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The Politics of Memory/Errinerungspolitik and the Use and Propriety of Law in the Process of Memory Construction

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Abstract

The post-Second World War trial for the crime against humanity from the start assumed pedagogical proportions, with the tribunals involved conscious that their legal verdicts would represent historical pronouncement and national values. The newly defined crime has been asked to institutionalize far more than the traditional task of adjudicating the guilt or innocence of the defendant. The trials themselves are meant to define the past, create and crystallize national memory, and illuminate the foundations of the future. I suggest that, by placing a burden on law that it is not designed to bear, we risk deforming law and legal principle. We risk creating an edifice that will not be equal to the task of memory, that will trivialize the memory it seeks to establish and fortify and, worst of all, that may betray law itself by subverting it from within.

THE POLITICS OF MEMORY/*ERRINERUNGSPOLITIK* AND THE USE AND PROPRIETY OF LAW IN THE PROCESS OF MEMORY CONSTRUCTION

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ABSTRACT. The post-Second World War trial for the crime against humanity from the start assumed pedagogical proportions, with the tribunals involved conscious that their legal verdicts would represent historical pronouncement and national values. The newly defined crime has been asked to institutionalize far more than the traditional task of adjudicating the guilt or innocence of the defendant. The trials themselves are meant to define the past, create and crystallize national memory, and illuminate the foundations of the future. I suggest that, by placing a burden on law that it is not designed to bear, we risk deforming law and legal principle. We risk creating an edifice that will not be equal to the task of memory, that will trivialize the memory it seeks to establish and fortify and, worst of all, that may betray law itself by subverting it from within.

KEY WORDS: Algeria, crimes against humanity, France, judiciary, Nazi occupation

INTRODUCTION

Law and politics are not identical, yet are inseparable. This has proven to be one of a very few reliable universals of our world. Consequently, it is misleading to discuss law as being "politicized" inasmuch as this implies an a priori "un-politicized" concept of law. Such a concept is both inaccurate and incoherent. Additionally, to focus on the politicization of law is to dichotomize law and politics, and consequently to examine only one aspect of a dynamic that is of mutually interactive influence.

My topic therefore necessarily will offer an incomplete account. Nevertheless, it may be of interest because of the ideal of neutrality, objectivity and independence from politics that has characterized, and continues to characterize, human aspirations for law. The history of the crime against humanity, entrenched in the legacy of Nazism, offers an opportunity to observe mechanisms intrinsic to and pervasive in law. Analyzing crimes against humanity yields greater visibility of some of law's attributes in large part because crimes against humanity catch law at an extreme point of rupture, as did Nazism, such that studying the crime against humanity's trajectory makes it possible

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* Professor of Law, University of Pittsburgh. Unless otherwise noted, translations are mine. This is a revised version of the chapter which appeared in 14 LAW AND CRITIQUE 309 (2003) A longer version of this chapter appeared under the title *Polticizing the Crime Against Humanity: The French Example*, 78 NOTRE DAME L. REV. 677 (2003).

to observe phenomena of law and society that in less turbulent times tend to be dormant or undetectable.[1]

The convergence of law with political ideology was extreme in Nazi Germany and Nazi-occupied states.[2] Equally extreme was the degree of legalism of Nazism, the degree to which Hitler Germany's self-description, self-representation, and to a significant extent also self-understanding, was as a nation under law, governed by law.[3] By also placing jurisprudential concepts within Nazi law that were antithetical to traditional notions of law, however, the Nazi régime simultaneously rendered Nazi Germany and Nazi-occupied countries lawless, at least in one sense. The propriety of describing that society as lawless has itself been a matter of hot dispute since the war.[4] However one comes out on this dispute, and both sides make irrefutable points within it,[5] at the least one may conclude that Nazi Germany and occupied countries such as France maintained a mimicry of law, such that Fascist terror was visited upon people in the name of law, pursuant to apparently legal mechanisms, channels and structures, and not in an overt shunning or repudiation of law.[6]

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[1] *See* THEODOR ADORNO, MINIMA MORALIA: REFLECTIONS FROM DAMAGED LIFE 15 (E.F.N. Jephcott trans., 1974) ("He who wishes to know the truth about life must scrutinize its estranged form.").

[2] *See* Vivian Grosswald Curran, *Fear of Formalism: Indications from the Fascist Period in France and Germany of Judicial Methodology's Impact on Substantive Law*, 35 CORNELL INT'L. L.J.101 (2001-2002) [hereinafter Curran, *Fear of Formalism*].

[3] For an excellent portrayal of this complex issue, see Michael Stolleis, *Reluctance to Glance in the Mirror: The Changing Face of German Jurisprudence after 1933 and post-1945*, *in* THE DARKER LEGACY OF EUROPEAN LAW: PERCEPTIONS OF EUROPE AND PERSPECTIVES ON A EUROPEAN ORDER IN LEGAL SCHOLARSHIP DURING THE ERA OF FASCISM AND NATIONAL SOCIALISM AND ITS REMNANTS (Christian Joerges ed., 2003).

