auschwitz, more than two hundred Jews of the Bordeaux region.

July 2, 1942 had marked the abandonment by Bousquet and Vichy of the foreign Jews, arrested from then on by the French police; January 10, 1944 marks the abandonment by Darnand and Vichy of the French Jews, arrested thereafter en masse either by the Vichy police, or by the Gestapo, thanks to lists from the prefectures and indications furnished by the *Milice*.

On January 25, 1944, the General Director of the National Police informed *Milice* member Knipping, who had become the north zone delegate to the General Secretary of the MO, that “by a note of the 20th of November 1943, that has just come to my attention [this was a reference to the Knochen note that I already cited and to which Bousquet had replied by the negative, which response I have also mentioned], the commandant of the Security Police and of the SD has just demanded that I give instructions to the Prefects in the southern zone allowing the German police services to have access to information at the headquarters of each prefecture in order to know the names of French and alien Israelites. I have the honor to let you know that I have just sent instructions to all of the regional Prefects.”

Therefore, by the intervention of Darnand, the Germans obtained what they sought, which even Bousquet had refused to give them.

The seizure of control of the State Police by the Chief of the *Milice* and his crew opened a new phase of persecution: First and in particular, the massive arrest of Jews of French nationality by the French police forces conducted by Darnand for the benefit of the Germans; and second, the participation of the *Milice* in the summary execution of Jews.

Up to that point, Vichy had always caused or left the Jews interned in the camps of the free zone, such as those at Gurs, Noé or Rivesaltes to die by physical misery. Up to that point, Vichy had delivered Jewish Resistance members to the Germans as hostages that the Germans executed by firing squad. But up to that time Vichy had not gone as far as the summary execution of Jews.



This was the work of the *Milice*, an organ which, we must recall, was created and promoted by the Germans in 1944, the iron lance of the police forces of Vichy, forged to strengthen the defenses of this collaborationist government that it served so well.

The Gestapo wanted the arrest of a large number of French Jews. The Vichy of the *Milice*, the Vichy of 1944, agreed to accomplish that which the Vichy of 1942 and of 1943 had refused.

In 1944, notably after the Normandy invasion, the Gestapo, impelled by rage, fear, and hatred, began the summary execution of Jews and Resistance members. The *Milice*, its accomplice, servilely followed its example.

Like their chief, Joseph Darnand, all the *Milice* members were united by oath to Hitler and in their heart were wearing German uniforms: they were indeed perceived as such by their compatriots, who saw in them French Hitlerites totally aligned with Nazi ideology.

A French Hitlerite: that is what Touvier was when he brought about the massacre of seven Jews at Rillieux-la-Pape.<sup>149</sup>

Turning to Touvier individually, his efforts to portray himself as motivated by a desire to see the law respected, and his denial of anti-Semitic animus, failed for want of evidence. Touvier had kept a diary during his years of exile which contained more than his sympathetic regard for Barbie's fate in Lyon. In that diary, Touvier referred to a French female newscaster and her interview subject as "Jewish garbage," the old *Milice* slogan.<sup>150</sup> A French intellectual was called a "[d]readful Jewish shopkeeper."<sup>151</sup> Mengele, on the other hand, was "a victim of hatred."<sup>152</sup> Touvier's diaries contained many other similar remarks.

Touvier was thus revealed as part of a group within the *Milice* that so fervently supported the Reich's goals of racial purity that he required no specific German order to carry out the murder of the seven Jews at Rillieux-la-Pape. He was the good Nazi servant, doing deeds in the hope that he might stem the Allied tide and be recognized in the postwar Reich for his works. While his offense was the crime against humanity, his legal responsibility rested upon settled principles of ordinary criminal law. Touvier was convicted and sentenced to life imprisonment.

