1995

# Changing Notions of State Agency in International Law: The Case of Paul Touvier

Claire O. Finkelstein
*University of Pennsylvania Carey Law School*

# Changing Notions of State Agency in International Law: The Case of Paul Touvier

Claire Finkelstein†

Summary

I. Introduction . . . . . 262

II. Historical Background . . . . . 263

III. Crimes Against Humanity . . . . . 265

IV. State Agency . . . . . 270
A. *The Act-by-Act Test and Individual Responsibility* . . . . . 271
B. *The Act-by-Act Test and State Responsibility* . . . . . 273
C. *The Status Approach to State Agency: A Proposal* . . . . . 276

V. Conclusion . . . . . 282

VI. Appendix: The Lesser Evil . . . . . 283

† Acting Professor of Law, University of California, Berkeley; J.D., Yale Law School; Ph.D candidate, University of Pittsburgh Philosophy Department. The author gratefully acknowledges the support of Brooklyn Law School during the 1994–95 academic year. The author also wishes to thank Bruce Ackerman, David Caron, Peter Detre, Michael Finkelstein, and Samuel Mrumba for their comments on drafts and discussions on the topic of this Article.

## I. INTRODUCTION

Under general principles of international law, an individual can be held liable for an international offense only when the offense is committed on behalf of an international state.[1] There are a number of notable exceptions to the general rule: Historically, piracy has been considered *jus cogens*,[2] and more recently, the Genocide Convention[3] and various terrorism treaties[4] authorize international prosecutions against individuals without regard to their relation to a state. Despite these exceptions, the state agency requirement remains the central vehicle for distinguishing domestic from international offenses.

The recent trial of Frenchman Paul Touvier for crimes against humanity has brought the issue of state agency to the fore. The *Touvier* case presents the novel question of whether the acts of a public official of one state can be imputed to a second sovereign state as acts of that state. The case answers this question in the affirmative: Touvier, the head of a division of the French military police in Vichy, was convicted of crimes against humanity on the grounds that he was acting to further *Germany's* policy of racial persecution during the war.[5] By allowing a Frenchman to be tried as a German agent, the *Touvier* court thus indirectly expanded the reach of the concept of crimes against humanity.

This Article presents a framework for deciding questions of state agency in prosecutions for crimes against humanity. It will argue that the correct test for state agency would focus on the *status* of the offender and whether there is an expectation of accountability between the offender and the relevant state. The proposed test constitutes a rejection of the existing approach to state agency, which focuses instead on the particular act and the degree to which it has been authorized by the state, rather than on the actor. This Article will suggest that the *Touvier* court's extension of the notion of state agency can be best understood in light of the conception of agency the Article proposes. The *Touvier* case thus reflects a potentially significant evolution in juridical thinking about the relation between individual actors and international states.

---

1. *See* Sanchez-Espinoza v. Reagan, 770 F.2d 202, 206–07 (D.C. Cir. 1985) (holding that customary international law "does not reach private, non-state conduct"); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 776 (D.C. Cir. 1984) (Edwards, J., concurring) ("I do not believe the law of nations imposes the same responsibility or liability on non-state actors . . . as it does on states and persons acting under color of state law."); Linder v. Calero Portocarrero, 747 F. Supp. 1452, 1462 (S.D. Fla. 1990) (customary international law does not establish cause of action for torture against defendants who are not state actors), *rev'd on other grounds*, 963 F.2d 332 (11th Cir. 1992); *see also* Draft Articles on State Responsibility art. 19, *in Report of the International Law Commission to the General Assembly on the Work of its Thirty-First Session*, U.N. GAOR, 34th Sess., Supp. No. 10, at 1, U.N. Doc. A/34/10 (1979), *reprinted in* [1979] 2 Y.B. Int'l L. Comm'n 87, 92, U.N. Doc. A/CN.4/SER.A/1979/Add.1 (Part 2) [hereinafter Draft Articles I]; M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 235–62 (1992).

2. *See* United States v. Smith, 18 U.S. (5 Wheat.) 153, 161–62 (1820); LOUIS HENKIN ET AL., INTERNATIONAL LAW CASES AND MATERIALS 468 (2d ed. 1987).

3. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951).

4. *See, e.g.*, International Convention Against the Taking of Hostages, G.A. Res. 34/146, U.N. GAOR 6th Comm., 34th Sess., Supp. No. 46, at 245, U.N. Doc. A/34/46 (1979); Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 565, 974 U.N.T.S. 177.

5. Judgment of Apr. 20, 1994, Cour d'assises des Yvelines (Fr.); *see* Alan Riding, *Frenchman Convicted of Crimes Against the Jews in '44*, N.Y. TIMES, Apr. 20, 1994, at A3.

## II. HISTORICAL BACKGROUND

For the past fifty years, France has struggled to come to terms with its role in the elimination of roughly two-thirds of the Jewish population of Europe. Over 75,000 French Jews were deported during the Second World War, of whom approximately 2,500 survived.[6] Not all those deported came from occupied France.[7] Vichy developed an elaborate collaboration with the Nazi deportation program, helping to fill a German quota of 40,000 in 1942.[8] Jewish families and children without their parents were packed onto cattle cars bound for Auschwitz.[9] There is little reason to suppose this collaboration was anathema to the Vichy government. Long before collaboration with the Germans had begun, Vichy implemented its own anti-semitic policies. In the fall of 1940, Vichy passed a series of anti-Semitic laws depriving Jews of the right to hold political office, authorizing the internment of foreign Jews, and lifting a ban on articles that fanned racial hatred in the press, all without prompting from Germany.[10] Moreover, there were concentration camps operating in Vichy long before Germany demanded that Vichy assist its deportation efforts.[11] Thousands died of starvation and disease prior to 1942 in a camp thirty miles south of Toulouse.[12] After 1942, the camp became an assembly point for Jews awaiting deportation to Nazi death camps.[13]

Despite this record of persecution, Vichy officials have not been widely prosecuted for their wartime activities. Immediately after the war, France conducted a handful of trials for war crimes, but many defendants had fled the country and other sentences were never carried out.[14] Pétain himself, for example, was sentenced to death for treason in 1945, but his sentence was commuted by De Gaulle.[15] René Bousquet, the chief of police of Vichy who played a major role in shaping Vichy's policy of collaboration, was given only a five-year sentence, and the sentence was lifted immediately on the basis of unspecified "acts of resistance."[16]

Paul Touvier was the head of a division of the *Milice*, the military police organization of Vichy.[17] In 1946, he was sentenced to death *in absentia* for treason and again in 1947 for exchanging information with the enemy.[18] Aided by various right-wing members of the Roman Catholic Church, he remained in hiding until 1967, when the twenty-year limitation on execution of judgment expired under French law.[19] Then in 1971, Touvier received a presidential pardon from Georges Pompidou. This provoked a great outcry in

---

6. MICHAEL R. MARRUS & ROBERT O. PAXTON, VICHY FRANCE AND THE JEWS 343 (1981).

7. *See* SUSAN ZUCCOTTI, THE HOLOCAUST, THE FRENCH, AND THE JEWS 208 (1993); *see also* MARRUS & PAXTON, *supra* note 6, at 255–62.

8. *See* PAUL WEBSTER, PÉTAIN'S CRIME: THE FULL STORY OF FRENCH COLLABORATION IN THE HOLOCAUST 108 (1991).

9. *Id.* at 1–3.

10. *Id.* at 63–69.

11. *Id.* at 60.

12. This was the camp known as "Noé." *See id.* at 1–2.

13. *See id.* at 121–22.

14. *Id.* at 199.

15. *Id.* at 53.

16. *Id.* at 106.

17. *Id.* at 204.

18. BERNARD LAMBERT, DOSSIERS D'ACCUSATION: BOUSQUET, PAPON, TOUVIER 279–80 (1992).

19. CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] art. 763 (Fr.).

France,[20] and prompted relatives of Touvier's victims to file an action for crimes against humanity based on acts for which Touvier had not yet been prosecuted.[21] After a number of years of evasion,[22] and an attempt to publish a false announcement of his death, Touvier was finally arrested in 1989.[23] Many years passed while the prosecution attempted unsuccessfully to bring Touvier to trial. Finally, last October, the *Cour de cassation*[24] issued a ruling that cleared the way for trial,[25] and in April of 1994, Touvier was convicted of crimes against humanity.[26] The use of the notion of a crime against humanity was important in this case, since Touvier could no longer be tried for war crimes or for violations of the French Penal Code, both of which are barred by a statute of limitations after ten years.[27] Under a 1964 act of parliament, however, crimes against humanity are imprescriptible.[28]

Touvier's conviction was based on his role in the execution of seven Jewish hostages at a cemetery in Rillieux-la-Pape, on June 29, 1944.[29] The killings occurred the day after

---

20. *See Paul Touvier, un collaborateur dans l'Histoire—Chronologie*, LE MONDE, Mar. 17, 1994, Dossier spécial, at III [hereinafter *Chronologie*] (chronicling Touvier's life until 1993).

