Judging War Crimes and Torture

French Justice and International Criminal Tribunals and Commissions (1940-2005)

Yves Beigbeder

Martinus Nijhoff Publishers

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Foreword

by Otto Hieronymi[1]

This latest book by Yves Beigbeder is both highly topical and ambitious. It deals with the evolution of the system of criminal justice sanctioning war crimes, crimes against humanity and crimes against the state – in France and at the international level since the start of the Second World War. At the same time the book provides an insight – especially unique for the English speaking reader – into the ongoing debate about some of the most tragic periods of French history – and into the current efforts of France of coming to terms with her past and of reaffirming herself as the original country of freedom, justice and democracy, not only in Europe but in the world. Beigbeder's book is also a welcome illustration of the numerous similarities between the two great republics on the opposite sides of the Atlantic – the United States and France: two deeply conservative and liberal nations – both the results of revolutions and at the same time marked by long historical memory and continuity.

In fact, the kind of soul-searching, the sharp incisive analysis of the relationship between politics and justice, the reminder of how easy it is to judge others while forgetting the conflicts between acts and ideals in France's own

1 Otto Hieronymi is the Head of the Program of International Relations and of Migration and Refugee Studies at Webster University in Geneva

past by a Frenchman, reminds one of the no-holds-barred debate among American patriots about American actions and war-time actions in particular. In fact, one of the great merits of this very detailed analysis, which is both very well researched and passionately argued, is to show how narrow is the path between justice and self-interest, between upholding peace, freedom, human rights and democracy, on the one hand, and pure revenge or political expediency, on the other hand. It also shows the shared interest and responsibility of these two great democracies – the United States and France – for defending the cause of justice and of human rights in the world in the 21st century.

Yves Beigbeder is one of the most thoughtful and most prolific writers today on international organizations. He takes the original objective and *raison d'être* of international organizations literally: international organizations are the tools of international cooperation and they are to serve the interest of the international community. While he can be critical in pointing out that many international organizations do fall short of this ideal. He is, however also a realist who believes that constructive criticism is the first step towards improvement. He brings the same combination of idealism and realism and of national and international perspective to the subject of this book: the interdependence of politics and justice.

The relationship between values, law and politics is often confused by the claim of the lawyers that "law is above politics" and our goal to be nations ruled by law rather than just by people. But this should not make us forget that values and preferences create political ideals and programs and political leaders legislate laws that then have to applied by the judicial system. When we speak of the "Etat de droit" or the "Rechstaat" we automatically imply that the State has "just laws". Unfortunately we know that this is not always the case as has been amply demonstrated in the 20th century.

The story of this book begins in 1940. But the organized horrors of the 20th century started at least in 1917, or even before. It was in the wake of the Bolshevik revolution that the entire judicial system of the newly created people's state turned into the instrument of the oppression of an entire nation and of the extermination of millions of the State's own citizens. This system was spread to all the communist states and it survived well beyond the process of "de-Stalinization".[2] The competitor of Communism for the prize of the most murderous ideology and political system in modern times

[2] Stéphane Courtois and others: *Le Livre noir du communisme*, Robert Laffont, Paris, 1997, 1105p

– National Socialism – also began, immediately after coming to power, by corrupting the entire German legal system. Yet reading today the *National Socialistic Handbook of Law and Legislation*, edited by Hans Frank, who went on to become one of the greatest Nazi war criminals to be judged in Nürnberg[3], one cannot help to make comparisons with what is passing today for legal systems or judicial reform and practice in the name of religious fanaticism. In fact, in France's own history: the revolution of July 14, 1789 aimed at destroying the symbol of biased, unjust justice, was also to give birth to the most murderous "revolutionary justice" introducing at the same time the term "terror" into the political vocabulary and into the book of recipes of so many liberation movements.

This book rightly dwells at length on France's colonial past. Whatever the initial motivations, the practice of justice in the colonies and towards the colonial peoples was far from the ideals of the Republic – as it was also in the other colonial empires. This was also, or even more, true for the period of "de-colonization". No doubt that it is important for the sake of conscience of today's and of future generations to deal openly and honestly with the dark corners of history during the not so distant past. This, however, also should be a lesson for historians, governments and peoples in other parts of the world. Coming to the terms with the heavy legacy of the past – what the Germans so aptly call *Vergangenheitsbewältigung* – is an indispensable condition for creating lasting political systems based on the principles of freedom, democracy and the respect of human rights. This is true not only for the former Communist countries – including the Russian Federation and Ukraine – but also for the numerous countries that obtained their independence and identity during the last half century in incredibly bloody struggles against both foreign rulers and among the local populations. The crimes committed in the name of independence remain crimes nevertheless. Recognizing this is also in the interest of the international community, but it is first and foremost in the interests of the countries directly concerned. Like charity, *justice also begins at home.*

[3] Dr. Hans Frank (ed): *Nationalsozialistisches Handbuch für Recht und Gesetzgebung*, Zentralverlag der NSDAP, München, 1934, 1604p

Introduction

'*The fundamental element of the democratic system is the truth*'
Pierre Mendès-France, Former French Prime Minister

France has a high reputation as the 'homeland of Human Rights', a land of asylum for refugees. It adopted the French Declaration of Human Rights in 1789. Its values are those of the Enlightenment, the progressive and rationalist values associated with the 1789 French Revolution, considered as universal values carried by France all over the world. The "French Doctors" have invented and practised the 'rights and duty of international humanitarian intervention', giving assistance to those who need it, even against the opposition of governments. France is a liberal country, a parliamentary democracy with separate executive, legislative and judiciary powers. It enjoys a free press.

However, as many other democratic countries, France has not always kept these high standards. France has committed war crimes and crimes against humanity[1] as a colonial power. The colonialist policies and practices of French governments were supported by most political parties and public opinion: opponents and dissidents were few. They were considered as unpatriotic, some were condemned by courts. French war crimes and crimes

[1] War crimes are defined in the Geneva Conventions of 1949 and the Protocols of 1977 which protect noncombatants including prisoners of war and the civilian population. Are prohibited: murder, torture, corporal punishment, mutilation, outrages to personal dig-

against humanity were amnestied. France has pursued a post-colonial policy in supporting the Hutu government responsible for the Rwanda genocide: this has hampered its participation in the International Criminal Tribunal for Rwanda.

After World War II, French justice has been ineffective or slow in judging French officials who participated in the Holocaust during the German occupation of France from 1940 to 1944. Only one senior Vichy official has been judged and sanctioned for 'complicity with crimes against humanity'. While Vichy's antisemitic laws and action were supported by some, or generally ignored by the population until 1942, opposition was voiced by a few Catholic and Protestant church leaders.

France is not the only State which has been guilty of war crimes or crimes against humanity and torture, or has allowed political and prestige considerations, reasons of state, or emergency situations to override human rights and humanitarian considerations. In a book on 'Genocide, War Crimes & The West' edited by Adam Jones (2004), chapters include the genocide of the Southern Africa Herero by the German colonizers, US and Canadian genocide of the native North Americans (through tribal dissolution, forced transfer of children, starvation, diseases, forced labour, torture, predation), the Anglo-American bombardment of German cities as violations of international law, military ethics and war conventions, US war in Vietnam and US intervention in 1970s Chile, the West's Role in Human Rights violations in the Bangladesh war of independence, crimes against the people of Iraq and others.

Jones' book was justified 'as an attempt to erode, in some small way, the culture of impunity' in Western countries, who consider themselves to have (or have had) an exceptional role as a civilizing force, with a benevolent behaviour exempt from critique. Jones has coined the neologism of *democrisy* 'as the stain of hypocrisy that attaches to regimes that are avowedly democratic in character, that allow comparative freedom and

nity, the taking of hostages, collective punishments, execution without regular trial and all cruel and degrading treatment. Massive air bombardment, indiscrimate attacks on non-defended localities or demilitarized zones are also forbidden. Crimes against humanity were first defined in the Charter of the Nuremberg International Military Tribunal of 1945. They include murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population. War crimes and crimes against humanity have been included in the Rome Statute of 1998 establishing a permanent International Criminal Court as giving jurisdiction to the Court, together with crime of aggression and genocide.

immunity from naked state violence domestically, but that initiate or participate in atrocious actions beyond their borders'. Jones' and other books (including the present one) are part of a 'contemporary trend under which the actions and atrocities of the powerful are under examination and public criticism as never before in history'. Criticism of the hypocrisy, double standards of the democratic 'powerful' through virtuous declarations of civilizing the natives or imposing democracy on reluctant populations, is still a minority trend, countered by powerful political (nationalistic) and economic interests linked to patriotism, national history and prestige. At the same time, democracies are self-correcting: they allow criticisms, the exposure of past or present exactions, which may lead to correction, punishment, or at least public repentance. Rediscovered facts may show the contradictions between avowed policies and field reality.

France, as a democratic Western nation, cannot be immune to well-founded criticisms of its past colonial behaviour, its anti-semitic policy and practices during the German occupation, and more recent political and military positions in the Balkans and in Africa. Criminal action, or complicity in criminal action, whatever the circumstances, motivation or excuses, must be recalled and exposed, particularly if they have been hidden, covered by amnesties, thus not judicially sanctioned. They must come into the country's history in order to show a true picture of its past, to avoid recurrences, and to erode the widespread culture and practice of impunity, particularly if the alleged crimes have been committed in the name of civilization, patriotism, and preferably in far away places over 'different' persons or races.