[4] *See generally* H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); Lon L. Fuller, *Positivism and Fidelity to Law:—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958); H.L. HART, ESSAYS IN JURISPRUDENCE AND PHILOSOPHY (Oxford, 1983).

[5] For my discussion of this debate, see Curran, *Fear of Formalism*, *supra* note 2. *See also* David Fraser, *The Outsider Does Not See All the Game. . . : Perceptions of German Law in the Anglo-American World, 1933-1940* (2001, manuscript on file with author).

[6] One might dispute this statement to the extent that Nazi Germany and occupied countries also had institutions that bypassed strictly legal ones. On the whole, however, scrupulous maintenance of the structures of law and use of the channels of law and legal institutions characterized Nazi Germany and Vichy France. *See* BERND RÜTHERS, DIE UNBEGRENZTE AUSLEGUNG: ZUM WANDEL DER PRIVATRECHTSORDNUNG IM NATIONALSOZIALISMUS, 4th ed. (1968, Heidelberg: C.F. Müller, 1991); BERND RÜTHERS, ENTARTETES RECHT: RECHTSLEHREN UND KRONJURISTEN IM DRITTEN REICH 1939-41 (1988); and Micahel Stolleis, who captures what I mean above when he writes of rules clothed in law, *supra* note 3.

Among the many whose reaction to Hitlerism after 1945 was to pin their hopes on depoliticizing law, with an underlying faith that law at its core is neutral and correlates positively with justice, was Raphael Lemkin. Lemkin was a lawyer and law professor, originally from Poland, whose family was exterminated by Hitler because they were Jews. Lemkin coined the term "genocide," and drafted what became the U.N. Convention on Genocide, always in the capacity as a private individual, as he had no diplomatic or other governmental status.[7]

According to a recent article by Michael Ignatieff, among the many remarkable attributes of Lemkin was his understanding Nazi genocide from his reading of Nazi jurisprudence, not from being privy to the critical facts of the Nazis' actual genocide.[8] According to Ignatieff, at a time when others who were privy to those facts could not bring themselves to believe them, people such as Isaiah Berlin, Nahum Goldman and Chaim Weizmann (all of whom would have had every personal motive to believe the truth), Lemkin divined and believed the truth from his reading of Nazi jurisprudence, and in the absence of the sort of concrete, factual information that had reached Goldman, Berlin and Weizmann.[9]

Already in 1933 at the League of Nations' Fifth International Conference for the Unification of Penal Law, held in Madrid, Lemkin proposed a new sort of crime, what later he would call the crime of genocide, though in 1933 he had not yet coined that term.[10] In an article he wrote in 1947, Lemkin described his 1933 idea.[11] At that time he had formulated two new crimes for international law, the crime of "barbarity" and of "vandalism," which in 1947 he explained as follows:

> [T]he present writer . . . envisaged [in 1933] the creation of two new international crimes: the crime of barbarity, consisting in the extermination of racial, religious or social collectivities, and the crime of vandalism, consisting in the destruction of cultural and artistic works of these groups.[12]

He had drafted his 1933 proposed crimes as follows:

> Whosoever out of hatred towards a racial, religious or social collectivity, or with a view to the extermination thereof, undertakes a punishable action against the life, bodily integrity, liberty, dignity or economic existence of a person belonging to such

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[7] *See* WILLIAM KOREY, AN EPITAPH FOR RAPHAEL LEMKIN (2002; pre-publication monograph on file with author).

[8] Michael Ignatieff, *The Danger of a World Without Enemies: Lemkin's Word*, NEW REPUBLIC, Feb. 26, 2001, at 25-28.

[9] *See id.*

[10] *See* Raphael Lemkin, *Genocide as a Crime under International Law*, 41 AM. J .INT. L. 145 (1947).

[11] *See id.*

[12] Lemkin, *supra* note 10, at 146.

> a collectivity, is liable, for the crime of barbarity, to a penalty of . . . unless his deed falls within a more severe provision of the given code.
>
> Whosoever, either out of hatred towards a racial, religious or social collectivity, or with a view to the extermination thereof, destroys its cultural or artistic works, will be liable for the crime of vandalism, to a penalty of . . . unless his deed falls within a more severe provision of the given code.
>
> The above crimes will be prosecuted and punished irrespective of the place where the crime was committed and of the nationality of the offender, according to the law of the country where the offender was apprehended.[13]

Lemkin was utterly unsuccessful in 1933. As William Korey describes it in his recent monograph about Lemkin, Lemkin was treated with derision and contempt in Madrid, especially so because, by the time of the meeting (October, 1933), Germany's delegates already were Nazis.[14]