21. *See Chronologie, supra* note 20, at III. Touvier could not be retried for events for which he had already been convicted. C. PR. PÉN. art. 6, para. 1. When the present action was commenced, there were three incidents for which Touvier had not been tried: the bombing of a Lyon synagogue in 1943, the assassination of League of Human Rights President Victor Basch and his wife, and the execution of seven Jewish hostages at Rillieux-la-Pape. On April 13, 1992, the *Cour d'appel de Paris* dismissed the first two charges for lack of evidence. Judgment of Apr. 13, 1992, Cour d'appel de Paris, 1992 Gazette du Palais [G.P.], No. 1, at 387, 392, 400 (Fr.).

22. It appears, however, that Touvier did not have to go to great lengths to avoid arrest. He remained on French soil without interruption from 1944 until 1989, and at various points lived openly in his family house in Charmettes with his wife and children. LAMBERT, *supra* note 17, at 279.

23. *Chronologie, supra* note 20, at III.

24. The *Cour de cassation* is France's Supreme Court.

25. Judgment of Oct. 21, 1993, Cass. crim., 1993 Bull. Crim., No. 307, at 770 (Fr.).

26. Judgment of Apr. 20, 1994, Cour d'assises des Yvelines (Fr.); *see* Riding, *supra* note 5, at A3. The court originally attempted to deny jurisdiction over the case, claiming that the crimes of which Touvier was accused involved, among other things, the crime of sharing information with an enemy of war, and that the *Cour de sécurité de l'état* (Court of State Security) would therefore be the proper forum to consider the matter. The court of appeals of Lyon affirmed the lower court's lack of jurisdiction, agreeing that the matter had to be heard by a military tribunal. The *Cour de cassation*, however, vacated the order of the Lyon appeals court, and sent the case to the appeals court of Paris. Judgment of Feb. 6, 1975, Cass. crim., 1975 G.P., Nos. 124–26, at 310, 311 (Fr.). The Paris court assumed jurisdiction over the case, but claimed that the law declaring crimes against humanity exempt from the ordinary statute of limitations for murder did not apply in this case, because of retroactivity. Judgment of Oct. 27, 1975, Cour d'appel de Paris, 1976 G.P., Nos. 154–55, at 382, 383 (Fr.). *See discussion infra* note 28.

27. *See* MICHÈLE-LAURE RASSAT, DROIT PÉNAL ET PROCÉDURE PÉNALE 122 (1986).

28. JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.], Dec. 29, 1964, at 11.788 (Fr.). Prior to 1964, the same domestic statute of limitations applied to crimes against humanity as to other crimes under French law. For a discussion of the problem of prescription as it relates to the notion of crimes against humanity, see Leila S. Wexler, *The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again*, 32 COLUM. J. TRANSNAT'L L. 289, 318 (1994).

In earlier proceedings, arguments were made to the effect that application of the 1964 law to acts that occurred prior to 1964 would be retroactive, and hence unconstitutional. The question turned on whether the 1964 law altered the nature of the concept of crimes against humanity or merely clarified a preexisting concept in international law. After the question had worked its way through the lower courts, the *Cour de cassation* said in 1976 that the matter would have to be decided by the Minister of Foreign Affairs. Judgment of June 30, 1976, Cass. crim., 1976 G.P., Nos. 322–23, at 699, 700 (Fr.). After three years of deliberation, the Ministry concluded that the 1964 statute was simply declarative of the nature of crimes against humanity, and thus that it was not retroactive. MICHÈLE-LAURE RASSAT, DROIT PÉNAL 215 n.160 (1987). This decision opened the way for the prosecution of both Touvier and Klaus Barbie.

29. The present litigation began in 1973, when a son of one of the victims filed a complaint before the *Tribunal de grandes instances de Lyon*, the trial court of Lyon, alleging that Touvier was responsible for crimes against humanity.

members of the resistance had assassinated Philippe Henriot, the Minister of Information of Vichy and a rather prominent member of the *Milice*.[30] The killings at Rillieux were understood as revenge for Henriot's assassination,[31] and the *Milice* accepted responsibility for it.[32]

Among his other duties, Touvier had been in charge of detaining Jewish and political prisoners, and the seven murdered at Rillieux were among those under his supervision.[33] He admitted to having personally selected the victims, and to having given the orders to the execution team as well as various detailed instructions about how the killings should be carried out.[34] In his defense, however, Touvier asserted that it was the Germans who demanded revenge for the death of Henriot, and that Knab, the Gestapo chief assigned to the region of Lyon, had planned a vast reprisal which was to involve the murder of a hundred or more Jews. Touvier claimed that his direct superior, De Bourmont, managed to convince Knab to leave the matter in the hands of Vichy officials.[35] De Bourmont, according to Touvier, then ordered Touvier to organize the execution of thirty Jews instead.[36] Touvier was able to exercise a sufficient degree of autonomy, he claimed, to reduce the number killed still further, from thirty to seven.[37] Rather than think of him as having killed seven Jews, he argued, he should be thought of as having saved twenty-three.[38] Discussion of the legal sufficiency of a defense of the sort Touvier offered is deferred until the Appendix. The body of the Article will focus on the elements of crimes against humanity and, in particular, the question of state agency.

## III. CRIMES AGAINST HUMANITY

The concept of crimes against humanity was formally introduced into international law by the Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, signed by the Allies in London on August 8, 1945.[39] Annexed to the Agreement is the Charter of the International Military Tribunal,[40] empowering the Tribunal to try individuals accused of an international crime, and defining three categories of crimes: crimes against the peace, war crimes, and crimes against humanity.[41] Article 6 of the Charter provides in relevant part:

> The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organisations, committed any of the following crimes. . . .

---

30. Riding, *supra* note 5, at A3.

31. Wexler, *supra* note 28, at 292.

32. *See* Judgment of Apr. 13, 1992, Cour d'appel de Paris, 1992 G.P., No. 1, at 387, 405 (Fr.).

33. *Id.*

34. *Id.* at 408.

35. Lee Yanowitch, *Touvier Relives Jewish Executions for Court*, REUTERS, Mar. 29, 1994, *available in* LEXIS, World Library, Txtnws File.

36. *Id.*

37. *Id.*

38. Riding, *supra* note 5, at A3.

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

40. Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1546, 82 U.N.T.S. 284 [hereinafter Nuremburg Charter].

41. *Id.* art. 6.

. . . .

> (c) Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.[42]

The jurisdiction of the International Military Tribunal was not made exclusive. Under the Agreement, members of the Allied nations specifically retain the power to conduct trials of war criminals in their own courts for crimes committed within their own jurisdictions.[43]

Article 55 of the French Constitution, which declares international law superior to French domestic law,[44] provides the basis for the incorporation of international law into French law. The international concept of crimes against humanity could therefore be used to prosecute Touvier for violations of international law, despite the fact that he is a French national and was tried before French courts for crimes committed on French territory. Although no Frenchman had ever been tried for crimes against humanity before, the *Touvier* court did have substantial guidance from the prosecution of Klaus Barbie,[45] the only other person of any nationality France has tried for crimes against humanity.[46] The *Barbie* case thus supplied the *Touvier* court with its only direct precedent.

An important preliminary decision of the *Cour de cassation* in the *Barbie* case defined crimes against humanity as:

> inhuman acts and persecution perpetrated in a systematic way in the name of a state engaging in a policy of ideological hegemony, not only against persons in virtue of their belonging to a racial or religious community but also against the adversaries of this political system, whatever form their opposition takes . . . .[47]

This definition breaks down the concept of a crime against humanity into two main elements: a material element, i.e. an act requirement, according to which the actor must have performed an act of a certain sort, such as those listed in the definition of crimes against humanity set forth in the Charter, and a moral element. The moral element, in turn, appears to have two components. The first is the requirement that the act have been performed "in the name of a State engaging in a policy of ideological hegemony."[48] The second is a principle of individual responsibility: The agent himself must either have committed the acts in question in virtue of the political, racial, or religious identity of the victims, or he must have been aware that the victims were selected on that basis.[49] The first component of the moral element can be further broken down into two sub-components. The relevant state must in some sense be an illegitimate one; call this the

---

42. *Id.*

43. London Agreement, *supra* note 39, art. 6.

44. LA CONSTITUTION art. 55 (Fr.).

45. Judgment of July 4, 1987, Cour d'assises de Lyon (Fr.); *see* Nicholas R. Doman, *Aftermath of Nuremberg: The Trial of Klaus Barbie*, 60 COLO. L. REV. 449 (1989).

46. *See* Riding, *supra* note 5, at A3.

47. Judgment of Dec. 20, 1985, Cass. crim., 1986 Bull. Crim., No. 407, at 1038, 1053 (Fr.) (translation from the French); *see also* Doman, *supra* note 45, at 458–59.