## VII. CONCLUSION

Touvier was probably the last of the World War II Nazi henchmen to be tried. The others are dead or in hiding.<sup>153</sup> The *Touvier* and *Barbie* trials were designed by French authorities to teach and to provoke memories of the Holocaust;<sup>154</sup> how well they succeeded is debatable. Guyora Binder has eloquently doubted the wisdom of any group defining itself in opposition to some extreme ideology, even when the ideologues are bent on the group's destruction.<sup>155</sup>

---

149. KLARFELD, *supra* note 50, at 103-09.

150. Morgan, *supra* note 1, at 57, 78.

151. *Id.* at 57.

152. Mengele was the Auschwitz doctor who conducted medical experiments on prisoners. *Id.* at 78.

153. See Riding, *supra* note 22, at A3.

154. See Marby, *supra* note 27, at 29.

155. See generally Binder, *supra* note 24.

Whether or not one agrees with that argument, the crime against humanity has existed for decades as an abstract concept. Enslavement and piracy, which can be regarded as examples of crimes against humanity, have been recognized for centuries. However, it is one thing to define a crime and another to dignify the definition by concrete action. There may be many homicides, but a system of criminal justice that punishes murder does not emerge until some assassins are caught and tried. Likewise, the concept of crime against humanity could not take shape until Nuremberg. In that context, and for all the war crimes prosecutions since then, international criminal law was dedicated to ensuring not only that guilty persons were punished, but that the criminals and their accomplices were denied an opportunity to rewrite history by denying their crimes.

The discord over Touvier's case—and to a lesser extent over Barbie's—in many ways focuses on a potential change in the use of international penal law. An expansive definition of the crime against humanity gives the offense contemporary relevance. The elements of the offense can become criteria for judging the present-day actions of power-wielders. Even those who are not now targets of such scrutiny may well recoil at this advance in the law. In Touvier's case, the potential for judging contemporary events was compounded by the possibility that millions of French people who had lived under the Vichy regime would be branded as collaborators with the Nazis.

The *Touvier* trial, and the debate over the crime against humanity, indicates something important about the role of the lawyer. As lawyers, we are in charge of remembering, but for different purposes than victims remember. For lawyers are to remember so that we can make constructive change in the future. Specifically, we should view the atrocities committed in World War II in a critical context, so that we can devise and apply principles of international law to restrain such actions in the future, and to punish the individuals who violate those principles. This has, indeed, been the task of postwar human rights activism.

The *Touvier* litigation is valuable because it shows the ways in which the human rights movement is both fragile and powerful. It was powerful in compelling the bringing of charges. It was fragile because conservative French jurists saw clearly that a broad definition of the crime against humanity would implicate a new generation of French colonial military officers. These jurists responded in the *Barbie* case by narrowing the definition of the crime against humanity, and that theme was sounded again in the *Touvier* case.

In addition, these conservative judges were anxious to portray the Vichy government, which so many still in public life had served in one way or another, as more victim than wrongdoer. That part of French civil society represented by the French judges was no more ready to confront a disgraceful past than are some judges and lawyers in the United States when faced with the history of racism in this country.

The sense of public officials that human rights principles can strike too close to home has repeatedly been a major obstacle to progress in strengthening human rights institutions. All too often, such officials merely pay lip service to ideals to which they have no real commitment, even if that commitment is in fact "formalized" through the ratification of a treaty or convention. It is evident that the crimes against humanity committed against the backdrop of World War II did not end with that war: Witness the decimation of hundreds of thousands of Mayan Indians in Guatemala, the annihilation of the Kurds in Iraq and elsewhere, and ethnic cleansing in the former Yugoslavia. The most important lesson of the *Touvier* case is not, therefore, that one must remember the Holocaust as an event to be avenged, but rather that one must continue to be vigilant today.

## A POSTSCRIPT ABOUT MAURICE PAPON

The Papon case became far more significant than those of Touvier or Barbie. When I first began to lecture in France on the crime against humanity and the French trials, some of my French colleagues reproached me, and the French legal system, for digging up the past in this way. “Law and history do not make good bedfellows,” one French law professor declaimed. I thought him wrong in general and specifically. Law and history are, or ought to be, not only bedfellows but intimately connected. One principal theme of this book is that ignoring the lessons of history inflicts a great social price.