This book will focus on exemplary judiciary trials, which are often revealing of the attitude of governments and the military in exceptional circumstances. These trials provide a real-life assessment of France's declarations of principle on its respect for equal justice for all and the need to fight against impunity against the actual performance of its national courts and its actual position and performance on the setting up and running of an international criminal tribunal. The book will also review the creation of the first French Parliamentary Commissions, set up to review and assess France's action and possible responsibility in relation to the genocide in Rwanda and the Srebrenica massacre. Trials and Parliamentary Commissions show, on the one hand, the power of government, of the military, the complicity of the media and often the tacit support of public opinion, – on the other a minority of opponents, church leaders, human rights activists and non-governmental organizations, famous writers, rare political partisans, and even more exceptionally, the public opposition of a few government officials

or army officers or soldiers. In other words, they tend to exemplify the potential or real conflicts between government's internal or foreign policies, the perceived state's interests and national and international justice, or more simply real politik vs. morality.

Why France? Because of my nationality, upbringing, life during several periods of national dramas or tensions (German occupation of France, the Algerian war, the Evian agreements), a natural interest in French history. My writing of three books on international criminal justice has revealed examples of French abuses which are further developed in the present book, following more research into books, periodicals and libraries. My work at the Nuremberg Trial from March to August 1946 as a legal secretary to the French judge, Henri Donnedieu de Vabres, gave me an early exposure to international criminal justice in action.

Most of the situations referred to in the present book have been reported and published separately in many French and English books and periodicals, although some of the situations and their details are not generally known to the French public (for instance, the massacre in Madagascar in 1947–1948). The present book collects in only one volume a number of separate situations with a historical summary and reference to forgotten or well-known trials.

Am I disloyal to my own country ? French and foreign historians have studied and revealed most of the situations reviewed in the present book. French human rights activists, political or religious leaders and other individuals have denounced and fought against French exactions at various periods. Real loyalty to one's country requires that truth be told.

This book does not imply that French violations of international humanitarian law have necessarily been more serious and widespread than those of other Western countries in comparable situations, such as colonialist ventures, threats of civil war or other conflictual and tragic circumstances, terrorist actions or threats. It aims at showing the difficulties and obstacles met by such 'civilized' nations as France to be equal to their ambition of being a universal 'beacon of democracy and human rights'.

A first Chapter recalls the origins and evolution of French democracy, as a basis for its claim of 'fatherland of human rights' and exceptionalism. Relevant French and international criminal laws are then listed, as well as the evolution of French justice and some of its problems.

The book is then divided into three Parts.

The First Part is concerned with French colonization, which dates back to the 16th century. Chapter 2 identifies the main elements of colonialism and its French characteristics, its support by most political parties and

public opinion, and the rare dissidents. The evolution from early colonization to decolonization, imposed on French governments following World War II, and the evolution of public opinion, are recalled, in relation to several trials of rebels or opponents. The war crimes and crimes against humanity committed by the French military were later covered by broad amnesties. There is no attempt to cover all countries and territories colonized by France over the centuries with their attendant violence, killings, torture and massacres: the book focuses on the French Indochina War from 1946 to 1954 (Chapter 3), the massacres in Madagascar in 1947–1948 (Chapter 4), the "Dirty War" in Algeria from 1954 to 1962 (Chapter 5).[2]

Part II is concerned with Vichy France and the Holocaust. Although the events concern the period of the German occupation of France from 1940 to 1944, the key Papon trial only started in 1997, 53 years after the facts. Vichy's anti-semitic laws and practice are recalled in Chapter 6. Chapter 7 focuses on the Post-Liberation Myth, purge and the trials of Pierre Pucheu, Philippe Pétain and Pierre Laval. Chapter 8 reviews the trials of Klaus Barbie, Paul Touvier, the aborted trial of René Bousquet and the long delayed trial of Maurice Papon.

In Part III, France's participation in international criminal tribunals and the role of national and international inquiry or information commissions are reviewed. Chapter 9 focuses on the Nuremberg and Tokyo tribunals. Chapter 10 recalls the 1994 genocide in Rwanda which triggered the creation of the International Criminal Tribunal for Rwanda, and the assessment of France' involvement in the genocide by a Belgian Commission, a French Parliamentary Mission and by international commissions. Chapter 11 refers to the violations of international humanitarian law committed in the Balkan wars of the 1990s and the creation of the International Criminal Tribunal for the Former Yugoslovia: a second French Parliamentary Commission was set

[2] Even after the independence of African countries, former French colonies, France maintained a military presence under cooperation agreements with their governments. As an example of post-colonial abuses and crimes committed by French troops, in 1960–1961, the estimated number of deaths caused by the French repression of a popular insurrection against the government of the Cameroon, independent since January 1960, is of 40 000. President Ahmadou Ahidjo had called for France's military assistance against the rebels of the *Union des populations du Cameroon (UPC).* A Reuter journalist also described the 'horrendous regime of torture and extermination camps' witnessed by him: see *La Françafrique, le plus long scandale de la République*', François-Xavier Verschave (Stock, Paris, 1999), pp. 91–108.

up to assess the role of France in relation to the Srebrenica massacre. Chapter 12 reviews briefly France's role in the creation and work of the International Criminal Court. A Conclusion is in Chapter 13.

Many thanks are due to those who have helped me in my research, including the librarians in the World Council of Churches in Geneva, Mr Charles Harper, Ms. Mireille Descrez at the CIMADE in Paris, Ms. Valérie Boucher at the French Protestant Federation, the librarian at the Bibliothèque protestante d'histoire de la mission et de missiologie, both in Paris, the librarians at the Bibliothèque de documentation internationale contemporaire in Nanterre. Many thanks to Jery Kilker for patiently reviewing and wisely advising on substance and writing of the manuscript. The editing skills of Mandy Eggleston are, again, gratefully acknowledged. Finally, I am, again, most grateful to Professor Otto Hieronymi, Head, Program of International Relations and Migration and Refugee Studies at Webster University, Geneva (Switzerland) who has kindly written a Foreword to this book.

Thonon-les-Bains
February 2006 Y.B.

Notes

As for the preceding three books on the issues of international criminal justice, '*Judging War Criminals – The Politics of International Justice*', '*Judging Criminal Leaders – The Slow Erosion of Impunity* , and *International Justice against Impunity, Progress and New Challenges*, the present book is not a legal treatise, although references are made to legal texts and interpretations, and to trials and judgments.

Translation of French texts into English is by the author, except when otherwise shown.

List of Abbreviations

AI	Amnesty International
CCIA	Commission of the Churches on International Affairs (WCC)
CIC	(US) Counter-intelligence Corps
CIMADE	Commission Inter-Mouvements auprès des évacués
CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
DGSE	Direction générale de la sécurité extérieure
EU	European Union
FIDH	International Federation of Human Rights Leagues
FLN	Front de Libération National (Algérie)
FRY	Federal Republic of Yugoslavia
FTP	*Francs-Tireurs et Partisans*
GIGN	Groupe d'intervention de la Gendarmerie nationale
HRW	Human Rights Watch
ICC	International Criminal Court
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IHT	International Herald Tribune
ILC	International Law Commission

LDH	Ligue des Droits de l'Homme
MDRM	Mouvement Démocratique de la Rénovation Malgache
MRAP	Mouvement contre le racisme et pour l'amitié entre les peuples
MRND	Mouvement républicain national pour le développement et la démocratie (Rwanda)
MRP	Mouvement Républicain Populaire
MSF	Médecins sans Frontières
NATO	North Atlantic Treaty Organization
NGO	Non-governmental organization
OAS	Organisation Armée Secrète
OAU	Organization for African Unity
OHCHR	Office of the (UN) High Commissioner on Human Rights
OTP	Office of the Prosecutor
PADESM	Parti des Déshérités de Madagascar
PrepComm	Preparatory Commission for the International Criminal Court
RPA	Rwandan Patriotic Army
RPF	Rwandan Patriotic Front
STO	Service du travail obligatoire
TC	Témoignage Chrétien
UN	United Nations
UNAMIR	United Nations Assistance Mission for Rwanda
UNPROFOR	United Nations Protection Force (Former Yugoslavia)
WCC	World Council of Churches

Presentation

French Penal Code
(Revised on 22 July 1992)

Book II - Crimes Against Persons

Chapter 1

French Democracy and Justice

France is a democracy.[1] Its citizens' fundamental freedoms and human rights are guaranteed by France's Constitution, laws, national justice and the European Court of Human Rights. France is a State Party to most global and European human rights and humanitarian conventions. France is a founder, among others, of the European Union and of the Council of Europe, organizations both composed of only democratic countries, both promoting democracy and human rights.

France has a stable government, accountable to the elected National Assembly. French citizens have the right and the opportunity, without discrimination as to race, colour, sex, religion, political or other opinion, to vote and be elected at genuine periodic elections by universal and equal suffrage, held by secret ballot. The electoral system allows them to elect the President of the Republic every five years and a new National Assembly at least once every five years.