48. Judgment of Dec. 20, 1985, 1986 Bull. Crim. at 1053.

49. *See* Judgment of June 3, 1988, Cass. crim., 1988 Bull. Crim., No. 246, at 637, 646–47 (Fr.).

"nature-of-the-regime" requirement. Additionally, the acts must have been performed on behalf of the state in question; call this the "state agency" requirement.

To summarize, then, the *Barbie* court's definition of crimes against humanity includes the following four criteria:

(1) an act requirement,

(2) a principle of individual responsibility,

(3) a nature-of-the-regime requirement; and

(4) a state agency requirement.

We shall consider each in turn.

The acts that can satisfy the first requirement are those specified in the Charter, namely "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population . . . or persecutions on political, racial or religious grounds . . . ."[50] In a preliminary hearing in the *Touvier* case, the *Cour d'appel* found that Touvier satisfied the act requirement, a point which no one appears to have contested.[51]

The principle of individual responsibility is a specialized *mens rea* requirement. The *mens rea* for murder does not require that the killing have been performed from any particular motive; it will ordinarily suffice if it was done knowingly or with awareness of a substantial risk of death.[52] Crimes against humanity, however, are like crimes of specific intent in Anglo-American law:[53] They require that the perpetrator have acted from a particular motive. In this case, the act must have been performed in order to further a state ideology of persecution.[54] Unlike ordinary crimes of specific intent, however, the actor himself need not share this ideology; he need only be *aware* that his acts serve to further a state policy of the relevant sort. The *Cour d'appel* also easily found that Touvier satisfied this second requirement, since, by his own admission,[55] he was responsible for selecting the victims, and he chose them because they were Jews.[56]

The nature-of-the-regime requirement is not a common condition of international prosecutions. It is thus difficult to know exactly what the *Barbie* court had in mind when

---

50. Nuremberg Charter, *supra* note 40, art. 6.

51. Judgment of Apr. 13, 1992, Cour d'appel de Paris, 1992 G.P., No. 1, at 408 (Fr.). Touvier's defense could be thought of as denying that the act requirement was satisfied, since his claim that the killings were justified by necessity, *see infra* Appendix, can be thought of as denying that the killings amounted to murder. The act requirement for crimes against humanity includes murder, rather than just killing, in the way that a national legal instrument criminalizing murder would. But it is preferable to think of the necessity defense in this context as a plea that one's responsibility for murder should not amount to a crime against humanity, rather than to think of necessity as applying to the act of murder itself, since the agent has violated a prohibitory norm even if his conduct is justified.

52. *See, e.g.*, MODEL PENAL CODE § 210.2 (1962) (allowing the *mens rea* requirement for murder to be satisfied with a killing performed "knowingly" or "under circumstances manifesting extreme indifference to the value of human life").

53. For example, forgery under New York law is when "with intent to defraud, deceive or injure another, a person falsely makes, completes or alters a written instrument." N.Y. PENAL LAW § 170.05 (McKinney 1988). The Model Penal Code defines burglary as entering "a building . . . with purpose to commit a crime therein . . . ." MODEL PENAL CODE § 221.1(1) (1962).

54. *See* Jacques-Bernard Herzog, *Contribution à l'étude de la définition du crime contre l'humanité*, 1947 REVUE INT'L DROIT PÉNAL 155, 158–61.

55. Judgment of Apr. 13, 1992, Cour d'appel de Paris, 1992 G.P., No. 1, at 408 (Fr.).

56. Further evidence for this lies in the fact that Touvier arranged to have an eighth victim released after it was discovered the latter was not Jewish. *See* Riding, *supra* note 5, at A3.

it used the phrase, "a state practicing a political system of ideological hegemony."[57] One possibility is that the court intended to restrict the category of perpetrators of crimes against humanity to agents of states that fail to comport with standards of international law generally. Alternatively, the court might have intended to restrict this category to agents of states that maintain, more specifically, policies of persecution. Whatever the *Barbie* court had in mind, the restriction is clearly meant to rule out international prosecution of offenders from countries like France. Although one commentator has called the requirement a "blatant attempt[] to exonerate . . . the Vichy government from wrong,"[58] it might nevertheless be defensible under general principles of international law. International criminal law should be thought of as helping to fill the gaps left by domestic criminal law, authorizing prosecutions where domestic law fails to remedy wrongs. Where the state itself is illegitimate, a wrongful act will go unpunished unless the international community steps in. Where a state is not fundamentally illegitimate, its own criminal justice system should prosecute the offender, and international law, one might argue, has no grounds for intervention. The problem with this argument, however, is that substantially "good" regimes may perform "bad" acts, even acts that rise to the level of international crimes. As France's experience makes clear, one cannot rely on domestic law-enforcement to prosecute perpetrators even where the conduct is abhorrent to the current regime. There does not seem to be a coherent rationale, then, for exempting actors of "legitimate" states from prosecution for international crimes.

Moreover, the nature-of-the-regime requirement derives little support from the various sources of international law.[59] The closest statement of precedent one can find lies in the Charter's limitation of those eligible for prosecution to agents of the Axis powers. Putting matters in the best possible light, the *Barbie* court might have extrapolated from the restricted jurisdiction of the International Military Tribunal to the nature of crimes against humanity generally, interpreting the Charter's specific focus on the Axis powers as implying a permanent nature-of-the-regime requirement. But a stringent substantive limitation on the sorts of agents that can commit crimes against humanity should not be inferred from a mere grant of jurisdiction to a particular tribunal.

Finally, the nature-of-the-regime requirement cannot even be made fully coherent. Depending on how one interprets the court's mysterious phrase "state practicing a political system of ideological hegemony," the requirement is either irrelevant to the question of crimes against humanity or largely redundant of the intent requirement for such crimes. If the phrase implies a criterion of illegitimacy based on general violations of international law, the "illegitimate" states might not be the ones whose officials engage in acts targeted by the notion of crimes against humanity. For example, an expansionist state with hegemonic aspirations could be illegitimate under this test, but it might have no propensity to engage in persecution based on race or religion. Conversely, a state which largely respected the co-equal sovereignty of other international states could engage in a policy of racial or religious persecution of its own population. On the other hand, if the phrase does attempt to identify states that practice racial or religious persecution, the nature-of-the-regime requirement would be unnecessary: The only important function it could serve is already served by the *mens rea* requirement, which limits crimes against humanity to acts intended to further a state policy of persecution.

---

57. Other commentators appear to agree. *See* Wexler, *supra* note 28, at 343.

58. *See id.* at 355.

59. *But see* Georges Levasseur, *Les crimes contre l'humanité et le problème de leur prescription*, 93 J. DROIT INT'L 259, 271 (1966) (emphasizing that individual act must be reflective of actual state policy for perpetrator to be guilty of crimes against humanity).

Notice, moreover, that the *mens rea* formulation of the requirement is preferable to the nature-of-the-regime formulation. International law is concerned to prosecute state agents who carry out heinous acts in the course of their official duties. Whether such acts reflect *actual* state policy is irrelevant. It would be possible, for example, for a state actor acting in the course of her official functions to *regard* herself as carrying out a policy of persecution, and thus to satisfy the *mens rea* requirement, even if no such policy existed. The actor, in short, could be mistaken as to the state's actual policy. The nature-of-the-regime requirement would rule out the prosecution of such "reasonably mistaken" actors, but these actors should be eligible for prosecution for crimes against humanity. A crime against humanity is a notion of individual, rather than state, responsibility. It is not, therefore, the moral standing of the regime that is at issue, but the moral standing of the individual in her capacity as state actor. Although the question of ultra vires action, namely action which falls outside the scope of an agent's official mandate, will be addressed in greater depth below,[60] it should be noted here that an individual who was badly mistaken about the nature of the state's policy could cease to be a state actor with respect to acts that fell under the supposed policy. Not all mistaken conduct, however, is ultra vires. And in cases in which the mistaken official *is* acting within the scope of her authority, she should still in principle be eligible for prosecution for crimes against humanity, even where the regime itself is not fundamentally evil.

As one might expect, it was the nature-of-the-regime requirement that provided the initial obstacle to liability in the *Cour d'appel*'s preliminary decision in the *Touvier* case. According to that court, the requirement was not satisfied because "if the Vichy regime possessed, by the force of circumstances, a certain state policy, it was not in any sense a policy of ideological hegemony, in the way in which we have indicated was the case with respect to Nazi Germany."[61] There were several aspects to the court's reasoning. It argued first that Vichy was a system of political alliances and oppositions, rather than a coherent ideology of oppression and racial subordination.[62] Anti-Semitism, the court maintained, did not reach anywhere near the level in France that it did in Germany.[63] Second, the court admitted that the *Milice* was an organization that had as its goal the takeover and militarization of the French government,[64] and that it *did* put into practice a political program of ideological hegemony.[65] But, the court argued, the *Milice* could not have had the takeover of the French state as its goal if the state already shared that ideology, that is, if the *Milice* represented the state as a whole.[66] The acts of the *Milice* thus could not have been carried out in the name of the French state and therefore could not constitute crimes against humanity.[67] In this way, the *Cour d'appel* also disposed of the state agency requirement, implying that Touvier could not even be considered an agent of *Vichy* with respect to the killings at Rillieux, on the grounds that the acts of the *Milice* were not acts undertaken on behalf of the state. Further discussion of the agency requirement is reserved for the next Part.