Lemkin escaped Europe, and became a law professor at a number of eminent United States law schools, including Duke and Columbia, but left each of his university posts to devote his energy to the all-consuming task of drafting what was to become the U.N. Convention on Genocide, to promoting its adoption, and, finally, to tireless efforts, unavailing during his life-time, towards United States ratification of the Convention.[15] Lemkin lived to see the U.N. adopt his convention, with the name of "genocide" he had given to the newly defined crime.[16] He had sacrificed his personal and professional life to this end, and died alone, completely impoverished, and semi-starved.[17]

THE EVOLUTION OF THE CRIME AGAINST HUMANITY IN FRANCE

Today we hear an ever-growing enthusiasm in legal circles for international tribunals and international criminal standards. The hope Lemkin and many others cherished in 1945; namely, that formulating the crime against genocide would prevent future genocides, proved false. Nevertheless, faith in the positive potential of international law and criminal tribunals appears unabated to date. Many urge universal submission to international tribunals with the power to adjudicate crimes against humanity.[18]

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[13] *Id.*
[14] *See* KOREY, *supra* note 7, at 11-13.
[15] *See id.*
[16] *See id.*
[17] *See id.*
[18] For a thorough history of the origins of and connections between crimes against humanity, genocide and war crimes in recent western legal history, see Georges Levasseur, *Les crimes contre l'humanité et le problème de leur prescription*, 1996 JOURNAL DE DROIT INTERNATIONAL 259 (1966).

The history of the crime against humanity suggests that such hope is misplaced. If one takes as a study sample its treatment under French law, one sees a legal system prepared to re-orient legal concepts so as to prevent unpleasant political issues and consequences deemed politically undesirable. Each nation's legal developments follow a course that has much to do with national phenomena of a legal, social, historical and cultural nature, so no example can pretend to universal applicability or generalization. The many twists and turns of events in France highlight, however, the politicization to which the crime against humanity is amenable and is likely to remain amenable.

In 1964, France's crime against humanity became "*imprescriptible*": not subject to a statute of limitations.[19] When a new French criminal code went into effect in 1994, it maintained the imprescriptible nature of the crime against humanity.[20] Events after the Second World War created numerous thorny issues for France's post-war administrations and judicial system in cases alleging crimes against humanity, however.

The German Nazi, Klaus Barbie, was just the sort of defendant for whom France's crime against humanity had been prolonged to reach, despite the passage of many decades between his crimes and his trial. The French law on crimes against humanity was tied to the London Accord of August 8, 1945, and Article 6 of the Nuremberg International Military Tribunal, including the idea that imprescriptibility for crimes against humanity was implied in the Nuremberg Tribunal.[21] The Barbie trial gave rise to an unexpected possibility that his defense attorney explicitly threatened: namely, that if Barbie were convicted of crimes he had committed as part of the Nazi occupation on French soil, against French people, the analogy between his conduct and France's conduct in Algeria would result in French defendants being deemed to have committed crimes against humanity in Algeria in the name of France.[22]

This is not the first time in history that the world has seemed oblivious to the pitfalls of its legal vision for the future. *See* Nathaniel Berman, *But the Alternative Is Despair: European Nationalism and the Modernist Renewal of International Law*, 106 HARV. L. REV. 1792 (1993).

[19] *See*, *e.g.*, Vivian Grosswald Curran, *The Legalization of Racism in a Constitutional State: Democracy's Suicide in Vichy France*, 50 HASTINGS L.J. 1 (1998) [hereinafter Curran, *Legalization of Racism*].

[20] *See* Article 213-5 of CODE PÉNAL (1994).

[21] See *L'arrêt Barbie*, October 6, 1983 (Bull. No. 239—Gazette du Palais 1983.2.710, rapport C. Le Gunehec, concl. Dontenwille); and *L'arrêt*, 26 January 1984 (Bull. No. 34—Gazette du Palais 1984. 1. 202, rapport C. Le Gunehec, concl. Dontenwile), both of which are discussed in *Cour de cassation* (Ch. Criminelle, 1 April, 1993), Rapport de M. le Conseiller Pierre Guerder, 'Pourvoi en cassation contre l'arrêt de la Chambre d'accusation de la Cour d'appel de Paris du 20 décembre 1991 (Georges Boudarel)', 174-175 *Jurisprudence* 281, 286, Gazette du Palais—1993 (1er sem.) (1993).