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[1] A democracy is deemed to be a country where its citizens enjoy the political, civil rights and fundamental freedoms contained in the International Covenant on Civil and Political Rights of 1966, in regional instruments such as the European Convention on Human Rights and individual countries' Bill of Rights.

According to article 64 of the French Constitution of 4 October 1958, the judiciary authority is independent. There is freedom of assembly and association. Freedom of religion is protected by the Constitution and anti-defamation laws prohibit religiously motivated attacks. The media are now largely free from government interference. Television and radio became increasingly free from state control and competitive in the 1980s.

Rated 'free' by Freedom House in 2004, with '1' ratings for both political rights and civil liberties,[2] it took many centuries of wars, political turmoil, advances and setbacks, for France to reach this level of democratic standing, even though France's democracy, like others, still has a few serious flaws.

Historical Evolution

A history of wars and massacres

Not unlike the history of other European countries, French history is a long and cruel story of wars, wars of conquest, wars of glory, wars of revenge, religious wars, colonial wars, civil wars, massacres, repression, interlaced with periods of relative peace and prosperity.

Religious intolerance has long been (and still is) the cause for many persecutions and killings. The Christian Crusades, military-religious expeditions launched periodically from 1096 until 1291, in the service of a Christian God, to free the Holy Land from Muslim occupation, caused many Christian and Moslem casualties, including members of the Eastern Orthodox Church, and the slaughter of many Jews. Other crimes were committed, such as rape, looting and robbery.[3] In the 13th century, the Cathar heresy, a pacifist brand of Christianity embracing tolerance and poverty, was exterminated in the Languedoc region of France by the King's army, at the urging of Pope Innocent III. Entire populations were slaughtered, thousands were tortured and burned at the stake, in an orgy of death and destruction. The hundred-year extermination of this heresy gave birth to the

[2] See http://www. freedomhouse.org/research/freeworld/2004/countryratings/france/htm, accessed on 27 November 2004.

[3] In the Rhenish valley region alone, over 10 000 Jews were said to have been massacred by troops on their way to the mid-East during the First Crusade of 1096. The Crusaders came from France, Germany, England, Italy and Spain. See: http://www.myjewishlearning.com/history_community/Medieval/TheStory6321666/Christ . . . accessed on 20 February 2005.

Inquisition. Its tools were torture, denunciation of neighbour by neighbour, life jail sentences and mass execution by fire and by sword.[4]

The 100 year-war between France and England, in the 14th and 15th centuries did not involve large numbers of combatants but still caused miseries to the French population in a few provinces, even when they were not forcibly recruited by the royal or princes' troops. It is estimated that Normandy lost one third of its population in one hundred years.[5] From 1562 to 1598, the religious wars between Catholics and Protestants caused more human losses than the 100-year war, as they involved every village. The massacres of St. Bartholomew are still alive today in the hearts of French Protestants. On the order of King Charles IX, during the night of 23 to 24 August 1572, 3 000 Huguenots were murdered in Paris and their bodies thrown into the river Seine. More murders took place in the provinces, while in Rome, the Pope celebrated the event by bonfires.[6]

The French Revolution made many victims: in September 1793, 1200 prisoners were murdered in Paris jails, including many priests. The 'Grande Terreur' of June–July 1794 sent to the scaffold more than 1 400 condemned persons. External wars followed for twenty years, during the Revolution and the first Empire, ending with Napoleon's defeat in 1815, with large human losses. In June 1848, a Socialist insurrection in Paris was crushed by the military: there were 1 000 dead on both sides. More than 15 000 Parisians were arrested, 4 000 deported to Algeria. The Second Empire (1852–1870), like the First, ended with a military defeat, with 25 000 French military deaths. The revolt of Paris gave birth to the Commune, a revolutionary popular movement against peace with the Prussians and against the just-elected conservative Assembly. Encircled in the capital, the 'Communards' were

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[4] The First (or 'People's) Crusade was preached by Pope Urban II in 1095. The Inquisition was officially established by Pope Gregory IX in 1231. On 12 March 2000, Pope John Paul II apologized for the errors of the Roman Catholic Church over the last 2 000 years, including the Crusades and the Inquisition: see 'An Apology from the Pope', *IHT*, 15 March 2000. On the Cathars, see a review in the *IHT* of 25 October 2000 of S. O'Shea's *The Perfect Heresy, The Revolutionary Life and Death of the Medieval Cathars* (Walker & Co., 2000).

[5] P. Miquel, *Histoire de la France* (Librairie Arthème Fayard, Paris, 1976), p. 127.

[6] Ibid., p. 171, – see also M. Greengrass, 'Hidden Transcripts, Secret Histories and Personal Testimonies of Religious Violence in the French Wars of Religion' in M. Levene and P. Roberts (eds), *The Massacre in History* (Berghahn Books, New York/Oxford, 1999), pp. 69–88.

defeated by the army, with the complicity of the Prussians. In May 1871, 20 000 men were killed without judgment. 13 000 were deported to Algeria or New Caledonia.

The First World War (1914–1918) bled France: 1.4 million deaths or missing, almost three million wounded combatants. Property destruction was enormous, and its economic effects were catastrophic.[7]

The Second World War (1939–1945) saw the defeat of France, its occupation by the German forces and the setting up of the Vichy government which collaborated with Hitler's Germany. Besides human and material losses,[8] the end of WWII left France in the false position of a last-minute 'victor', while Vichy's adoption of an antisemitic policy and its complicity with the Holocaust were left unaddressed: 76 000 French and foreign Jews were deported from France to the Nazi extermination camps: only 2600 returned to France.

The last French colonial war ended in 1962 with the independence of Algeria. The 'dirty war' was fought with abuses and crimes on both sides, including the use of torture by the French army.

In 2004, some 34 000 French troops were deployed outside of France, of which 11 000 were participating in UN or other multilateral peacekeeping operations. Only a few of these troops are used as combatants.[9]

Some of the past massacres and other crimes were related to religious intolerance, some to external wars, wars of conquest in the guise of promoting regime change by unseating tyrants and expanding human rights, some to civil wars and revolutions, some to external military causes and/or to internal political pressures. Some of these actions committed in the Twentieth Century are related to these contexts, to which one should add colonialism with its repression, ethnic strife, religious and ideological struggles, and the genocide of the Jews. Many of the exactions were conveniently forgotten, some recently rediscovered, raising denials, controversies and occasional declarations of belated repentance.

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[7] Miquel (see Note 5), pp. 360–362, 409–413, 503.

[8] France had 250 000 military deaths during WWII, and 360 000 civilian deaths: see Earl F. Ziemke, Microsoft Encarta 97, http://www.emayzine.com/lectures/WWII.html.

[9] For instance, in Afghanistan and in Ivory Coast. France participates in KFOR in Kosovo, SFOR in Bosnia-Herezgovina. 5 000 troops are stationed in various African countries under bilateral agreements. See http://www.ambafrance-uk.org/asp/service.asp?LNG=fr&SERVID=6 , 12 July 2004.

Towards democracy and the rule of law

In the midst of all these tragedies and widespread suffering, France made slow and irregular advances towards the recognition of the individual rights of its citizens, including their right to freely choose its leaders, with relapses to autocratic rule. In 1748, during the reign of Louis XV, the French essayist, lawyer and political philosopher Montesquieu (inspired by John Locke) published 'De l'esprit des lois', defining three types of government: despotism, based on fear; republic, based on virtue; and monarchy, based on honour. He opted for a constitutional monarchy where political freedom would be guaranteed by the separation of three powers (legislative, executive and judiciary) and by intermediary and dependent bodies. In 1762, another essayist and philosopher, Jean-Jacques Rousseau (inspired by Locke and by Hugo Grotius), published his 'Contrat social', according to which a ruler could only derive his powers from a social contract, which imposed obligations on him as well as granting him rights. According to Rousseau, the will of the sovereign could only be the 'general will' of the people: the sovereignty belongs to the people, a direct attack against the absolute and divine power of the monarchy.

The French *Déclaration des droits de l'homme et du citoyen* – 'Declaration of the Rights of Man and the Citizen' was adopted on 26 August 1789 during the French Revolution. It was reaffirmed in the French Constitution of 1958. The Declaration affirms that 'all men are born and remain free, and have equal rights'. It provides for due process of law: 'no man can be indicted, arrested or held in custody except for offences legally defined . . .'. Other provisions include the presumption of innocence, freedom of opinions and of communications of thoughts and opinions, within legal bounds, the 'sacred' right to private property. Due process of law had already been affirmed by the Magna Carta granted by King John in 1215, reaffirmed by King Edward III in 1354 and followed by the English Bill of Rights of 1688. In the United States of America, the Bill of Rights was added to the Constitution in 1791. The French Declaration and the US Bill of Rights were used by many other countries as models. The French Revolution and the Déclaration convinced France that it was the homeland of human rights ('la patrie des droits de l'homme') with a messianic mission to promote freedom to other countries.

However, the Revolution gave rise to an authoritarian and warring Empire, followed by a return of the monarchy (1815). French colonialism started with the conquest of Algeria in 1830. Another Revolution gave birth to the 2nd Republic in 1848, which finally abolished slavery: slavery had

first been abolished by a revolutionary decree in 1794, but was reversed by Napoleon in 1802. The 1848 Constitution also abolished the death penalty for political offences.