The *Cour d'appel* thus found *as a matter of law* that Touvier could not be tried for crimes against humanity, since the Vichy regime did not fit the definition of the type of

---

60. *See infra* text accompanying notes 103–107.
61. Judgment of Apr. 13, 1992, 1992 G.P. at 412 (translation from the French).
62. *Id.*
63. *Id.*
64. *Id.* at 413.
65. *Id.*
66. *Id.* at 414.
67. *Id.*

regime required under the *Barbie* precedent.[68] This court, however, failed to realize what the *Cour de cassation* later did,[69] namely that accepting this pronouncement on the nature of Vichy did not foreclose conviction in Touvier's case. If, as conceded, the *Milice* selected its victims in virtue of their racial or political status, and if the ideology of the *Milice* was the same ideology under which Germany carried out its crimes, *Germany* might be thought of as the relevant international state in whose name the killings at Rillieux were committed. In light of the reluctance of French courts to characterize Vichy as a German bedfellow, the surer route to prosecution required an extension of the concept of state agency: Touvier could be tried for crimes against humanity as an agent of Germany. In November 1992, the *Cour de cassation* accepted this argument, clearing the way for Touvier's trial.[70]

This ruling breaks new ground in international law. The case holds for the first time that a public official of one sovereign state can be the agent of another sovereign state, and therefore that his acts can be imputed to the second state as acts of that state. The finding is all the more remarkable in the face of France's evident reluctance to alter its image of Vichy, since a finding that a relatively high-placed Vichy official committed an international crime as an agent of the Third Reich ought to impute responsibility to Vichy itself. After all, treating Touvier as an agent of Germany does not impugn his agency relation with Vichy. Yet the question of state agency with respect to Germany arose in this case *precisely because* French courts were unwilling to identify Vichy as collaborationist. It is true that under principles of international law, the Vichy regime can potentially escape international responsibility for the acts of its agents if, as the *Cour d'appel* appeared to be suggesting, Vichy agents were acting far outside the scope of their official functions.[71] But where the state agent is as central to government administration as members of the *Milice* were, a finding of criminal conduct ought at least to raise a presumption of *state*, in addition to *individual*, responsibility.

The next Part will attempt to elucidate the basis in international law for the *Cour de cassation*'s innovative approach to state agency in the *Touvier* case. It will argue that this approach provides the only coherent understanding of the state agency requirement.

## IV. STATE AGENCY

Although not an explicit condition under the Charter, the state agency requirement follows from the general principle that international law governs relations among states, rather than among individuals.[72] The traditional reason for restricting the focus of international law to nations is that the notion of co-equal sovereignty would be threatened if states could prosecute the domestic criminals of other nations. Although sovereignty

68. *Id.* at 416.

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

70. *Id.*

71. *See* BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 205–07 (1994).

72. *See* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 791–93 (D.C. Cir. 1984) (Edwards, J., concurring); *see also* GERHARD VON GLAHN, LAW AMONG NATIONS 61–62 (4th ed. 1981); Ian Brownlie, *The Place of the Individual in International Law*, 50 VA. L. REV. 435 (1964). Further support for this principle lies in the fact that only states can appear before the International Court of Justice, whether as plaintiff or as defendant. Statute of the International Court of Justice, *opened for signature* June 26, 1945, art. 34(1), 59 Stat. 1031, T.S. No. 993; *see also* Richard B. Bilder, *The United States and the World Court in the Post-"Cold War" Era*, 40 CATH. U. L. REV. 251, 252 (1991).

considerations do not weigh as heavily in international jurisprudence as they once did,[73] it remains at least politically infeasible for international prosecution to substitute for domestic law-enforcement. International prosecution, then, is thought appropriate only where the offense was committed by a state through its recognized agents.

Despite the importance of the requirement, criteria for state agency have never been clearly articulated. Moreover, it is not apparent to what specific legal principles one should turn for guidance, since sovereignty considerations can dictate the need for the agency requirement, but not its form. It is at least clear that domestic law is irrelevant,[74] and thus that any guidance on the question must be international in nature.[75] International law, however, has largely failed to address the question of state agency. The Charter of the International Military Tribunal incorporates the requirement by saying that the defendant must have been "acting in the interests of the European Axis countries."[76] But the Nuremberg prosecutions did not themselves explore the nature of the agency requirement, since the defendants were all high-ranking German officials, and their status as state actors was never in doubt.[77] The course of international criminal law since Nuremberg has done little to clarify the nature of the requirement.[78]

What law there is on the question of state agency focuses on the *nature of the offense*, rather than on the *status of the offender*. The former approach will be referred to as the "act-by-act" approach, since it restricts its attention to the nature of the particular act under consideration. This Part will argue instead for what it will refer to as the "status" approach, under which the court looks to the wider nature of the agent's status relative to the state in question.

### A. *The Act-by-Act Test and Individual Responsibility*

The act-by-act test collapses into what one could call a "lack-of-autonomy" requirement. If the offender's relation to the state must be manifest in the act itself, it will be impossible to demonstrate that the individual is a state actor unless the state has authorized the agent to perform *the particular offense* in question. Thus, under this approach, if the perpetrator decides to perform the act on his own initiative, the act cannot be shown to be an act of the state, even if the actor is generally authorized to act for the state. On an act-by-act test, then, the actor must display little or no independence of judgment in order for the individual to be considered a state actor with respect to the act. In most cases, this will mean that the individual must have been acting under orders to commit the crime. And although the fact that a defendant was following orders does not provide a defense to crimes against humanity,[79] it can be considered in mitigation of punishment.[80] This shows the absurdity of expecting an entire agency relationship to manifest itself within the confines of an individual action: In practice, the approach implies

---

73. *See, e.g.*, Joan E. Donoghue, *Taking the "Sovereign" Out of the Foreign Sovereign Immunities Act*, 17 YALE J. INT'L L. 489 (1992); Joel A. Paul, *Comity in International Law*, 32 HARV. INT'L L.J. 1 (1991).

74. *See* CHENG, *supra* note 71, at 207.

75. *See id.* at 370–72.

76. *See* Nuremburg Charter, *supra* note 40.

77. *See generally* the individual judgments *in* The Nurnberg Trial, 6 F.R.D. 69, 147–87 (judgment of the International Military Tribunal 1946).

78. *See* BASSIOUNI, *supra* note 1, at 236.

79. Article 8 of the Charter provides that "[t]he fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility . . . ." Nuremberg Charter, *supra* note 40, art. 8.

80. *Id.*

that any defendant who satisfies the conditions for crimes against humanity can be considered for mitigated punishment on the basis of those same conditions.

In the *Touvier* case, Touvier could only be convicted of crimes against humanity if he received orders to kill the people whose executions he arranged and he knew that they were selected on account of their race. He could not be convicted, for example, if he himself decided that the victims should all be Jewish, even if he had received orders to conduct an execution, and he certainly could not be held responsible if he had acted on his own initiative entirely. The act-by-act test in application to the Touvier case would thus be expected to produce the result that Touvier could only be guilty of a crime against humanity if he took no initiative for the killings himself, that is, if he were following orders. And this is precisely the conclusion the *Cour d'appel* reached in its preliminary ruling: The court found that Touvier had operated largely autonomously with respect to the killings at Rillieux, and for this reason he could not be considered an agent of any state.[81]

As evidenced by the *Cour d'appel*'s opinion, the act-by-act test not only rules out the possibility that Touvier was an agent of Germany. It has the further absurd implication that Touvier was not even an agent of *France* with respect to the killings at Rillieux. This is because the autonomy Touvier exercised in ordering the killings would have been sufficient under this test to sever his connection to that state as well. Similarly, the test would imply that a *German* official who hand-picked victims on the grounds of race, although acting on orders to perform executions, would not be an agent of Germany, since he would have been acting with a certain degree of autonomy. Since on this theory of state responsibility there is no basis, outside the particular act under consideration, for linking French agents to the French state and German agents to the German state, high-placed officials and anyone else enjoying a certain measure of autonomy cannot be thought of as state agents. Although this result appears to be a *reductio ad absurdum* of the act-by-act approach, courts have adhered to it nonetheless, even when it required them to exclude the public actions of a head of state from the category of state action.[82]

Any test of agency which restricts its focus to particular acts will thus be unable to allow independence of judgment on the part of state actors to co-exist with full state authorization for the acts performed. Indeed, this defect of the approach becomes more pronounced the higher up on a chain of command one looks, since the greater the agent's power, the more significant the scope for independent action will be. Requiring the offense to fall within the parameters of an order from a recognized state official will thus exclude offenses committed by actors with greater autonomy from the ambit of authorized state action. And this will be true, not only where the offense is committed by a national of one state and the authorizing regime represents a second, independent state. Offenses performed by individual members of a single state's hierarchy will be excluded from the ambit of state action if an act-by-act test is used.