The Papon case dredged up enough history, even fairly recent history, that it provoked a shift in attitudes. The January 1997 Cour de Cassation opinion signaled a different judicial attitude towards the Vichy government. The trial itself caused a change in the attitudes of many people who had been holding on to old illusions. I recall that after giving a lecture on the crime against humanity shortly after the trial court judgment against Papon in early 1998, one of my French colleagues took the podium to say, “J’aveu. La France, elle etait collaboratrice” – “I confess. France was a collaborator.”

Papon had a distinguished law school record and had, in the 1930s read Hitler’s works and understand their meaning and menace. During World War II, joined the Vichy France government and was an official in its Ministry of the Interior. In February 1941, he became sub-prefect of the Gironde, based in Bordeaux, which was part of Vichy France. He also, as part of his responsibilities, assumed the position of Secretary for Jewish Questions, and was in charge of the police, gendarmerie and detention facilities.

At some point during the War, Papon also assisted the French Resistance. After the War, his political career continued. He became a mayor, a prefect of police in Paris, and then a minister in the government of President Valéry Giscard d’Estaing. Powerful figures in French politics tried to derail any potential prosecution. On the side of prosecuting, however, were ranged the powerful voices of deportee organizations – the same ones that had lobbied for passage of the 1964 amendments to the French Penal Code and for the Touvier prosecution.

On October 17, 1961, then-prefect of police Papon ordered suppression of a mass demonstration being held by people agitating for Algerian independence from France. This was in the final months of the French occupation of Algeria, and the Algerians were to win independence fairly early in 1962. The police, acting on Papon’s orders, rounded up thousands of demonstrators, who were then held in deplorable conditions. In addition, the police opened fire and killed between one hundred and three hundred demonstrators. After the event, Papon was instrumental in covering up the facts. However, eventually he was not prosecuted for any of the 1961 events, although the vivid memory of those events lent fuel to the demands that he be prosecuted for his role in World War II events.

In 1981, while the French presidential election was underway, a French newspaper published an expose of Papon’s wartime role in signing orders sending Jews to concentration camps. The publicity is said to have rallied some voters to victorious candidate François Mitterand. From that point, the prospect of Papon being tried for crimes against humanity was often debated in the press and in political councils. However, the official investigation of his role proceeded fitfully.

Finally, in September 1996, a set of charges was filed in Bordeaux, in the prefecture of the Gironde, based on a detailed set of factual allegations. These allegations were in turn based on a lengthy investigation phase conducted under the supervision of magistrates. The indictment charged Papon with crimes against humanity committed between July 1942 and May 1944,

during his service as subprefect of the Gironde. The formal charge was based on documents and witness statements, many of which were produced before the juge d'instruction. Thus, the defense and the reviewing court had a detailed factual context within which to discuss the legal issues.)

Papon challenged the charges in the Cour de Cassation, which rejected all his legal claims. That court noted that the crime against humanity is not subject to any statute of limitation, and it rejected that Papon's claim of excessive delay in bringing the case. Turning to the merits, the court held that the prosecution would have to prove that somebody responsible for the deportations and deaths was acting as agent of a hegemonic regime. This element was clearly satisfied by the proposed proofs, because of the involvement of German Nazi police officials in designating who was to be rounded up, when, and where. However, in order to be complicit in the crimes of such people, Papon did not have to share their ideology or their direct subservience to that regime. He did not have to be a member of the unlawful organization.

The German authorities demanded roundups of Jews. Papon was in charge of a list of Jews, drawn up under Vichy government guidelines as that government brought its policies more and more in line with Nazi wishes. He signed orders for searches, seizures and detentions of Jews. He therefore became an accomplice of the Nazi regime and its ideology.

Papon acted with knowledge of the Nazis' actions and motivations. He could therefore be an accomplice even though he did not share the Nazi ideology and was not a member of any Nazi organization. This holding did not differ greatly from the analysis used in Touvier's case, and is consistent with accomplice law in most legal systems.