The 2nd Empire replaced the Republic in 1852. Following France's military defeat to the Prussians, it gave way to the Third Republic on 4 September 1870. Its constitutional laws creating a parliamentary governance were voted in 1875.

The Third Republic essentially – if not formally – died following France's defeat by the Germans in 1940, with the military occupation of the northern half of France and its maritime coasts and the creation of an authoritarian 'French State' (*Etat français*), the Vichy regime, under the authority of Marshall Philippe Pétain. Its 'constitutional laws' were decrees edicted by Pétain, without democratic control. Political dissidents were hunted , Jews were persecuted and many deported. In August 1944, following the Liberation of Paris, and later of the whole of France, by the Allies, the Republic was restored by De Gaulle. Another parliamentary Constitution, creating the Fourth Republic was adopted by popular referendum on 13 October 1946. The political crisis caused by the Algerian war and strong pressures by the French army brought De Gaulle back in power and the adoption of a 'gaullist' Constitution on 4 October 1958.[10] The Fifth Republic – still in force in the 21st century – was born.

By 2004, the Constitution of 1958 had been revised 17 times, either by the Parliament or by referendum. It was the fifteenth constitutional act promulgated since the French Revolution.

International Conventions and French Laws

International human rights and humanitarian conventions

The French jurist René Cassin drafted the Universal Declaration of Human Rights, which was adopted by the UN General Assembly on 10 December 1948 on the recommendation of its Human Rights Commission. The Commission had been initiated primarily by the widow of President Franklin Delano Roosevelt and Cassin. France is a State Party to the subsequent 1966 International Covenant on Economic, Social and Cultural

[10] De Gaulle resigned in January 1946 when his proposed Constitution, strengthening the executive, was rejected by the political parties.

Rights, and the International Covenant on Civil and Political Rights. It is a Party to the first Optional Protocol to the latter Covenant. However France has neither signed nor ratified the Second Optional Protocol aimed at the abolition of the death penalty, on the grounds of 'legal obstacles of a constitutional nature'. Finally, on 19 March 2004, a government minister told the UN Human Rights Commission that France would soon initiate the ratification process.[11] Amnesty International believes that France's resistance was caused by the government's excessive consideration for the military corps's concerns, including the possible wish to restore the death penalty (abolished in 1981) in time of war or of exceptional circumstances: in fact, the Protocol allows countries to insert a reservation to that effect. French diplomats might have feared that the inclusion of this reservation would (rightly) alter France's image as the 'homeland of Human Rights' in the eyes of the international community.

France ratified on 14 October 1950 the 1948 Convention on the Prevention and Punishment of the Crime of Genocide: however, it only included the crime in its revised Criminal Code on 1 March 1994.

Among other international instruments, France is a party (since 18 February 1986) to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and has recognized the competence to receive and process individual communications of the Committee against Torture under Article 22 of the Convention. In a contradictory move, France, which had supported the drafting of the Optional Protocol to the Convention adopted by the UN General Assembly on 18 December 2002, seemed later to raise some problems related to its implementation at national level.[12]

France is also a Party to the following Conventions:

- The 1951 Convention relating to the Status of Refugees and the 1967 Protocol;
- The 1989 Convention of the Rights of the Child and to its two Optional Protocols: on the involvement of children in armed conflict and on the sale of children, child prostitution and child pornography;
- The fundamental International Labour Conventions: no. 29 on Forced Labour and 105 on Abolition of Forced Labour, no. 87 on Freedom of Association and Protection of the Right to Organize, no. 98 on Right to Organize and Collective Bargaining, no. 100 on

[11] See 'France, patrie des droits de l'homme, Le regard d'Amnesty International', 2004, pp. 13–15.

[12] Ibid. pp. 16–17.

Equal Remuneration and 111 on Discrimination (Employment and Occupation), no. 138 on Minimum Age and 182 on Worst Forms of Child Labour;
- France is a Party to the 1949 Geneva Conventions and to its 1977 Additional Protocols.

France has not signed the Convention on the Non Applicability of Statutory Limitations to War Crimes and Crimes against Humanity of 1968.

At the European level, France is a State Party to the European Convention for the Protection of Human Rights and Fundamental Freedoms and to its Protocols 1, 2, 3, 4, 5 6, 7, 8 and 11. It has ratified the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and its two Protocols.

French criminal laws

Torture was prohibited under the monarchy in 1780 and 1788, a prohibition confirmed by a revolutionary decree on 8 October 1789. As noted above, slavery was abolished by a revolutionary decree in 1794. An 1881 law affirmed the freedom of the press, in 1884 a law was adopted on the freedom of trade unions and in 1901 on the freedom of association.

Forced labour was finally abolished in French colonies by a law of 11 April 1946.

A law of 26 december 1964 decided that crimes against humanity, as referred to in Resolution 3(I) of the UN General Assembly of 13 February 1946, 'Extradition and Punishment of War Criminals', itself referring to the definition of crimes against humanity contained in the Charter of the International Military Tribunal, the Nuremberg Tribunal, dated 8 August 1945, were not subject to statutory limitations by their nature.

A judgment of the Court of Cassation of 20 December 1985, in the Barbie case, defined crimes against humanity further (see Chapter 8, the Trial of Klaus Barbie). In another judgment of 1 April 1993, the Criminal Chamber of the Court of Cassation in the Boudarel case decided that the principle of the imprescribility of crimes against humanity only applied to crimes committed in the context of World War II in Europe (see Chapter 3).

The French Penal Code was revised by a law of 22 July 1992, with effect as from 1 March 1994. Under 'Crimes against humanity' it includes 'genocide' and 'other crimes against humanity'.[13] The definition of genocide follows essentially the text of the Genocide Convention: see Presentation 1.1.

[13] Translation from the French by the author.

Presentation 1.1
French Penal Code

(Revised on 22 July 1992)

Book II – Crimes Against Persons

Title 1 – Crimes against humanity

Chapter 1 – Genocide, Art. 211-1
A genocide is the fact, in the execution of a concerted plan aiming at the destruction, in whole or in part, of a national, ethnical, racial or religious group, or of a group determined by reference to any other arbitrary criterion, of committing or causing to be committed, against members of this group, one of the following acts:

- wilful attack on life;
- causing serious bodily or mental harm;
- deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- imposing measures intended to prevent births;
- forced transfer of children.

Genocide is punished by life imprisonment.

Chapter 2 – Other Crimes against humanity, Art. 212-1
The deportation, the reduction in slavery or the massive and systematic practice of summary executions, abduction of persons followed by their disappearance, torture or inhumane acts, inspired by political, philosophical, racial or religious motives and organized in implementation of a concerted plan against a group of civilian population are punished by life imprisonment.

Art. 212-2
When they are made in times of war pursuant to a concerted plan against those who fight against the ideological system in the name of which are perpetrated crimes against humanity, the acts listed under Art. 212.1 are punished by life imprisonment.

Art. 213-5
Public prosecution regarding crimes under the present Title, as well as sentences delivered, are imprescriptible'.

Source: http://www.preventgenocide.org/fr/droit/codes/France.html

Prosecution against genocide and other crimes against humanity under the Revised Penal Code could only be initiated against crimes committed after 1 March 1994, the effective date of entry into force of these articles.

Amnesties

On 5 January 1951, a few years after the criminal trials of the main Vichy leaders and the purge trials, a law granted amnesty to all those who had committed acts for which the punishment involved loss of civil rights and a prison sentence of less than fifteen years. The law did not apply to grave crimes nor to judgments of the High Court of Justice. A second amnesty law adopted on 24 July 1953 released remaining prisoners of the purge, except those guilty of the most serious crimes (see Chapter 8, the amnesties).

War crimes and crimes against humanity which may have been committed during the wars in Indochina and in Algeria by French civilian or military personnel were granted amnesty respectively by two decrees of 22 March 1962, a law of 18 June 1966 and a law of 31 July 1968. A judgment of the Court of Cassation, of 1 April 1993 stated:[14]

> No constitutional principle, nor any principle of international law, allows an affirmation according to which a category of offences would be, by nature, removed from the power of amnesty of the national legislator. The legislator may modulate the range and modalities of each law of amnesty. He can choose to erase not only venial offences, as traffic tickets, but also the gravest offences, such as crimes, and even crimes against humanity. . . . The principle of imprescribility of these crimes constituting an exceptional derogation to the rules of ordinary procedure, must be interpreted restrictively.

This policy statement reflects the traditional caution of the French judiciary about, and at times its resistance against, the perceived encroachment of such international conventions as the Genocide Convention and the Convention against Torture, in declaring the imprescribility of such crimes, and more generally, against the concept and practice of universal jurisdiction.

French Justice

The assertion of the independence of the judiciary has been, in France, a long uphill struggle against the executive. In spite of Montesquieu, governments

[14] See http://www.damocles.org/article.php3?id_article=4339

and members of Parliament of all political colours have long been loath to accept that the non-elected judges could sanction their laws, decisions or their conduct. Monarchies and Napoleon controlled their judges, and the Republics were slow in supporting their judges.