The act-by-act test of state agency thus produces profoundly counter-intuitive results. The correct test would at least accommodate the moral principle that the more an agent initiates a wicked act, the more culpable he is for it. Although at some point on a spectrum of initiation, he will cease to represent his state when he acts, there is no reason to suppose that point is reached at the first insertion of independent moral judgment.

---

81. Judgment of Apr. 13, 1992, Cour d'appel de Paris, 1992 G.P., No. 1, at 414 (Fr.).

82. *See* discussion of the Marcos cases *infra*, text accompanying notes 95–108.

### *B. The Act-by-Act Test and State Responsibility*

Although there is no law on the question of when an individual can be considered a state actor for purposes of *individual* responsibility in international law, there are several sources of law on the question of when acts of an individual can be imputed to a state for purposes of *state* responsibility. A number of cases before both the International Court of Justice (ICJ) and U.S. courts have turned on the latter question. In addition, the International Law Commission has proposed its Draft Articles on State Responsibility, which speak to the question of state responsibility.[83]

Although individual and state responsibility have been treated separately, the criteria for the two should be the same. Cases of individual responsibility in international law must satisfy the state agency requirement, and international states are responsible for the acts of their agents. Under the current state of the law, however, there are three types of cases that will provide apparent exceptions to the general rule. First, there are the exceptions to the state agency requirement for individual responsibility already noted.[84] Thus, for example, it would be possible for an individual to be guilty of an international crime of terrorism, and yet for her conduct not to be attributable to an international state. These instances of liability in the absence of an agency relation could be thought of as examples of universal jurisdiction on the part of individual nations over certain defendants, rather than as crimes which are *by their nature* international.[85] The distinction between crimes of international jurisdiction and international crimes, however, may be one without a difference. It might be better simply to allow that these forms of individual responsibility provide true exceptions to the identity of individual and state responsibility.

Second, the extensive principle of sovereign immunity shields states from responsibility for acts for which individuals might nevertheless bear liability, for example, under the Alien Tort Claims Act (ATCA).[86] Unlike the above additional grounds of individual responsibility, however, sovereign immunity does not provide a proper exception, since individual responsibility will necessarily be non-international in nature where sovereign immunity applies. An individual can only be responsible in her capacity as state actor where the state could also be responsible, and this can only be where sovereign immunity is inapplicable.

Third, there are cases in which individuals may be responsible for acts which they perform ultra vires, that is, outside the scope of their official duties which may not be attributable to the state. As with the cases of sovereign immunity, however, the exception is only apparent, since the form of individual responsibility will not be international in nature. A state is responsible for many of the unauthorized acts of its officials, and in such cases the individual will be subject to international prosecution as a state agent as well.

---

83. Draft Articles I, *supra* note 1, arts. 1–32; Draft Articles on State Responsibility, arts. 33–35, *reprinted in Summary Records of the 1635th Meeting*, [1980] 1 Y.B. Int'l L. Comm'n 270, 270–73, U.N. Doc. A/CN.4/SER.A/1980 [hereinafter Draft Articles II].

84. *See* text accompanying notes 2–4 and sources cited therein.

85. This appears to be the approach taken by the Restatement of the Law of Foreign Relations, which treats such crimes as "piracy, slave trade, attacks on or hijacking of aircraft . . ." as expanding the reach of a nation's *domestic* laws. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 404 cmt. a (1986): "This section . . . recognize[s] that international law permits any state to apply its laws to punish certain offenses although the state has no links of territory with the offense, or of nationality with the offender (or even the victim)." *See also* John M. Rogers, *The Alien Tort Statute and How Individuals 'Violate' International Law*, 21 VAND. J. TRANSNAT'L L. 47, 48 (1988) ("to say that commission of an 'international' crime, for instance piracy, is 'in violation of international law' makes no sense. Committing the crime does not result in a violation of one state's obligations to another.")

86. 28 U.S.C. § 1350 (1988).

Cases in which the action is not even performed "under color" of state authority will be ones in which neither the state nor the individual can be held internationally accountable.[87]

Keeping the foregoing real or apparent exceptions in mind, one can attempt to shed light on the question of individual responsibility by considering the more established sources of international law on state responsibility. The handful of recent cases that have spoken to the latter question, however, all apply an act-by-act test.

In *Libya v. United States*,[88] for example, Judge El-Kosheri of the ICJ argued in a dissent that the question of state agency should have been determinative of whether international responsibility should lie for the 1988 terrorist bombing of Pan Am flight #103 over Lockerbie, Scotland. The important question, in his view, was whether the perpetrators could be treated as agents of the Libyan State. Judge El-Kosheri maintained that the fact that the actors were civil servants in Libya did not imply that the acts could be attributed to the Libyan government.[89] Instead, he wrote that the test should be whether the agents "committed their crime upon orders from their governmental supervisors or at least with the knowledge and acquiescence of those persons."[90] That is, he restricted his focus to the particular act under consideration, arguing that the terrorists did not appear to have committed the act under orders from superiors, and thus that the act bore insufficient evidence of an agency relation. But if the agents had sufficient authorization from the Libyan government to commit acts of this general sort, it should be irrelevant whether the agents were specifically ordered to destroy flight 103. It is not clear that other Libyan officials need even have known of plans to commit the offense, as long as the agents themselves who performed it bore the requisite relation to the state and they were acting within the expected bounds of that relation.

The ICJ explicitly endorsed the act-by-act test of state agency in *Nicaragua v. United States*, a suit brought by the government of Nicaragua against the United States for terroristic and violent activities of the Nicaraguan rebels.[91] Nicaragua claimed that the criminal acts of the *Contras* could be attributed to the United States, on the grounds that the *Contras* were entirely "recruited, organized, paid and commanded" by the U.S. government.[92] The Court, however, said that "[f]or this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that State had effective control of the military or paramilitary operations *in the course of which the alleged violations were committed*."[93] Although the Court did not elaborate its view of the agency relation, Judge Ago articulated the Court's approach to state agency in a concurrence, saying that state agency can only be imputed "in cases where certain members of [the *Contras*] happened to have been *specifically charged by United States authorities to commit a particular act, or carry out a particular task of some kind* on behalf of the United States."[94]

Most recently, the act-by-act approach has been used to limit the scope of a head of state's agency relation to the state he governs. In a class action suit brought against the estate of Ferdinand Marcos by victims of human rights abuses in the Philippines during his

---

87. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 207 (1986).

88. Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.S.), 1992 I.C.J. 114, 199 (Provisional Measures Order of Apr. 14) (El-Kosheri, J., dissenting).

89. *Id.* at 202.

90. *Id.*

91. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

92. *Id.* at 64, para. 114.

93. *Id.* at 64–65, para. 115 (emphasis added).

94. *Id.* at 181, 188–89, para. 16 (separate opinion of Judge Ago) (emphasis added).

tenure *(Estate II)*, the Ninth Circuit held that Marcos was not responsible as an agent or instrumentality of the Philippine state for his acts as head of state.[95] The court explained that Marcos was not "an absolute autocrat,"[96] but instead a head of state bound by laws, and that where his actions violated the law, they could not be considered acts of the state.[97] The court thus maintained that actions performed in violation of a sovereign's legal powers are individual, rather than sovereign, actions.[98] Similarly in an earlier case *(Estate I)*, the Ninth Circuit had found that Marcos' daughter, Imee Marcos-Manatoc, in charge of a portion of the military police in the Philippines, was also not acting in her official capacity when she authorized numerous acts of violence.[99] The court held that because Marcos-Manatoc exercised a reasonable degree of autonomy, her acts were not within her official mandate and were therefore not the acts of the Philippine state for purposes of sovereign immunity under the Foreign Sovereign Immunities Act (FSIA).[100]

These holdings are the natural but unfortunate consequence of the act-by-act test of state agency. They are another manifestation of the idea that an agent must have been following orders for his act to be an act of the state. In *Estate II*, the statutory mandate to which Marcos was subject plays the role of the required command: Marcos' actions cannot be thought of as state action unless they were directly authorized, and for a head of state, authorization can only come from the laws under which he is bound to govern. But surely these cases provide a clue that something has gone badly wrong: A test of state agency should not produce the result that the actions of heads of state and high government officials, conducted in the course of state governance and "under color" of state authority are removed from the category of state action and relegated to the domain of private action. Abuse of power should not turn state action into private violence.