[22] *See* Curran, *Legalization of Racism*, *supra* note 19, at 77-78 ("Barbie's lawyer, . . . the renowned Jacques Vergès, whose clients have included numerous Middle Eastern terrorists, raised the unpleasant specter of France's crimes in Algeria in the 1950's, suggesting that a guilty verdict for

The French judicial response was to nullify this threat by redefining and delimiting the crime against humanity so as to avoid this previously unforeseen possibility. The *Cour de cassation* thus stated that the crime against humanity would be limited to crimes committed "in the name of a State practicing a policy of ideological hegemony."[23] France would not be subject to inclusion in that definition because its scope was deemed limited to fascist-totalitarian states.[24]

No sooner had the French judiciary seemingly solved this problem than another, equally unpleasant, prospect arose out of the crime against humanity. This time the defendant was Paul Touvier, a Frenchman who had worked for the *Milice* during the Vichy period. The *Milice* was a paramilitary organization created by the Vichy government, which garnered the reputation of Gestapo-like cruelty for its torture and its murders.[25] The new challenge concerned how the judicial decision might implicate France for its collaborative acts during the holocaust.

The lower court dismissed the charges against Touvier pursuant to the limitation on crimes against humanity that the *Cour de cassation* had crafted in Barbie: namely, the judicial requirement that the crimes be committed by a state practicing "ideological hegemony."[26] The lower court in Touvier's case ruled that Vichy France did not meet that criterion, so it dismissed the charges against Touvier because Touvier had worked for Vichy France, rather than for Nazi Germany.[27]

Thus, the original limiting language of the Barbie decision, designed to immunize France from being judged for crimes against humanity based on its conduct in Algeria, was extended in the Touvier case to avoid a judicial confrontation with the nation's past during the Vichy years. Paradoxically, this ruling represented a sea change in the post-war France tenaciously promulgated mythology about Vichy. The Touvier decision signified a concession, never made before in official circles, that Vichy was not a German phenomenon, since crimes committed by Nazi Germany were within the purview of the crime against humanity, and Nazi Germany came within the scope of a state "practicing a policy of ideological hegemony." This implicit aspect of the court opinion contradicted the official claim, initiated by de Gaulle and perpetuated since the time of France's Liberation, that Vichy never had been France, that it always was a German phenomenon, a puppet state set up by Germany and carried out with the complicity of only a few French henchmen, to the disagreement and resistance of essentially the entire occupied nation.[28]

Barbie necessarily would augur by analogy the same result for those responsible for crimes of torture and murder committed in France's name during the Algerian war of 1954-1962.").

[23] "Au nom d'un État pratiquant une politique d'hégémonie idéologique." Cass. Crim., Dec. 20, 1985, 1986 J.C.P. II G, No. 20, 655, Barbie.

[24] *See* Curran, *Legalization of Racism*, *supra* note 19, 78.

[25] *See id.*

[26] Arrêt de la chambre d'accustaion de Paris du 13 avril 1992.

[27] *See id.*

[28] *See* Curran, *Legalization of Racism*, *supra* note 19, at 60-61, 79.

In the end, however, public outcry probably was primordial in leading to a reversal of the lower court decision on Touvier.[29] While this reversal may have deemed politically necessary to calm an indignant public,[30] the French judiciary still managed (as it has done to date) to avoid the issue of Vichy. It did this by introducing yet another limitation on the French crime against humanity, holding that the act must have been committed by a European Axis power, or by a perpetrator acting in complicity with an Axis power.[31] Henceforth, no inquiry as to whether Vichy was an autonomous perpetrator of crimes against humanity could be legally cognizable, and France's judiciary would be spared the challenge of examining and defining historical meaning and the role of France in the holocaust.[32]

Although the Touvier trial was surrounded by a media blitz that equated it with the trial of Vichy France, the charges against the defendant concentrated solely on his personal decision to murder Jewish hostages, impeding any connection between his acts and the Vichy government.[33] Touvier's conviction theoretically depended on the jury's finding that he had acted on behalf of Germany (or possibly Italy, a still less likely outcome), however, since the court required the act to have been done by or for a European Axis power.

Since so much remains implicit and unarticulated in French court decisions, we are left to infer that, since Touvier was found guilty, he, somehow, must have worked for Germany, rather than for France, even though the *Milice* was an official organization created by Vichy, with a charter of its own.[34] The *Cour de cassation* did not address explicitly whether the lower court had erred in ruling that Vichy by its nature was autonomous, and therefore could not have committed crimes against humanity.

The issue of Vichy's role seemed still more difficult to avoid in the most recent collaborator trial, that of Maurice Papon. Second in command in the police in the Gironde, the Bordeaux area, Papon had ordered the arrest and deportation of some 1700 Jews pursuant to orders of his superiors in the Vichy French government. Given that Papon's acts were state acts, it seemed as though the

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[29] The public's role was part of the complicated relation between the French executive and judiciary. The *parquet* traditionally submitted to politically motivated orders from the executive branch. In the Papon case, the Minister of Justice, Jacques Toubon, "in a state of panic at the prospect of the public outcry likely to follow a second dismissal, asked the prosecutor to reverse its decision and to issue instead a *renvoi d'assises*, as order committing the case for trial at the trial court level." Curran, *Legalization of Racism*, *supra* note 19, at 77, *citing* L'EXPRESS, Oct. 8, 1997, at 11-31. For the public's involvement in Touvier, see *id.* at 79.