There was, however, a second conclusion that followed from applying this accomplice analysis to Papon's conduct and position. Touvier was a foot soldier, a murderer, a petty thief and a Gestapo wannabe. He spent his post-war life on the run, sheltered by far-right clerics. He was charged with a single act: rounding up seven Jews to serve a distinct Nazi purpose towards the end of the War.

Papon acted from a position of authority in the Vichy government, and over nearly two years. The cour de cassation opinion cast significant doubt on the claim that Vichy France was truly an independent state. It used evidence of Papon's power and influence, and of his continuing contact with Nazi agents and officials, as central to its argument that the indictment charged an offense. If a man who systematically ordered deportations of Jews served as Vichy interior minister and as a prefectural official, the Touvier case description of the Vichy France as disorganized, somewhat well-intentioned and pragmatic hardly bore examination. In setting the stage for Touvier's prosecution, the court of cassation insisted on proof that he served the Nazi cause, and dismissed all efforts to characterize the Vichy government in any particular way. The judges who decided Papon's case did not forthrightly declare themselves. However, they cast doubt on Papon's claim of innocent intent by saying given his service in the Vichy France Interior Ministry he surely knew of the "anti-Jewish policy" of the Vichy government, and his acceptance of a job entitled "Jewish Questions" added more proof of his culpable mental state. These references characterize the explicit policy of the Vichy government as pro-Nazi and collaborationist in a way that the Touvier court did not.

Papon was convicted of complicity in the deportations, but acquitted of complicity in the eventual deaths of the detainees in concentration camps. He was sentenced to ten years in prison. While his appeal was pending, he left France for Switzerland and lived there under an assumed name. The French courts dismissed his appeal because of a French law that deprives a fugitive of the right to appeal. The European Court of Human Rights in Strasbourg held that

dismissal of the appeal is too harsh a sanction. The French courts then reviewed the merits and affirmed.

In the meantime, influential French politicians secured passage of a law that allowed an aged and infirm person to be set free from prison. Papon, who was at that time over 90 years old and in ill health, was liberated.

What do the Touvier and Papon cases tell us about national courts applying transnational law to punish state-sponsored terrorists? It is a mixed lesson, and provides little cause for optimism. The amendments to the French penal code that permitted prosecutions for crimes against humanity were not added until 1964, nearly two decades after the end of World War II. A broad-based political campaign was necessary to secure this change. Once the penal code permitted prosecutions, it was 1983 before Barbie was brought to trial, and almost ten years before Touvier's trial began. French officials' reluctance to confront the widespread complicity with the Nazis was the principal reason for the delay.

There has never been a prosecution under French law for crimes against humanity committed by French soldiers or commanders for actions in Indochina, Algeria, Tunisia and other outposts of empire, nor for brutal police actions such as the 1961 killings in Paris when Papon was prefect of police. Such prosecutions would be deterrent and educational, just as were the Papon and Touvier cases. But there is a significant right-wing element in French politics whose power is sufficient to deter authorities from pursuing any such cases. This element organizes around racial and ethnic issues, including the alleged "surrenders" in Algeria and Indochina. The uprisings in French Muslim communities in late 2005, and the public and political reaction to them, shows that racism and ethnic prejudice run deep in French society. This fact is both an explanation of why politicians do not care to examine the history of French colonial power, and in some measure a result of the state not having addressed the issue.

Perhaps as a result of the Papon case, French President Jacques Chirac said, during a speech on July 16, 1995:

There are moments in the life of a nation that hurt the memory and the idea one has of his country. It is difficult to evoke them, because those dark hours tarnish forever our history, and are an insult to our past and our traditions. Yes, the criminal folly of the occupier was assisted by French, by the French state. France, homeland of the Enlightenment and of human rights, land of welcome and asylum, France, on that very day, accomplished the irreparable. Failing her promise, she delivered those she was to protect to their murderers.