Trials during colonial times exposed the blatant interference of governments over judges, under pressure from the military, to take 'exemplary' judgments towards rebels, while violations of civil, criminal or military law allegedly committed by the French military or the police in the colonies were generally forgotten (see Chapters 3, 4 and 5).

The authoritarian and antisemitic Vichy regime, which ruled France from 1940 to 1944, limited public freedoms and individual rights, instituted a separate legal system for the exclusion and the persecution of Jews, and set up special courts to judge former political leaders and 'terrorists' (see Chapters 6, 7 and 8).

Judicial principles and structure under the 1958 Constitution

The principle of the independence of the judiciary is enshrined in Article 64 of the French Constitution of 1958. This article provides that the President of the Republic is the guarantor of this independence and is assisted by the High Judicial Council (*Conseil supérieur de la magistrature*).[15] Organic law 58-1270 enacted on 22 December 1958 affirms the principles underlying the administration of justice, including equal and free access to justice, justice as a public service, the objectivity, neutrality and independence of the judges, the secrecy of deliberations and the unity of the judicial body (standing and sitting judges). The law also prohibits judges from holding political or administrative offices.

The French system is divided in two parallel hierarchies of courts, the judiciary and the administrative courts, and the separate category of military tribunals. The supreme court of the judiciary is the Court of Cassation, and the supreme administrative court is the Council of State. Judges are appointed by the President of the Republic with the consent of the High Judicial Council, they have security of tenure, guaranteed by Art. 64 of the Constitution. The Council is also the disciplinary authority within the judiciary for judges.

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[15] The Council is composed of the President of the Republic and the Minister of Justice as *ex officio* members, and ten other members (judges, public prosecutors, members of the Council of State and other persons with a high moral reputation).

Public prosecutors have a different, dependent, status. They are answerable to the Minister of Justice who holds power to appoint, transfer, apply disciplinary measures or dismiss them. The High Judicial Council only has a consultative, non-binding, role regarding their appointments. Unlike judges, the prosecutors operate under the direction and control of their hierarchical superiors. They have no security of tenure.

The 1958 Constitution created the '*Conseil constitutionnel*', which developed from a political to a constitutional court. Its main function is to ensure that the laws passed by Parliament do not contravene the Constitution. It ensures observance of the fundamental individual and collective freedoms and of elections and referenda.[16] The government created in 1973 a new institution, the 'Mediator of the Republic', modelled on Scandinavian precedents for an Ombudsman. It is staffed by an independent personality appointed by the government for six years. He/she should help persons who have challenged, to no avail, a decision or a behaviour of the French administration. Such complaints cannot however be submitted by individuals but only by a member of the Parliament or a senator.

Military tribunals

A law of 9 March 1928 changed the 'War Councils' (*Conseils de guerre*), active during the First World War, into military tribunals, restricting their jurisdiction in peacetime to purely military offenses, such as rebellion or desertion. Breaches of civil or criminal law remained within the competence of the judiciary courts. Military tribunals, consisting of officers, are presided by a civilian magistrate.

A decree of 29 July 1939 extended, even before the Second World War started, the competence of military tribunals to crimes and offences against the external security of the state, even if committed by civilians. These included treason, spying, but also the broad term of 'enterprise of demoralization'.

Military tribunals were replaced by ad hoc special courts during the German occupation. After the Liberation, an ordinance of 18 August 1944 re-established the military tribunals.

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[16] The Constitutional Council is composed of nine members appointed for nine years by the President of the Republic, the President of the Senate and of the National Assembly.

A law of 21 July 1982 finally abolished military tribunals in peacetime. By exception, military tribunals are allowed to function in peacetime only for French military forces deployed outside France. In wartime, military tribunals are to be re-established in France.[17]

Justice and politics under the Fifth Republic

The Fifth Republic of 1958, a mixed presidential/parliamentary system, with its domination of the executive over the legislative, saw governments restrict the initiatives of the prosecutors, give them instructions to stop or delay indefinitely politically embarrassing or security sensitive investigations, influence directly or indirectly judges. Judges were not to judge cases concerned with affairs of the state, security and military secrets, high level officials.

Inspired by the example of Italian judges, French judges and prosecutors started to affirm their autonomy beginning in the 1970s. New generations of judge graduates, the counter-powers offered by *co-habitation*, i.e. the election of a President of the Republic of right or left, and of an Assembly of the other party, pressures and exposures of scandals by the media contributed to more transparency. It became more difficult for the government to control the judiciary.[18]

Since the 1990s, investigating judges (*juges d'instruction*) have started to charge prominent politicians, political leaders and managers of leading firms for corruption. According to the International Commission of Jurists, in the last ten years, approximately 500 French politicians have been indicted in corruption cases.[19] Even President Jacques Chirac has been the object of investigations: – over the suspected illicit funding of his political party while he was Mayor of Paris from 1977 to 1995, and – on suspicion of having used illegal money to finance trips for himself and his entourage. Chirac has denied the allegations. On 10 October 2001, the Court of Cassation validated Chirac's claim that presidential immunity protected him from investigation and prosecution during his office as President. However, Alain Juppé, a prominent politician and Chirac's protégé, was convicted for the

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[17] Since 1946, the French League of Human Rights campaigned for the abolition of military tribunals in peacetime: see, for instance, the resolution by its Congress of 13–14–15 July 1956 calling for a reform of military justice.

[18] See 'Le système a produit une culture de la dépendance et de la déférence', Alain Bancaud in *Le Monde*, 21 October 2004.

[19] See note xiii, p. 9.

same illicit party-funding scheme while he served as finance director at Paris City Hall during Chirac's tenure as mayor. On 1st December 2004, an appeals court sentenced Juppé to a 14-month suspended prison term, reduced from the original judgment of 18 months, and a one-year ban on elected office, instead of a ten-year ban.[20]

Eva Joly, a French magistrate of Norwegian origin, investigated 20 senior figures in the Elf corruption case, including a former Minister of Defence. The case typically included economic interests (petroleum), security and diplomatic issues related to senior French officials and African heads of state. During her investigations, Joly was advised to drop the case and received death threats. She had to be accompanied by body guards.[21]

National defence secrecy: an obstruction to justice

Judges have often been confronted with the government's or administration's denial of information and documentation necessary for their investigations on the grounds of the ill-defined and extended definition of national defence or national security.

On 3 December 2004, 400 journalists, publishers, jurists and representatives of civil society launched an appeal against the 'abuse of administrative secret, a French evil', attributed by some to a 'culture of opacity led by lobbies and the high administration'.

They said that the law of 17 July 1978 guaranteeing, in principle, access of all to administrative documents, is rarely applicable in view of the prevalent, systematic, and abusive administrative practice of classifying documents as '*confidentiel défense*' without explicit justification.[22] They asked that French law be aligned to the Swedish law of 1776 and to the US Freedom of Information Act of 1966.

The law of 1978 created a Commission, *Commission d'accès aux documents administratifs*, which is to control the implementation of the law by giving consultative opinions when requested by a person having difficulties in obtaining communication of an administrative document. However, the law of 12 April 2000 states, in part, that documents which might infringe upon 'the secret of national defence', 'the conduct of external politics of France', 'the security of the State' are not allowed to be released. The Commission received 5 000 requests in 2003 and only dealt with half of them.

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[20] *International Herald Tribune*, 3 December 2004.

[21] See Eva Joly, *Est-ce dans ce monde-là que nous voulons vivre*? (Les arênes, Paris, 2003).

[22] *Le Monde*, 2 December 2004.

A law of 8 July 1998 has created a Consultative Commission on the secret of national defence. It renders advice on the declassification and communication of information having been classified as 'secret' for national defence, at the request of a French jurisdiction. The latter may request, with appropriate justification, the declassification and communication of protected information to the administrative authority in charge of classification, which then submits the case to the Commission.

The Commission is an independent administrative authority. However, its membership is heavily loaded in favour of the judiciary and political establishment: three of its five members are appointed by the President of the Republic from a list of six members of the Council of State, Court of Cassation or the *Cour des Comptes.* Both the Council of State and the Court of Cassation have contributed in the past to an extensive definition of the '*secret-défense*' to the benefit of the executive, thus restricting the judge's investgations. The other two members are a member of the National Assembly and a Senator.

In the case of Mehdi Ben Barka, who 'disappeared' in 1965, judges finally obtained the release of all relevant documents in November 2004, by decision of the Minister of Defence, Michèle Alliot-Marie, following the advice given by the Commission. While General De Gaulle was President of the Republic, Ben Barka, a political opponent to Morocco's King Hassan II, was kidnapped in Paris on 29 October 1965 by two French police agents and an agent of the French counter-intelligence service, and probably killed by Moroccan officials. His body was never found. Two trials, in October 1966 and in April–June 1967, ended with condemnations of two French agents to jail sentences, and, *in absentia*, life imprisonment for General Oufkir, Moroccan Minister of the Interior. Previous requests for documents by the judges met only with partial success, probably because of the possible implication of high level French and Moroccan officials.[23]

Imperfect Democracy and Justice

France's compliance with international conventions that it has ratified has been reviewed by the European Court of Human Rights, and it has been monitored by UN and European committees.