[30] *See id.*

[31] Cass. crim. 27 novembre 1992, Touvier: JCP 1993 (ed. G, II 21977, note M. Dobkine).

[32] *See* Curran, *Legalization of Racism*, *supra* note 19, at 73-94.

[33] *See id.*

[34] *See id.* and sources cited therein.

Papon court would have to address directly the issue of whether Vichy had been autonomous or a puppet government of Germany. The *Cour de cassation* managed once again to avoid the issue, however.[35] The Court wrote that Papon had been "fully cognizant of the Vichy government's antisemitic policies,"[36] but then characterized Papon's acts as having been performed to further Germany's plans for genocidal extermination:

> [The] illegal arrests, imprisonments and internments, carried out at the request of the German authorities, particularly of the *Kommando der Sicherheitspolizei und der Sicherheitsdienst* (SIPO-SD), lending its services to the Bordeaux branch of the *Reichssicherheitshauptamt* (RSHA), the Reich security organization, [the above illegal acts] were accomplished with the active assistance of Maurice Papon, at the time the Secretary General of the préfecture of the Gironde, who, by virtue of the wide delegation of power accorded him by the regional préfet [i.e., the head of the préfecture], exercised authority equally over the [several] services of the police, as well as over the running of the Mérignac camp and services emanating from the war, such as that of Jewish Questions [i.e., an organization set up by Pétain to accomplish the elimination of Jews from French public and professional life and from property ownership];
>
> [Further, Papon] fully assisted the German leadership at all stages of the operations; namely, in preparing the arrests and in the practical organization of the convoys; . . . Maurice Papon himself, from July, 1942 to May, 1944, delivered orders for the arrest, internment and transfer of persons to [the] Drancy [camp]; . . . the service which he led always sought to ensure maximum efficiency in the anti-Jewish measures that were in his jurisdiction—such as the updating of files on Jews, or regular communication with the [German] SIPO-SD to provide information about Jews—and sometimes even without waiting for instructions from the central authorities of the Vichy Government, where he requested the same [from Vichy] or from the occupier.[37]

The Court further redefined the crime against humanity by holding that, contrary to the Statute of the International Military Tribunal, under French law, the French courts can convict a defendant of crimes against humanity even if the defendant personally and individually had not adhered to the "policy of ideological hegemony." To date, the Court has remained silent as to whether Vichy had or lacked an ideology of hegemony.

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[35] Cass. crim., Jan. 23, 1977; Papon [arrêt No. 502], in LA SEMAINE JURIDIQUE, No. 14, Apr. 2, 1977, at 22812.

[36] *See id.*

[37] *See id.*

The highly political nature of the court's rulings reflects more than judicial aversion to confronting the issue of national history, memory and collaboration. It also resulted from the traditional control that France's executive branch exerts over the judiciary, stemming, among others, from the time of the French Revolution when the political system intentionally relegated the judiciary to a position of inferiority,[38] and reinforced by the power de Gaulle was able to infuse into the executive branch in post-war French government.

The turns and twists of Papon's trial were endless and too numerous to recount here.[39] They were buffeted on the one hand by the executive branch's wish to delay and ultimately avoid trials that risked involving France's crimes during Vichy; and, on the other hand, by the winds of public opinion, including an erupting, irrepressible curiosity about Vichy and its national significance to French youth. Governmental delay tactics gave way eventually to the public's clamor to see Papon stand trial, but the decades-long nature of the delays meant that almost everyone of relevance, other than Papon himself, was dead, including Sabatier, Papon's supervisor, who proclaimed before he died that it was he who had had full responsibility for the crimes attributed to Papon.[40]

French official reactions to Vichy have undergone numerous vicissitudes, including President Chirac's reversal of position by declaring that Vichy was French after all. Moreover, the issues of property expropriated or "spoliated" under confiscatory Aryanization laws, which recently were the basis of class action law suits initiated in United States courts, further intesified France's attention to its past. The issue of Vichy is far from over. It is clear that Vichy will not go away, no matter what the courts do, and French society as a whole is becoming more receptive to self-examination. Less clear is whether the courts can offer the appropriate forum for France's coming to terms with it.[41] It is perhaps preferable that the debate take place in a wider arena.

Algeria also will not "go away." Both Vichy and Algeria are like palimpsests, texts smothered by superimposed layers of history and rewritten texts, but slowly and inexorably penetrating through all of the smothering texts to surface after all, in a writing that must be decoded by new generations. Perhaps not coincidentally, the two periods are linked by the person of Vichy collaborator Maurice Papon. His career under Vichy was a prelude, not an impediment, to future professional successes and eminence. Papon eventually became a cabinet minister under Mitterrand.

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[38] *See*, *e.g.*, Curran, *Fear of Formalism*, *supra* note 2, at 141.