Enlarging the scope of governmental responsibility under the current state of the law would have the undesirable consequence of enlarging the reach of sovereign immunity under U.S. laws, since the only exceptions to sovereign immunity are restricted to the few listed in the FSIA.[101] But the present convoluted method of limiting sovereign immunity by artificially excluding large portions of official behavior from the scope of state action is ultimately untenable. Not only does it contort legal reasoning in cases implicating the FSIA, but it has unfortunate implications for other areas of the law which involve state agency, to which its impact on international criminal law attests. A more coherent solution,

---

95. *In re* Estate of Ferdinand Marcos, 25 F.3d 1467, 1472–74 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 934 (1995). The court did find that it had jurisdiction over him as a private citizen. *Id.*

96. *Id.* at 1471.

97. *Id.* The court instead assumed jurisdiction under the Alien Tort Claims Act, 28 U.S.C. § 1350 (1988). Unfortunately, against the background of the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1330, 1602–11 (1988), the court could not have had jurisdiction over the Marcos estate without finding that Marcos' acts were not acts of the state, since Marcos would have been immune to prosecution under the FSIA if his acts had been judged to be acts of state. *See* Princz v. Federal Republic of Germ., 26 F.3d 1166, 1173–74 (D.C. Cir. 1994) (holding that the waiver exception of the FSIA does not apply to *jus cogens* violations generally); Siderman de Blake v. Republic of Arg., 965 F.2d 699, 719 (9th Cir. 1992) ("[A] violation of *jus cogens* does not confer jurisdiction under the FSIA.").

98. 25 F.3d at 1470.

99. *In re* Estate of Ferdinand E. Marcos, 978 F.2d 493, 497–98 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 2960 (1993).

100. Again, the court found it had jurisdiction over the defendant as a private citizen under the Alien Tort Claims Act. *Id.*

101. *Id.*

and one called for by a number of scholars, would be to extend the exceptions to immunity under the FSIA.[102]

### C. *The Status Approach to State Agency: A Proposal*

The most salient feature of the agent-state relationship is a set of shared expectations between the agent on the one hand and the state or its recognized agents on the other. In particular, an agency relationship arises when both the agent and the state regard the agent as accountable to the state for purposes of carrying out the state's policies. What is of greatest relevance to state agency, then, is the existence of a shared understanding that the agent has assumed a certain type of accountability to the state.

Accountability need not be based on a relationship of superior to inferior. A group of individuals, for example, embarked on a joint venture tend to regard themselves as accountable to one another, even if all members of the group enjoy the same status. Moreover, accountability can obtain whether or not the agent is a national of the state. Nationality would appear to have little or no bearing on the matter. Nor should physical presence on the state's territory be in itself a relevant consideration. The fact that an individual was a German national, for example, living in Berlin during the Third Reich does not help to establish that person as an agent of the German state. Similarly, that an individual was not a German national and was not living in Germany should not preclude her from having an agency relationship with Germany. Nor does the fact that an actor was an official in the state government definitively establish state agency, since official status does not entail a shared expectation of agent-accountability with respect to all matters. Official status may create a *presumption* of state agency, but it should be possible for an agent's duties to be sufficiently circumscribed that the necessary element of shared expectations of accountability of the agent to the state is limited to certain spheres of activity. On the other hand, that a person did not have an official position in the state's bureaucracy should not create a presumption that the individual was not a state actor, since mutual expectations can easily develop outside of official bureaucratic channels.

On a status approach, the higher up on a chain of command one moves, the stronger will be the presumption of agency and the broader the scope of the agency powers. The limiting case is the nearly total accountability of the head of state. Although purely personal actions by a head of state need not be thought of as state action, any action undertaken in the public arena by a head of state should be considered state action. That an act was contrary to law thus should not stand as grounds for excluding it from the sphere of state action. Although it is possible for a head of state to commit a crime as a purely private actor, most crimes committed by members of a ruling party utilize official channels and state power for their commission. International responsibility for such crimes should not be easily evaded by devices that attempt to transform them into private acts.

---

102. As courts and commentators have pointed out, the structure of the FSIA makes little sense, since the Act allows an exception to sovereign immunity for violations involving commercial activity but not for grave human rights violations. *See* Princz v. Federal Republic of Germ., 813 F.Supp. 22, 26 (D.D.C. 1992) (holding that the FSIA "has no role to play where the claims alleged involve undisputed acts of barbarism"), *rev'd* 26 F.3d 1166, 1184–85 (D.C. Cir. 1994) (Wald, J., dissenting) (arguing that "the only way to interpret the FSIA in accordance with international law is to construe the Act to encompass an implied waiver exception for *jus cogens* violations"); *see also* Joan Fitzpatrick, *The Future of the Alien Tort Claims Act of 1789: Lessons From In Re Marcos Human Rights Litigation*, 67 ST. JOHN'S L. REV. 491 (1993); Adam C. Belsky et al., Comment, *Implied Waiver Under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law*, 7 CAL. L. REV. 365 (1989) (arguing that the FSIA should itself be understood as allowing an exception to sovereign immunity in cases of grave human rights abuses).

The status approach to state agency must be understood as accompanied by a certain approach to the question of ultra vires conduct. Under the status approach, the scope of ultra vires action will be relative to the scope of the agent's grant of authority. The more general the grant of authority to an agent, the more difficult it becomes to argue that the agent was acting ultra vires, since the broader the category of official acts would be. The status approach would thus shrink the domain of ultra vires conduct overall, in keeping with its significant expansion of the scope of state action for upper-level officials. The agent's sphere of international responsibility, then, would depend on the understanding that obtained between the individual and the state regarding the individual's role in furthering state policies. Thus a state might choose to extend authority to an agent only for purposes of accomplishing a discrete task. In this case, the act-by-act approach and the status approach would result in the same inquiry, and the sphere of state action for that agent would be limited to the particular act for which he was engaged. Although the scope of state action for an individual engaged for a limited purpose would itself be limited, a state's responsibility should increase with the generality of its grant of authority to the agent. The act-by-act approach appears to produce the opposite result: It diminishes the domain of state action and similarly augments that of ultra vires action as the level of autonomy on the part of the agent increases. The status approach, by contrast, would include all but the most private and personal of actions in the category of state action for actors whose grant of authority allows for a significant degree of autonomous action.[103]

This approach to ultra vires conduct suggested by the status approach is largely consistent with that of the Third Restatement of Foreign Relations.[104] Section 207, which addresses the question of state responsibility for the acts of its agents, provides that "[a] state is responsible for any violation of its obligations under international law resulting from action or inaction by . . . any organ, agency, official, employee, or other agent of a government or of any political subdivision, acting within the scope of authority *or under color of such authority.*"[105] Comment d, which defines the "scope and color of authority," goes on to say:

> A state is responsible for acts of officials and official bodies, national or local, even if the acts were not authorized by or known to the responsible national authorities, indeed if expressly forbidden by law, decree or instruction. In determining whether an act was within the authority of an official or an official body, or was done under color of such authority . . . one must consider all the circumstances, including whether the affected parties reasonably considered the action to be official, whether the action was for public purpose or for private gain, and whether the persons acting wore official uniforms or used official equipment.[106]

---

103. Properly speaking, there are four categories of action as related to state agency: (1) purely private acts which bear no relation to any state but which do not contravene either domestic or international laws (e.g., the sovereign brushing his teeth); (2) purely private acts of a state official which the official is not authorized to perform (e.g., the Secretary of State goes on a shooting spree); (3) state acts of a state official which the official is authorized to perform; and (4) state acts of a state official which the official is not authorized to perform, but which nevertheless are performed "under color of authority." It is this last category that has proven difficult for purposes of both sovereign immunity and conduct which is ultra vires. It is also for this category of acts that the act-by-act and the status approaches provide sharply divergent answers.

104. RESTATEMENT (THIRD) OF FOREIGN RELATIONS (1986).

105. *Id.* at § 207 cmt. c (emphasis added).

106. *Id.* at cmt. d.

The Restatement approach makes clear that individual actions need not be specifically authorized in order to count as state action. What matters instead is that the acts are performed *under color of authority*. This test implies a status approach to state agency, because determining whether the acts are performed under color of authority, when the acts are not specifically authorized, will require general consideration of the nature of the individual's relation to the state. The approach is necessarily a flexible one, exploring factors such as the agent's motivation for the act, as well as the appearance of the actor. The resulting category of ultra vires action is likely to be much narrower than on an act-by-act approach, restricting non-international conduct to that which is truly private in nature.[107]

The status approach to individual responsibility is also consistent with the ILC's approach to state responsibility.[108] Article 8 of the Draft Articles attributes to the state the conduct of persons acting on its behalf.[109] No exception is made for agents acting in violation of the laws of the state. Article 5 provides that the conduct of any organ recognized under that state's law as a state organ "shall be considered as an act of the state concerned under international law, provided that organ was acting in that capacity in the case in question."[110] Thus, official status is not dispositive under the Draft Articles: An organ officially recognized under the internal laws of the state may in certain cases be acting outside the scope of its official capacity. Similarly, Article 7, section 2 provides:

> The conduct of an organ of an entity which is not part of the formal structure of the State or of a territorial government entity, but which is empowered by the internal law of that State to exercise elements of the governmental authority, shall also be considered as an act of the State under international law, provided that organ was acting in that capacity in the case in question.[111]

Thus, an individual lacking an official position may be engaged by a state to act on its behalf, and the actions of that agent will be the actions of the state if the agent was acting in the capacity for which she was engaged.