The quasi-impunity of police officers and the impunity of the French head of state are failings of both the executive and the judiciary, as well as the

[23] *La vie économique*, 6 December 2004.

priority given by France to diplomatic/economic considerations over human rights concerns.

Judgments of the European Court of Human Rights

France has been condemned by the European Court of Human Rights for several violations of the European 'Convention for the Protection of Human Rights and Fundamental Freedoms' of 1950, ratified by France on 3 May 1974.[24]

A. Violations of Article 6: fair and public hearing

Lengthy proceedings

Article 6 §1 of the Convention provides, in part, for 'a fair and public hearing within a reasonable time'. The Court found that, in a number of cases over many years, the duration of the proceedings, including administrative trials, was unreasonable.

Only in 2004, France was condemned on these grounds in six cases: cases of excessively lengthy proceedings included: five years and 11 months (*Rouille*), eight and a half years (*Marschner*), nine years and one month (*Favre*), eight years and eight months (*Mutimura*), 14 years and six months (*Slimane-Kaïd*), 15 years (*Weil*), 16 years (*Subiali*).[25]

These repeated violations reveal a fundamental dysfunctioning of the French justice system, presumably due in part to lack of funds but perhaps also to more substantial judicial problems of substance and procedure. Basically, they are evidence of the lack of a political will to support the judiciary and respect its independence.

Unfair trial

In a few judgments notified in 2004 by the Court, France has been condemned for the following violations of Article 6 §1, 'right to a fair trial':

– Failure to disclose to an appellant or his/her advisers the judge rapporteur's report before the hearing when the Advocate General has

[24] The European Court of Human Rights was created by the Convention. Protocol No. 11 to the Convention replaced the existing, part-time Court and Commission by a single full-time Court. The Protocol came into force on 1 November 1998.

[25] *Press releases* of judgments of the European Court of Human Rights are found in http://www.coe.int/cp/2004/ . . . htm

been supplied with a copy created an imbalance incompatible with the requirements of a fair trial (*Crochard and 6 Others*);
- No opportunity to reply to the Advocate General's submissions (*Menher*);
- Failure to communicate the reporting judge's report to the applicant before the hearing, although it had been communicated to the Advocate General, no opportunity to reply to the latter's submissions (*Coorbanally – Weil* [*same case as above*]);
- The Court of Appeal had essentially grounded the applicant's conviction on a new interpretation of the evidence given by witnesses it had not itself examined , notwithstanding the applicant's requests to that effect. The applicant had thus been found guilty on the basis of testimony in relation to which his defence rights had been considerably restricted. The applicant had not had a fair trial (*Destrehem*);
- Forfeiture of the right to appeal to the Court of Cassation in a criminal matter, a particularly severe sanction affecting the right of access to a court guaranteed by Article 6 §1: there had been unreasonable interference with this right (*Morel*).

Violations of Article 2: Right to life
Article 2 §1 states in part that 'Everyone's right to life shall be protected by law' In the *Slimani* case (2004), the Court held that there had been a violation of Article 2 on account of the applicant's inability to take part in the inquiry to establish the cause of death of her partner or to gain access to the information thereby obtained.

Violations of Article 3: Torture, inhuman or degrading treatment or punishment
This Article states that 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'.

- For the first time, France was condemned by the Court in 1999 for acts of torture committed at the end of 1991 by police officers at the police station of Bobigny. In the Selmouni case, the Court found that pain and suffering had been inflicted on the applicant intentionally for the purpose of, *inter alia*, making him confess to the offence which he had been suspected of having committed. Annexed medical certificates showed clearly that the numerous acts of violence had been directly inflicted by police officers in the

performance of their duties. The Court was satisfied that the physical and mental violence, considered as a whole, committed against the applicant's person had caused 'severe' pain and suffering and had been particularly serious and cruel. Such conduct had to be regarded as acts of torture for the purposes of Article 3 of the Convention.

There had also been a violation of Article 6 §1 on account of the length of the proceedings (six years and seven months). The Court awarded the applicant 500 000 French Francs for personal and non-pecuniary injury, and 113 364 French Francs for costs and expenses;

- In the *Rivas* case (2004), it was not disputed that the applicant's injury (a blow in the genital area resulting in a ruptured testicle requiring emergency surgery) had been inflicted during his time in police custody, while he had been entirely under the supervision of police officers. The Criminal Court had considered that the police officer who had hit him had been guilty of assault. The Court of Appeal had overturned that judgment. The European Court considered that the treatment to which the applicant had been subjected had been inhuman and degrading. Under Article 41 (just satisfaction), the Court awarded the applicant 15 000 euros for non-pecuniary damage and 10 000 euros for costs and expenses;
- In the case of R.L. and M.-J.D. (2004), the Court found that the applicants had sustained injuries and it was not disputed that the police officers had used force during their inervention. The Court considered that the bruises noted were too numerous and too large, and the periods of unfitness for work suffered by the applicants too long to correspond to the use of force made absolutely necessary for the applicant's conduct. The Court held that the treatment inflicted upon them had been contrary to Article 3.

Violation of Article 5: Right to liberty and security

In the same R.L. and M.-J.D. case (2004), the Court held that there had been a violation of Article 5 §1 (c) of the Convention – the first applicant's arrest had not been justified in the light of the acts which could be held against him –, Article 5 §1 (e) – the first applicant's continued detention at the psychiatric infirmary had had no medical justification, but was attributable to purely administrative reasons: the deprivation of his liberty had therefore no longer been justified under this Article –, Article 5 §5 had also been violated – use of a remedy without obtaining satisfaction.

The United Nations Committee against Torture

The Committee was created by the UN Convention against Torture, and other Cruel, Inhuman and Degrading Punishment, ratified by France on 18 February 1986.

In May 1998, this Committee examined France's long-delayed second periodic report on its implementation of the Convention.[26] While remarking on the six-year delay in presenting its report, the Committee noted the obvious will of France to combat torture and welcomed new measures and proposals to improve the present legislation and practice. These include the creation of a High Council of Ethics (*déontologie*), the reactivation of the High Council of Penitentiary Administration, the limitation of pretrial detention. However, the Committee expressed its concern regarding the absence in the penal code of a definition of torture in conformity with the first article of the Convention, and that French courts were not formally obliged to disregard cases where evidence had been obtained by use of torture. Concern was also expressed about sporadic allegations of violence attributed to police forces on the occasion of arrests and during interrogations. Such allegations should be seriously considered by the authorities and subjected to impartial reviews, and, as required, appropriate sanctions.

The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment

This Committee was created by the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), ratified by France on 9 January 1989.

The Committee's fifth periodic visit to France took place from 14 to 26 May 2000. Its report,[27] released on 19 July 2001, deals with police establishments, prisons, detention centers for foreigners, psychiatric establishments. With regard to the police and gendarmerie establishments visited, the CPT received a number of allegations of physical ill-treatment of people in police custody, but their number was lower than on previous visits. The allegations were mostly related to police interrogations and

[26] See http://www.damocles.org/article.php3?id_article=4134

[27] Doc. CPT/Inf(2001)10.

included such actions as receiving blows and kicks and being thrown to the ground. Detention conditions for persons in custody of the national police are often unsatisfactory. With regard to prisons, few allegations of physical ill-treatment were received, but numerous complaints of abusive language were made. The staff of the disciplinary and isolation unit in one prison had used excessive force in order to control unruly inmates. The Committee expressed serious reservations about conditions and duration of placement in isolation cells. There were allegations of verbal abuse, aggressive attitudes and racist comments in the detention centers for foreigners. There were also allegations of staff overreaction to the behaviour of unruly patients in one psychiatric center.

The CPT praised the adoption of legislation reinforcing the protection of the presumption of innocence and victims' rights. The law gives detainees the right of access to a lawyer from the beginning of custody, but restrictions remain when the detainee is suspected of being involved in terrorist or criminal activities, or in drug trafficking. The Committee's earlier recommendation concerning the right of access to a doctor of their choice had not been implemented. The Committee made a number of recommendations, including a code of conduct applying to police interrogations, improving detention conditions in police establishments and in prisons. The government gave a detailed reply to the Committee's report, recalling, in part, that the findings of two parliamentary commissions of enquiry had led to the conclusion that a broad-based reform of the prison system was needed.[28]

The quasi-impunity of police officers

Some of the cases reported above have confirmed the allegations of human rights NGOs about French police brutality. They have also shown that French courts are often reluctant to judge police officers according to the degree and gravity of their illegal actions.

The International Commission of Jurists, in its 2002 report,[29] expressed its concern that

> courts are uneasy about handing down any but nominal sentences to police officers for crimes of violence or excessive force and that prosecutors are often too passive in applying the law, perpetuating a situation of effective impunity when police officers are concerned.

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[28] Doc. CPT/Inf(2001)11.

Among several examples given by the Commission:

- in January 2000, the Court of Cassation annulled an appeal court verdict against a gendarme, who, in 1993, had shot dead Franck Moret, when he tried to escape a road check-point;
- in July 2000, two anti-crime Brigade officers were sentenced by the Correctional Court of Lille to a suspended seven month prison term for 'involuntary homicide' in connection with the death in custody of Congo-born Sydney Manoka Nzeza;
- in October 2000, a judge ordered that charges of voluntary and involuntary homicide against police officers involved in the death of Mohamed Ali Saoud be dropped.