[39] I discuss them in detail in Curran, *Legalization of Racism*, *supra* note 19, at73-94. The lates twist occurred on July 24, 2002, when the European Court of Human Rights vindicated Papon and condemned France for having denied him his right of appeal. The *Cour de cassation* must meet in plenary session now to adjudicate Papon's *renvoi* (appeal).

[40] *See* Curran, *Legalization of Racism*, *supra* note 19, at 73-94. Indeed, it is one of the more bizarre judicial twists of this story that at one point the court decided to dismiss all charges against Papon, not because it deemed him innocent, but solely because it had been a mistake not to have indicted Sabatier also. *See id.*

[41] *See id.* at 73-96.

Before then, in the 1960s, he rose to become préfet de police in Paris. During that tenure, he ordered the torture and massacre of Algerians in France.[42]

On a legal level, despite the judicial contortions of the crime against humanity that would have seemed to have removed France from the potential onus of crimes against humanity, France's conduct in Algeria erupted into scandal last year with the publication of a book by General Aussaresses, *Services spéiaux: Algérie 1955-1957*.[43] The General recounts in detail that he tortured Algerians as part of France's military policy in Algeria. The book sports a prominent band with an unofficial subtitle added by the publisher: "My testimony on torture" ("*Mon témoignage sur la torture*"). A dual scandal has raged in France since its publication. On the one hand, the book recounts in detail what has been known for about fifty years, but had not been documented so irrefutably before. On the other hand, the author is not revealing his own conduct in order to indict France; on the contrary, he is completely unrepentant.[44]

Official response has been ambiguous. President Chirac immediately withdrew General Aussaresses's *Légion d'honneur*. Whether that act signified repudiation of the torture, or, rather, of the telling about the torture, is an issue of interpretation. A recent editorial in *Paris Match* put it this way: "What are we indignant about? About the confession of the old General Aussaresses about torture in Algeria. Or about the public exhibition of those crimes. Is it the torture that repels or its revelation that scandalizes?"[45]

Predictably, part of the French public is clamoring to try General Aussaresses for crimes against humanity.[46] As with Papon, it is the only serious crime which would not be dismissed, because all others would violate a statute of limitations.[47] Even the more suitable war crime ("*crime de guerre*") has been subject to a statute of limitations in France to date, because, notwithstanding France's having signed the European Convention of January 25, 1974 on the imprescriptability of war crimes, France's Parliament still has failed to ratify the Convention.[48] Moreover, the French law

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[42] *See* PIERRE VIDAL-NAQUET, MÉMOIRES: LE TROUBLE ET LA LUMIÈRE 1955-1998, 150 (1998); JEAN-LUC EINAUDI, OCTOBRE 1961. UN MASSACRE À PARIS (2001).

[43] PAUL AUSSARESSES, SERVICES SPÉCIAUX: ALGÉRIE (1955-1957) (2001).

[44] *See id.* Aussaresses has declared his endorsement of torture verbally in numerous interviews and public appearances since the publication of his book. *See also* Brigitte Vital-Durand, *Le Procès du général Aussaresses: Un tortionnaire jugé pour ses mots*, LIBÉRATION, 26 Nov. 2001.

[45] Alain Genestar, *Torture, la fin de la quarantaine*, PARIS MATCH, May 17, 2001 ("*De quoi s'indigne-t-on? Des aveux du vieux général Aussaresses sur la torture en Algérie. Ou de l'exhibition publique de ces crimes. Est-ce la torture qui révulse ou sa révélation qui scandalise*?").

[46] *See id.* [Genestar edit'l in PARIS-MATCH].

[47] The courts did find another criminal violation, and Aussaresses has undergone the first proceeding. *See infra*.

[48] *See* Rapport de M. le Conseiller Pierre Guerder, Pourvoi en cassation contre l'arrêt de la Chambre d'accusation de la Cour d'appel de Paris du 20 décembre 1991 (Georges Boudarel),

of 1964 that took crimes against humanity outside the scope of limitations periods "clearly limited imprescriptability solely to crimes against humanity, to the exclusion of war crimes."[49]

In another French court decision that followed on the heels of the Touvier case, the *Cour de cassation* interpreted Touvier as categorically limiting crimes against humanity under French law to acts committed by or for a European Axis power, and more specifically excluded acts committed in the far east.[50] As a legal commentator put it in that case, Boudarel, the Touvier decision of 27 November 1992 had "formally distinguished the Vichy régime from the Rome-Berlin Axis powers; namely, Germany and Italy (to which it perhaps is apposite to add their European allies, Hungary, Bulgaria, Romania)."[51]