It is important to stress the difference between the approach proposed here, which draws support from the ILC's recommendations for state responsibility, and the more standard approach to the state agency of individuals, exemplified by the 1992 lower court ruling in the *Touvier* case. While the *Touvier* court was concerned with the actor's relation

---

107. Section 702 of the Restatement appears to present an exception to the broad approach to state agency of § 207 for human rights violations which are not also breaches of treaty obligations. After citing to the state responsibility provision of § 207, Comment b of § 702 states:

> The violations of human rights cited in this section [§ 702], however, are violations of customary international law only if practiced, encouraged, or condoned by the government of a state as official policy. A state is not responsible under this section for a violation of human rights by an official that was not authorized, encouraged, or condoned by the responsible governmental authorities of the state.

*Id.* at § 702 cmt. b. The Restatement thus appears to retreat from its broad conception of state responsibility uniquely with respect to human rights violations. The approach to individual agency suggested in this Article maps onto the more general approach to state agency found in § 207 and would accordingly eliminate the exception found in § 702.

108. *See generally* Draft Articles I, *supra* note 1.

109. The article provides: "The conduct of a person or group of persons shall also be considered as an act of the State under international law if: (a) it is established that such person or group of persons was in fact acting on behalf of that State . . . ." *Id.* art. 8.

110. *Id.* art. 5.

111. *Id.* art. 7(2).

to the state with respect to a particular act, the present approach requires no interaction between an individual and the state on the level of the act. The important question on the status approach is whether the agent has a general grant of authority to act for the state, and if so, whether the agent was acting in his capacity as state agent under that grant. The idea of general, as opposed to act-by-act authorization, squares with the suggestion that the agent and the state must have shared expectations about the role of the agent with respect to the state. If the individual regards himself as accountable to the state government, and the government in turn regards the agent as responsive to it, whether the agent was specifically directed, or even more generally authorized to perform the act in question would appear to be irrelevant, as long as the agent was acting within his official capacity.

Consider the application of the status approach to the *Touvier* case. The question is whether Germany authorized Touvier to act on its behalf. Suppose for the sake of argument that Touvier had little or no contact with German officials himself, but that he was ordered by De Bourmont who maintained regular contact with the Germans. It is surely not necessary for Touvier to have been directly authorized to act on Germany's behalf; it should suffice if De Bourmont, or whoever might have been first in line, was directly authorized by Germany and that De Bourmont authorized Touvier to act. At least this analysis is sound if the grant of authority to De Bourmont were sufficiently general that it fell within the scope of his duties to authorize others to act. It is sufficient that Vichy officials were empowered to act for Germany; the lesser officials they empower need not themselves have had contact with Third Reich officials. The next question is whether Vichy, or the Vichy officials from whom Touvier derived his authority, had the requisite relationship with Germany. There are three theories under which an agency relationship could be found to exist. First, the acts in question would be attributable to Germany if Germany specifically directed or engaged *Milice* officials to commit the murders. This would be an instance of the sort of limited agency relationship a state can create on a one-time basis by engaging an individual to perform a particular task. This theory is reflected in the Draft Articles, which allows that a government can empower an organ of another state to act under its authority without controlling the state of which the organ is an official part:

> The conduct of an organ of an entity which is not part of the formal structure of the State or of a territorial governmental entity, but which is empowered by the internal law of that State to exercise elements of the governmental authority, shall also be considered as an act of the State under international law, provided that organ was acting in that capacity in the case in question.[112]

This basis for enlarging responsibility would be most appropriate in a situation in which an isolated organization within a state attempted to break away from its own government with the assistance and collaboration of an outside enemy. If sufficient collaboration obtained between the organization and the other state, the latter could be internationally accountable for the acts of the organization. If, for example, Germany had independent relations with the *Milice*, and had specifically engaged it to perform certain tasks, the actions of the *Milice* would be actions attributable to Germany under this provision.

Second, even if French officials undertook the killings at Rillieux on their own initiative, Germany can be held responsible for the event if it exercised *general* control over

112. Draft Articles I, *supra* note 1, art. 7(2).

the conduct of Vichy officials. It would not be necessary, under this theory, for a legal relationship to exist in order to establish an agency relation between the two countries. This theory of agency is reflected in Article 28 of the Draft Articles:

> An internationally wrongful act committed by a State in a field of activity in which that State is subject to the power of direction or control of another State entails the international responsibility of that other State.[113]

Under Article 28, if Vichy was subject to "the power of direction or control" of Germany, then any internationally wrongful acts of Vichy are attributable to Germany. On the proposed analysis, this would subject individual officials of Vichy to international criminal liability as German agents. This theory of agency would be appropriate for a situation in which the upper echelon of the Vichy regime had effectively collapsed into the administration of the Third Reich. If Vichy officials relied on a grant of authority of German officials for their power and status, French officials would all be German officials for purposes of international law. The distinction between the two regimes would have dissolved.

Third, under the Draft Articles it is possible for a state to be responsible for the internationally wrongful acts of another state if the first state assists the second state in committing these acts:

> Aid or assistance by a State to another State, if it is established that it is rendered for the commission of an internationally wrongful act carried out by the latter, itself constitutes an internationally wrongful act, even if, taken alone, such aid or assistance would not constitute the breach of an international obligation.[114]

This provision establishes the concept of joint liability among states under international law. Under this approach, it would not be necessary to decide whether Touvier was an agent of Germany. Vichy would be responsible for aiding Germany in the commission of internationally wrongful acts, and Vichy officials could be tried for crimes against humanity as authors of those acts. In this way, it would be possible for acts of a Vichy state actor to be done "in the name" or "on behalf" of Germany, without those acts having been performed by someone who is himself an agent of Germany.

As discussed in Part II, there is every reason to suppose that Vichy carried out a policy of vicious persecution of Jews and political resistants without prompting from Germany, and that the Vichy regime fully shared Germany's ideology.[115] In light of this history, it is probable that Vichy was a willing assistant in Germany's genocidal plans. Had it not been determined to put Vichy on a different moral plane from the Third Reich, the *Touvier* court would have had ample basis for finding that Vichy was a state "practicing a political system of ideological hegemony."[116] It appears, however, to be psychologically expedient for French courts to avoid gazing on Vichy's own policies of persecution with a cold eye, since such an assessment would produce the inevitable conclusion that Vichy was as motivated to eradicate its Jewish population as was the Third Reich. Indeed, the independent enthusiasm with which Vichy embraced anti-Semitism, and its resulting *moral* independence from Nazi Germany, seem to provide the very conditions that make dispassionate assessment of Vichy's culpability impossible. Vichy's racist agenda would be

---

113. *Id.* art. 28(1).

114. *Id.* art. 27(2).

115. *See supra* text accompanying notes 8–16.

116. Judgment of Apr. 13, 1992, Cour d'appel de Paris, 1992 G.P., No. 1, at 414 (Fr.).

all the easier for France to face if it could be understood as the mere implementation of another country's ideology.

If one works within the constraints imposed by the French courts and accepts that Vichy does not fit the required definition of an illegitimate regime, the collaboration between Vichy and the Third Reich nevertheless supports the existence of an agency relationship between Touvier and Germany under the third of the theories outlined above.[117] Starting in 1942, the Vichy government made a series of agreements with the Germans that formalized the cooperation of Vichy in deporting Jews to Nazi concentration camps in exchange for various French police privileges.[118] Apart from suiting its own anti-Semitic ideology, these agreements benefited Vichy by creating political clout with Germany.[119] If Vichy's persecution of the Jews does not qualify it as an illegitimate state in its own right, the level of assistance it afforded Germany provides the basis for treating the Vichy regime as an accomplice. The acts of its agents are acts performed "on behalf of" Germany.