In its annual reports, Amnesty International has repeatedly denounced police brutality and the effective impunity of police officers. Its 2004 report referred to statistics published by the General Inspection of [police] Services according to which the number of complaints filed in the Paris region against police officers has risen from 216 in 1997 to 432 in 2002.[30]

As another example, Karim Latifi lodged on 27 February 2002 a criminal complaint for racial violence and physical assault against Paris police officers with the General Inspection of Services, then with the courts. Amnesty International launched a campaign for a prompt, thorough and impartial police and judicial investigation into the alleged assault, and for those responsible to be brought to justice. So far, no such investigation has been initiated nor any prosecution of responsible police officers.

The Impunity of French Presidents

François Mitterand's tenure as President of the Republic, from 1981 to 1995, has been rich in abuse of power, illegal ventures, denials and judiciary impunity of the major actors. '*Secret-défense*', the official secret rules, has been used and abused to hide covert intelligence actions or lesser deeds from becoming public, rather than genuinely protecting national security.

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[29] See 'France – Attacks on Justice 2002', http://www.icj.org/news.php3?id_article=2682&lang=en

[30] See http://www.amnestyinternational.be/doc/article3843.html, 26 May 2004.

The Irish 'Terrorists' of Vincennes

A terrorist attack in Rue des Rosiers, an old Jewish district in Paris, on 9 August 1982, caused six deaths and 22 wounded persons. A few months later, President Mitterand, elected a year before, appointed Christian Prouteau, head of the *Groupe d'intervention de la Gendarmerie nationale* (GIGN- an elite police intervention body) to 're-organize' his security, deemed inadequate, as chief of a 'Mission of coordination, information and action against terrorism', later known as 'anti-terrorist cell', placed directly in the Presidency, while it would normally have been placed under the Ministry of the Interior. This secret, illegally constituted, body first arrested in Vincennes, near Paris, three Irishmen accused of terrorism. The Presidency saluted these arrests as important in the milieux of international terrorism. It was later revealed that the weapons found in the Irishmen's flat had been brought by Paul Barril, Prouteau's assistant in the GIGN. Neither Prouteau nor Barril were condemned by the courts: two whistle-blowers received a twelve-month suspended jail sentence. The responsibility of Barril was only recognized in 1995, when he sued the newspaper *Le Monde* for defamation: the judges found that the writer of *Le Monde*'s article published on 21 March 1991, Edwy Plenel, had established proof of the truth of his allegations.[31]

In March 2003, the Criminal Chamber of the Court of Cassation annulled the judiciary proceedings introduced at the request of the Irishmen' representatives against Barril on procedural grounds.[32]

The wiretapping scandal

Following the Vincennes' fiasco, the Presidency's 'anti-terrorist cell' stopped its operational activities and focused exclusively on Mitterand's own personal protection and interests. The illegal cell organized and carried out a system of illegal wiretapping, with the support or tacit complicity or assent of senior government officials, including two Prime Ministers, Pierre Mauroy (1981–1984) and Laurent Fabius (1984–1986) and other Ministers.

The phones of some 150 persons were tapped, including journalists, lawyers, businessmen and artists, in a bid to discover information embarrassing to the President (such as the existence of an illegitimate daughter), and combat potential scandals. One target was Edwy Plenel, *Le Monde*'s journalist, who

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[31] *Le Monde*, 16 November 2004.

[32] *Le Monde*, 24 January 2002, *Le Parisien*, 29 April 2003.

was then investigating the Irish terrorists' affair. Other targets were journalists, lawyers investigating the Rainbow Warrior's venture and even artists.

The illegal wiretapping operations were only brought to justice in November 2004, twenty-two years after the event, through delaying tactics of politicians and judges. Twelve former government officials and senior police officers were on trial, either as defendants or witnesses. All said that they were following orders given by the President: none protested publicly nor resigned on principles.[33]

The judgment was rendered on 9 November 2005 by a Paris court. None of the government officials – two Prime Ministers and one Minister of Defence – was condemned. The blame was laid entirely on the defunct President François Mitterand, who created the 'anti-terrorist cell' and was closely informed of its activities. All those condemned received suspended jail sentences, and fines which they could then ask the French state to pay, as their fault was not personal, but directly linked with their administrative functions. They included: – the prefect Christian Prouteau, head of the cell, condemned to eight months suspended imprisonment, and €5000 fine; Paul Barril, his assistant, six months and the same fine; a former head of Mitterand's cabinet, six months and, again, the same fine; a general, no. 2 of the cell, four months and €3000; a responsible officer of the state information services (*Direction de la surveillance du territoire*), three months and €2000. The Socialist mayor of Dunkirk and his successor were found guilty of invasion of the private life of a writer's family, but without punishment. Several others who were called to the court and blatantly lied under oath or claimed a loss of memory, including one Prime Minister and a Minister, a general and a director cabinet of a Prime Minister, and several secretaries, were left unpunished. The submissions of sixteen complainants were dismissed by the court, 22 others were declared unfounded. The submission of the 'whistle-blower' was dismissed as unfounded.[34]

The Rainbow Warrior Affair

The French secret operation called *Opération satanique* was to sabotage the Rainbow Warrior, flagship of the ecologist NGO Greenpeace, which sailed into the Auckland harbour (New Zealand) on 7 July 1985 to join other vessels on a protest voyage to the French nuclear test site at Mururoa Atoll.

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[33] *International Herald Tribune*, 16 November 2004, *Le Monde*, 15 November 2004.

[34] *Le Monde*, 11 November 2005.

Testing of France's nuclear weapons at this site in the South Pacific was a regular occurrence despite international condemnation of what was regarded as unnecessary and unsafe testing procedures.

At the end of 1984, the French military authorities expressed their concern to Charles Hernu, Minister of Defence, fearing a vast action by Greenpeace on the occasion of the nuclear tests forecast for the following summer. In turn, Hernu asked Admiral Pierre Lacoste, head of the French Intelligence Services (*DGSE*) to initiate a sabotage plan to keep Greenpeace from hampering the tests. In his 1997 book, '*Un amiral au secret*', Lacoste wrote that President François Mitterand, in a meeting on 15 May 1985, had authorized him to 'continue with the preparations in order to satisfy the request of the Minister of Defence'. Twenty DGSE agents were mobilized for the operation. Mitterand denied that he had ordered the sinking of the ship, and acknowledged only that he had approved a DGSE operation, without knowing about its details.[35]

On 10 July 1985, a bomb blast ripped open the Rainbow Warrior – a Portuguese photographer, Fernando Perreira, was drowned.

On 12 July, a counsellor at the French Embassy in Wellington said: 'In no way was France involved . . . The French government does not deal with its opponents in such ways'.[36]

On 24 July, Sophie and Alain Turenge (later revealed as Captain Dominique Prieur and Commandant Alain Mafart, both DGSE agents) appeared in a New Zealand court, charged with murdering Pereira, conspiring with each other and with others to commit arson and wilfully damaging the Rainbow Warrior by means of explosives. On 9 August, President Mitterand condemned the bombing as a 'criminal attack' and promised stern punishment if allegations that French agents were involved proved to be true.

In a report commissioned by the government, released on 26 August, Bernard Tricot, a Councillor of State, said: 'On the basis of the information available to me at this time, I do not believe there was any French responsibility'. The French agents caught in New Zealand were merely there to spy on Greenpeace, he implied, not to bomb them.

On 18 September, *Le Monde* revealed that the French authorities were responsble for the operation: Charles Hernu resigned and Lacoste was dis-

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[35] *Le Monde*, 'Le sabordage du "Rainbow-Warrior" dans les eaux troubles de la raison d'état', 28–29 November 2004.

[36] See 'The Rainbow Warrior Affair', diary compiled by Mike Andrews (Secretary of the Dargaville Maritime Museum) in http://www.kauricoast.co.nz/Feature.cfm?WPID=70.

missed from his functions. On 23 September, Prime Minister Laurent Fabius had to admit that the French military, in sinking the boat, had carried out orders of the political authorities.

On 22 November, Mafart and Prieur were sentenced to 10 years' imprisonment in New Zealand. Economic sanctions against New Zealand were then imposed by the French government, who asked for the return to France of the DGSE agents.

In June 1986, both France and New Zealand agreed to submit the dispute to Mr Perez de Cuellar, then Secretary-General of the UN and to accept his ruling, which he gave in July 1986: France should present formal apologies to the Prime Minister of New Zealand without delay, – France should pay New Zealand seven million US dollars in reparation for the damage done, – the two detainees would be transferred to the French authorities and placed in military station on an isolated island for three years, – they would not be allowed to leave the island under any circumstances, except by agreement between the two governments, – France would cease its economic sanctions.

France did not keep its word: both detainees were repatriated to mainland France prior to the three year' set time limit, without the agreement of the New Zealand government.

On 30 April 1990, an arbitration court declared that France had been guilty of violations of its obligations towards New Zealand and declared that the public condemnation of France was an appropriate satisfaction for the legal and material damages caused to New Zealand. The three arbitrators recommended that France should give $2 million to a fund aimed at promoting close and friendly relations between the citizens of the two countries:[37]

New economic sanctions were applied by France in December 1991 in order to stop New Zealand's request for extradition of another DGSE agent: New Zealand gave in to the French pressures.