The Boudarel case was to reach France's highest court, but it involved crimes against humanity allegedly committed outside of Europe, in a war unrelated to European Axis powers; namely, France's conflict in Vietnam. Boudarel was a Frenchman who had deserted the French army in Vietnam, proceeding to join the Communist Vietnam, and to torture French prisoners of war, participating and often directing their systematic starvation and political brainwashing.[52] The opinion of the *rapporteur* of the *Cour de cassation* in Boudarel concluded that the Touvier decision of 1992 had limited "the field of application of the Nuremberg Charter to the Axis powers and their accomplices."[53]

174-175 *Jurisprudence* 281, 286, Gazette du palais—1993 (1er sem.) (1993); Eric Conan, *Aussaresses: plaines en souffrances*, L'EXPRESS, May 24, 2001, at 23. On the distinction between crimes against humanity and war crimes, see Georges Levasseur, *Les crimes contre l'humanité et le problème de leur prescription*, 1966 JOURNAL DE DROIT INTERNATIONAL 259, 260, 271 (1966).

[49] Rapport de M. le Conseiller Pierre Guerder, Pourvoi en cassation contre l'arrêt de la Chambre d'accusation de la Cour d'appel de Paris du 20 décembre 1991 (Georges Boudarel), 174-175 *Jurisprudence* 281, 284, GAZETTE DU PALAIS –1993 (1er sem.) (1993). ("*La loi du 26 décembre 1964, en constatant l'imprescriptibilité des crimes contre l'humanité, 'tels qu'ils sont définis par la résolution des Nations Unies du 13 février 1946, prenant acte de la définition des crimes contre l'humanité, telle qu'elle figure dans la Charte du Tribunal international du 8 août 1945', a clairment restreint l'imprescriptibilité aux seuls crimes contre l'humanité, à l'exclusion des crimes de guerre*.") (Citing Jacques Francillon, JURISCLASSEUR Pénal Annexes, Fasc. 410, no. 140, and sources cited therein).

[50] *Cour de cassation* (Ch. criminelle, 1 April, 1993), Rapport de M. le Conseiller Pierre Guerder, *supra* note 49.

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

[52] *See Boudarel* decision, *supra* note 49.

[53] *Id.* at 284 ("*Le champ d'appliation de la charte de Nuremberg a été limité aux puissances de l'Axe, et à leurs complices*.").

The Boudarel case suggests that the French judiciary will not try Aussaresses for crimes against humanity because only crimes against humanity committed in the course of the Second World War, and excluding the Orient, can come within the scope of imprescriptability.[54] Moreover, the Boudarel Court further held that, even if the nature of the crimes committed by Boudarel did qualify as crimes against humanity, they were not cognizable because all acts arising out of the Vietnam conflict had been amnestied pursuant to Article 30 of the law of 18 June 1966.[55] This last reason also would seem determinative for Aussaresses inasmuch as a similar amnesty law was passed with respect to all acts committed during the Algerian conflict.[56] Indeed, in a previous decision, the Court of Cassation had ruled that the Algerian amnesty barred a lawsuit brought in the Yacoub case, in which the plaintiff had alleged crimes against humanity in connection with that conflict.[57]

The latest and no doubt least expected consequence of the Aussaresses debate has seen the filing of a complaint on August 30, 2001 against France for crimes against humanity after all, not by the Algerians whom France's military tortured, but by the opposite camp: the Harkis, a pro-French Agerian group, allied with France during the war in Algeria, claiming to have been tortured by the nationalist FLN Algerians after France pulled out of Algeria pursuant to the Evian agreements in 1962. They are suing France in a Paris court, the *tribunal de grande instance de Paris*, on the argument that, when France pulled out of Algeria, it knew or should have known that the FLN Algerian nationalists would massacre the Harkis.[58] It is estimated that between 30,000 and 150,000 of them were murdered.[59]

Under a strict jurisprudential analysis, the Harki claim should fail due to the amnesty of Algerian conflict crimes; the inapplicability of the imprescriptability criminal code provision to war crimes; and, finally, the fact that the allegations themselves do not accuse the French of the act of murder. Rather, the complaint alleges that crimes against humanity are legally attributable to France

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[54] *See Cour de cassation* (Ch. criminelle,), 1er avril 1993, in GAZ. PAL. 1993 (1er sem.), 24 June, 1993, at 289-90.

[55] *Id.* at 290.

[56] *See* Ordonnance no. 62-248 of 14 August 1962; and law of 31 July 1968, discussed in Rapport de M. le Conseiller Pierre Guerder, Pourvoi en cassation contre l'arrêt de la Chambre d'accusation de la Cour d'appel de Paris du 20 décembre 1991 (Georges Boudarel), 174-175 JURISPRUDENCE 281, 288-89 GAZETTE DU PALAIS –1993 (1er sem.) (1993).