Between 1942 and 1944, Vichy increasingly came under the power of the Third Reich.[120] On November 29, 1943, Pétain, who had shown a desire to maintain France's status as an independent and sovereign nation, was ordered to step down by Otto Abetz, a high German official stationed in Paris. Abetz's order also stated that all French laws would henceforth have to be submitted to the occupying powers in the North for approval.[121] Pétain was replaced by Laval, who was willing to bow entirely to the Nazis,[122] and who, from December 1943 until August 1944, headed the Vichy regime entirely on his own.[123] During this period, Laval took orders directly from Abetz, and all vestiges of independence from Germany were eliminated.[124]

During this period of increasing German control, the second theory outlined above[125] might be a more appropriate basis for regarding Vichy officials as agents of Germany than that provided by the prosecution. The Germans had de facto control over the day-to-day operations of the Vichy regime, and the State was effectively absorbed into the occupying powers in the North.[126] Since the killings at Rillieux took place in 1944, this is probably the most accurate theory under which to regard Touvier as an agent of Germany. It should be noted, moreover, that this state of affairs could not be used as a basis for denying Vichy's responsibility, since, as already mentioned, it is not a defense to an international criminal prosecution that the defendant was following orders.[127]

Finally, the first theory outlined above[128] would appear to be the least appropriate to the circumstances surrounding Touvier's crime. There is no evidence that collaboration with the Germans was restricted to certain organizations in the Vichy regime alone, or that the relations between the *Milice* and the Germans did not characterize the State as a whole. It should be noted, however, that arguments made at trial tending to show the relative

---

117. *See supra* text accompanying note 114.
118. *See* WEBSTER, *supra* note 8, at 107–14.
119. *Id.* at 107–08.
120. *See generally* MARRUS & PAXTON, *supra* note 6, at 281–340.
121. FRANÇOIS-GEORGES DREYFUS, HISTOIRE DE VICHY 732–33 (1990).
122. WEBSTER, *supra* note 8, at 174.
123. *See id.* at 174, 198.
124. DREYFUS, *supra* note 121, at 750–52.
125. *See supra* text accompanying note 113.
126. *See supra* text accompanying notes 109–112.
127. *See* Nuremberg Charter, *supra* note 40, art. 8.
128. *See supra* text accompanying note 112.

anomalousness of high level collaboration between elements in Vichy and the German state could still allow a finding of state agency under this theory.

It would appear, then, that there are at least two theories under which Touvier could be thought of as an agent of Germany with respect to the killings at Rillieux: He was an agent of Germany either because he belonged to an organ of the Vichy regime which afforded significant assistance to the Nazi government, or because the Nazi regime exerted a high level of control and direction over the daily operations of the Vichy government.

## V. CONCLUSION

If crimes against humanity are to be tried on the territory on which the criminal acts occurred, the important psychological and political stake local courts have in the outcome of the proceedings dictates a rethinking of the criteria for state agency. Requiring a court to offer an extremely unflattering portrait of its own historical legacies in order to find one of its nationals guilty of crimes against humanity creates unnecessary obstacles to the successful prosecution of such cases, at least in situations in which there is more than a single regime involved in the implementation of a common persecutive program.

The notion of state agency receives inconsistent and sometimes incoherent treatment. It is apparently all too tempting for courts, both in France and in the United States, to tailor the concept to suit the needs of a particular case. An approach to state agency based on the status of the actor, rather than on piecemeal evaluation of his behavior on an act-by-act basis would allow international law to develop consistently in this area. It would also provide the broadest foundation for conducting international prosecutions for human rights violations consistent with sovereignty restrictions. It would thus allow international condemnation to play a more significant role in efforts to hold perpetrators of wide-spread atrocities accountable for their actions.

## VI. APPENDIX: THE LESSER EVIL

Touvier claimed that he was faced with a choice of evils: allow De Bourmont to kill thirty Jews in revenge for the killing of Henriot, or implement his own plan to kill seven, which, he believed, would pacify the German desire for revenge equally well. Touvier's claim, then, is that but for his intervention, thirty Jews would have been killed, rather than seven. Touvier argues, therefore, that he should be thanked for saving twenty-three, rather than tried for the murder of seven. If the facts were as Touvier claimed, should he have a justification of necessity?

The defense of necessity has generally been understood as requiring, at a minimum, that the threatened harm which the actor chose to avoid was imminent and certain, that the threatened harm would be worse than the harm chosen, and that the threatened harm could not have been avoided by any other means. Several of these elements appear in Article 33 of the Draft Articles on State Responsibility on "state of necessity" defenses, which provides that the harm must represent "a grave and imminent peril."[129] The "effectiveness" requirement—that the chosen act was the only effective means for avoiding the harm in question—is also reflected in Draft Article 33, which says that it must be the case that "the act was the only means of safeguarding an essential interest of the State"[130] against the threatened peril.

This condition is also incorporated in an article dealing with another sort of defense under intentional law, the defense of "distress." Article 32 provides that the wrongfulness of an act is precluded if the actor acting on behalf of the state "had no other means, in a situation of extreme distress, of saving his life or that of persons entrusted to his care."[131] And since Touvier was in charge of Jewish and political prisoners of the *Milice* in the region to which he was assigned, he might attempt a defense of distress, citing the lives of the twenty-three prisoners he allegedly "saved" from execution.

With respect to a possible necessity defense, there is no question that the gravity requirement is satisfied. It also seems reasonably clear that the harm threatened is worse than the harm chosen, since presumably the death of thirty is worse than the death of seven.[132] It is doubtful, however, that the imminence requirement is satisfied. Touvier would have had to present evidence that the German action was immediately forthcoming, as well as evidence bearing on the certainty of the event. Suppose, however, he could meet these two requirements. The real problem with the necessity defense lies in satisfying the effectiveness requirement. It would be difficult to demonstrate that there was no other way to cause the Nazis to desist from their purpose when the threatened harm was to take place on non-occupied territory, largely under the control of the Vichy regime. Touvier's claim that he and De Bourmont were able to convince the Germans to leave the matter in French hands would tend to undercut any such argument.

---

129. Draft Articles II, *supra* note 83, art. 33(1)(a).

130. *Id.* Compare the approach of the MODEL PENAL CODE § 3.02 (1962) (requiring that the actor believed the act to be "necessary to avoid a harm or evil to himself or to another").

131. Draft Articles I, *supra* note 1, art. 32(1).

132. Philosophers, however, have debated whether the death of a larger number of persons should be thought of as a *worse* state of affairs than the death of a smaller number. *See generally* John M. Taurek, *Should the Numbers Count?*, 6 PHIL. & PUB. AFF. 293 (1977). The argument that it might not be rests on the claim that human lives are incommensurable (i.e. their worth cannot be compared), and thus the evil represented by the loss of human life is not additive.

It seems, at any rate, impossible to demonstrate that executing seven Jews was reasonably perceived as an effective way to prevent the Nazis from carrying out their threatened plan. Touvier presents the fact that Nazis did not take any reprisals against Jews after the killings at Rillieux as evidence that his supposition was correct.[133] But first, this fact is perhaps better evidence that the Germans intended no such action in the first place. Second, even if the killings at Rillieux *did* cause the Nazis to alter their plans, *it was not reasonable to think this method would have been an effective means for accomplishing that end.* If the Germans in fact wanted to avenge the death of Henriot by executing a hundred Jews, there is no reason to suppose they would have been satisfied by the execution of seven. And if it was reasonable to suppose they *would* have been satisfied with the murder of seven, it might also have been reasonable to suppose they would have been satisfied with the murder of three, or perhaps with persecutions short of murder. Finally, even if Touvier's supposed reasoning at the time subsequently did prove accurate, he should not be able to take credit for wild guesses which turn out to be correct.

The same effectiveness considerations that make the defense of necessity questionable in this situation would make the defense of distress inapplicable as well. Even on the extremely unlikely hypothesis that Touvier was attempting to save the lives of those entrusted to his care under circumstances of extreme distress, it would again be impossible to show that Touvier had adequate grounds for thinking his method effective. If one were to accept a defense of this sort to the crime of murder, the agent, whose own life is not at stake, would have to be certain both that the feared greater evil would result if he did not act, and that the killing he undertook in order to avert the greater evil would successfully avert it. In this case, Touvier could not plausibly have demonstrated either.

The deeper and more interesting question is unfortunately beyond the scope of this Article. Suppose Touvier had been able to demonstrate that the killings were both necessary to avert greater slaughter and that they would be effective at doing so. Should necessity or some sort of "distress" defense be permitted as a defense to intentional killing? Purifying what is now a difficult ethical situation of epistemic doubt does not eliminate all moral discomfort. It brings us face to face with the intuition that the event which is *my intentionally destroying a human life* may be in some ways worse than the event which is *an ending of a human life*, from whatever source. And it may be, therefore, that although I might very much prefer that an earthquake would kill three human beings rather than five, I may legitimately not prefer the death of three over the death of five if I must effectuate the death of the three in order to save the additional two. The preference, and the intuition that it is legitimate, can only rest on the fact that the death of the three under these circumstances may be an event which is not legitimately mine to choose, even though it may be better that three die than that five die. I may not, therefore, be able to claim the benefit of a justification where I do choose it. If it is my life that is at stake, it might seem more reasonable to allow me a defense under the circumstances. But presumably the applicable defense in this case would be an *excuse*, and excuse is not the appropriate defense for agents who perform disinterested acts for the sake of the common good.[134]

---

133. Judgment of Apr. 13, 1992, Cour d'appel de Paris, 1992 G.P., No. 1, at 406 (Fr.).

134. *See generally* Claire Finkelstein, *Self-Defense As a 'Rational Excuse': Accommodating Relations of Domination*, U. PITT. L. REV. (forthcoming 1995); Claire Finkelstein, *Duress: A Philosophical Account of the Defense in Law*, 37 U. ARIZ. L. REV. 251 (1995).