[57] *Cour de cassation* (Ch. Criminelle), 29 November, 1988, appeal no. 87-80/566, D. 1991, discussed in *Cour de cassation* (Ch. Criminelle, 1 April, 1993), and Rapport de M. le Conseiller Pierre Guerder, Pourvoi en cassation contre l'arrêt de la Chambre d'accusation de la Cour d'appel de Paris du 20 décembre 1991 (Georges Boudarel), 174-175 JURISPRUDENCE 281, 288-89 GAZETTE DU PALAIS—1993 (1er sem.) (1993).

[58] See Laurent Chabrun, Alexandre Lenoir & Thomas Varela, *La plainte des harkis est-elle justifiée?*, *in* L'EXPRESS, 30 August, 2001, at 12-14.

[59] *See id.* at 12.

even though France's enemies, the FLN Algerians, committed them, not Frenchmen and not persons acting under orders from, or on behalf of, France. On the other hand, the public outcry to expand the crime against humanity beyond acts of the Second World War is considerable, and it is not clear that the crime against humanity might not be about to change, particularly since the *Cour de cassation* in the Boudarel case left the door open to this possibility by suggesting that amnesty laws may not apply to crimes that qualify in substantive nature as crimes against humanity.[60]

In the closely knit relation of law to politics, France's courts have sought to appease the public outcry arising from the Aussaresses book by hauling General Aussaresses and his publisher into court, not for crimes against humanity, but for a little used violation of the criminal code. The author and his publisher were charged with "complicity for apologizing for war crimes," a *délit de presse* (press violation).[61] The Court focused on whether the book "incited readers to reach a favorable moral judgment" about the matters Aussaresses recounted.[62] This may have served the expiatory function of the trial in the manner René Girard believes to be the primary function of trials: the institutionalization of cathartic channelling of popular emotions that otherwise would threaten a polity's stability.[63]

The judicial setting was devoid of legal and political consequences for anyone but a defendant reviled by every side, whether because he "spilled the beans" on France's murderous practices in Algeria, or, for the other side, because he personally and unrepentantly committed torture and murder. The judiciary oversaw a discussion of France's practices in Algeria so confined by the delimitations of the criminal charge that had been brought, that no argument connected to crimes against humanity was legally cognizable within it. The *tribunal correctionel de Paris* decided that Aussaresses' crime lay in the book's justifying the methods used in Algeria, and that one does not have the right to say everything in the name of freedom of expression.[64] France's role in Algeria and towards Algerians was not an issue except at a remote, metatextual level.

From the trials of Nazi collaborators to Algerian torturers, the crime against humanity has been handled by the courts of France with every attention to the political message and political

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[60] *See Boudarel* decision, *supra* note 49, at 289-90; Jacques-Henri Robert, Note, 38 Lois pénales annexes, J.—CL.PÉNAL ANNEXES, at 10 (February, 1994).

[61] Article 24, CODE PÉNAL DALLOZ, at 1679, 1684.

[62] *100,000 F d'amendes requis contre Paul Aussaresses*, LE MONDE, Nov. 28, 2001 (http://www.lemonde.fr/article/0,5987,3226-249079-,00.html).

[63] *See* RENÉ GIRARD, LA VIOLENCE ET LE SACRÉ (1972).

[64] I am translating almost word for word the report on November 29, 2001 on French television of the November 28, 2001 court proceeding. (TV-5). For the French view on the limitations appropriate to freedom of expression, see ALICE KAPLAN, THE COLLABORATOR: THE TRIAL AND EXECUTION OF ROBERT BRASILLACH (2000); PHIL WATTS, ALLEGORIES OF THE PURGE: HOW LITERATURE RESPONDED TO THE POST-WAR TRIALS OF WRITERS AND INTELLECTUALS IN FRANCE (1998).

consequences of the adjudications. When one thinks of the faith Raphael Lemkin placed in law, perhaps one should be glad that he died shortly after what he still was able to experience as a moment of triumph, presaging, as he saw it, a future of justice under law.

CONCLUSION

The crime against humanity has not changed in nature, nor has it changed in definition, but its judicial application is at the mercy of the politics of those who interpret it. The context for law and law's meaning is society, and "a certain type of discourse dominates the public debates to the point of preventing the multitude from hearing any point of view which would not share the assumptions and the formal structure of that dominant discourse."[65] When those assumptions are themselves incompatible with fundamental principles of human rights, legal concepts such as the crime against humanity will not be adjudicated to serve humanitarianism.

Raphael Lemkin understood the truth of Nazi jurisprudence, but he forgot its most profound truth. The political philosopher, Ernst Cassirer, understood it better. In 1946 Cassirer wrote that legal concepts and legal texts "have no real binding force, if they are not the expression of [what] is written in the citizens' minds. Without this moral support the very strength of a state becomes its inherent danger"[66] His words apply equally well to supra- and international legal orders, and we would do well to heed them today.

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[65] Yves Citton, *Circularism and the Tyranny of Demand*, at 31 (manuscript on file with author).
[66] ERNST CASSIRER, THE MYTH OF THE STATE 76 (1946).