The French Parliament did not initiate an investigation in order to find out whether President Mitterand had approved the operation. Neither Prime Minister Fabius nor President Mitterand admitted any criminal, political or moral responsibility for the failed lethal operation, a violation of international law, nor for France's later violations of its obligations towards New Zealand.

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[37] See 'L'affaire du "Rainbow Warrior": les décisions arbitrales' in http.//www.eleves.ens.fr/home/mlnguyen/droit/DIP/rainbow_warrior.hlml, 12 July 2004.

On 29 January 1996, President Jacques Chirac announced that the sixth French nuclear test conducted on the 28th will be the last. Greenpeace welcomed this decision.[38]

Universal Jurisdiction or Realpolitik

Several cases have shown that France, when faced with a conflict between its obligations under international conventions to prosecute on its territory foreigners accused of crimes against humanity, torture or genocide, and its diplomatic relations with the countries of the nationality of the accused, generally chose realpolitik considerations.

France and Algeria

On 25 April 2001, an Algerian family whose son was killed in detention and two former Algerian detainees filed a complaint for torture against General Khaled Nezzar, who had just arrived in France to promote his book *Algeria, the failure of a programmed regression*. As Commander-in chief when the Algerian army fired on demonstrators in October 1988, killing from 500 to 1 500 persons, he was Minister of Defence from July 1990 until 1993. The complaint charged Nezzar for 'his direct responsibility in the policy of generalized repression, based not only on the massive and systematic use of torture, but also on extra-judicial executions'. Nezzar was a resolute promoter of the 'eradication of the Islamists', as was the Algerian military hierarchy. The Islamists had won the legislative elections of December 1991, which were then annulled.

France is a Party since 1986 to the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The Convention allows states to prosecute an alleged offender, whatever his nationality, present in its territory. After examination of relevant information, 'any State Party in whose territory a person alleged to have committed any offence referred to in article 4 is present shall take him into custody or take other legal measures to ensure his presence'.[39] The state must then make a preliminary inquiry into the facts.

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[38] See 'Greenpeace welcomes end to French nuclear testing: calls it "another barrier to global test ban removed", http://www.archive.greenpeace.org/comms/rw/jan29.html, accessed on 7 December 2004.

[39] Art. 6 of the Convention.

Nezzar returned hurriedly to Algeria on 26 April 2001, allegedly with the assistance of the French political authorities. The France-based International Federation of Human Rights Leagues (FIDH) and the US-based Human Rights Watch (HRW) protested against the French government's failure to prevent this departure. Reed Brody, advocacy director of HRW, said: 'France has cynically placed its relations with Algeria ahead of its international legal obligations'.[40]

Massacres at the Beach (Brazzaville, Congo)

In 1998, hundreds of Congolese fled from fighting in their country to ex-Zaire, on the other shore of the Congo river. In January 1999, Congo's President Denis Sassou Nguesso called for national reconciliation and invited the refugees to come home, under the auspices of the UN High Commissioner for Refugees. In May 1999, on arrival at the Beach (the river Congo's shore in Brazzaville), they were arrested by the security forces (military groups of the presidential guard): 356 civilian refugees 'disappeared'. Testimonies of survivors denounced the mass executions.

In December 2001, several human rights organizations (FIDH, the French League of Human Rights and the Congolese Observatory on Human Rights) submitted a complaint in France concerning crimes against humanity and torture allegedly committed in the Congo against Congolese nationals, against the President of the Republic of the Congo, the Congolese Minister of the Interior, General Pierre Oba and others. A French judge began investigations.

On 9 December 2002, the Republic of the Congo filed in the Registry of the International Court of Justice an Application instituting proceedings against France[41] seeking the

> annulment of the investigations and prosecution measures taken by the French judicial authorities further to a complaint concerning crimes against humanity and torture allegedly committed in the Congo against individuals of Congolese nationality filed by various human rights associations against the President of the Republic of the Congo, Mr. Denis Sassou Nguesso, the Congolese Minister

[40] *Le Monde*, 27, 28 April 2001, hrw-news@igc.topica.com, 30 April 2001.

[41] International Court of Justice, *Press Release* 2003/21, 'Certain Criminal Proceedings in France (Republic of the Congo *v.* France), *Fixing of time-limits for the filing of written proceedings*', 16 July 2003. The full text is in http://www.icj-cij.org

> of the Interior, General Pierre Oba, and other individuals including the General Norbert Dabira, Inspector-General of the Congolese Armed Forces, and General Blaise Adoua, Commander of the Presidential Guard.
>
> The Congo contends that by 'attributing to itself universal jurisdiction in criminal matters and by arrogating to itself the power to prosecute and try the Minister of the Interior of a foreign State for crimes allegedly committed by him in connection with the exercise of his powers for the maintenance of public order in his country', France violated 'the principle that a State may not, in breach of the principle of sovereign equality among all Members of the United Nations . . . exercise its authority on the territory of another State'. The Congo further submits that, in issuing a warrant instructing police officers to examine the President of the Republic of the Congo as witness in the case, France violated 'the criminal immunity of a foreign Head of State – an international customary rule recognized by the jurisprudence of the Court'.

The Congo Application requested an indication of a provisional measure, seeking an 'order for the immediate suspension of the proceedings being conducted by the investigating judge of the Meaux [France] Tribunal de grande instance'.

By Order of 17 June 2003 the Court found, by fourteen votes to one, that the circumstances were not such as to require the exercise of its power to indicate provisional measures.

Human rights organizations hailed this decision, which proved to be, however, a short-lived victory.[42]

On 1st April 2004, Jean-François N'Dengue, Congo's Director of the Police, was arrested in Meaux, charged with crimes against humanity and jailed in a Paris prison. According to a French satirical journal, during the night of 2 to 3 April, President Nguesso allegedly pressed President Chirac (by telephone) to release N'Dengue, making threats on the interests and operations of the French oil company Total in Congo. On 3 April, at 3 am (during the night), the Chamber of Investigations (*Chambre d'instruction*) of the Appeals Court of Paris freed the detainee. The justification, that N'Dengue had diplomatic immunity during a mission to France, was not backed by facts. The investigating judge, Jean Gervillié had been submitted to strong pressures by the Ministry of Justice. He was later moved from Meaux and 'promoted' to another Tribunal in Bobigny.

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[42] See http://www.fidh.org/afriq/dossiers/sassou/sassiu.htm, 17 June 2003.

The French investigation into the Beach massacre was finally annulled on 22 November 2004 by the same Appeals Court in Paris. This decision gave impunity to the Congolese leaders allegedly responsible for the massacre. A lawyer for the International Federation of Human Rights said: 'This is a completely political decision'. The Congolese leaders expressed satisfaction.

The Beach crisis had created high tensions between the Congo and France: diplomatic, political and economic considerations have, again, prevailed over international legal obligations.[43]

Conclusion

After many centuries of wars, massacres, political strife and instability, France is now a mature democracy, where power is allocated through periodical and free elections, where citizens are free to express their views freely without fear, where there is freedom of the media.

However, the constitutional system and its practice give an excessive power to the President in foreign affairs: he defines and implements France's foreign policy, he decides on his own to participate in UN peace-keeping operations or to intervene militarily in France's former colonies (with the agreement of the recipient country), he benefits from a *de jure* and *de facto* immunity. Foreign affairs decisions, including covert actions of the intelligence services, are protected from investigations and exposure through strict official secret rules, which judges find almost impossible to overcome. In a democratic country, one of the constitutional counter-powers to the power of the executive is the legislative. The French Assembly is weak, in part because of the Fifth Republic Gaullist Constitution, designed by De Gaulle for his own 'reign', and since adopted and practised by succeeding Presidents. De Gaulle established a tradition acccording to which the President has a 'reserved domain', that of foreign affairs, which took over one of the traditional responsibilities of the government, contributed to a lack of control by the parliament and provided an undemocratic and unhealthy immunity to the head of state.

When the Assembly's majority is of the same political party as the President, parliamentarians are expected to support the President, not to challenge his decisions. If the Assembly's composition has a majority

[43] *Le Monde*, 6 April, 22 May and 24 November 2004, *Le Canard Enchaîné*, 7 April 2004.

opposed to the President's party, parliamentarians still hesitate to challenge the President in foreign affairs, in order to show the apparent unity of the country.

For political and strategic reasons of national prestige, support to the 'francophonie' (the association of French-speaking countries), economic considerations, French Presidents have supported (and still support) 'rogue countries', dictatorial heads of states, covered up their misdeeds and exactions. Amnesty International (AI) has noted that French parliamentarians do not pay enough attention to the human rights clauses in the association agreements of the European Union:[44] among others, France's attitude towards Tunisia, Algeria, China, overlooking their human rights violations. AI deplores the 'lack of courage and initiatives aiming at taking into account the dimension of human rights in the conduct of France's external relations'. AI also underlines the lack of parliamentary control over transfers of weapons and security material.

Altogether, the French Parliament has adopted a subordinate position versus the executive: it does not take seriously its key role of monitoring, controlling, correcting and guiding the executive in external affairs. The President decides without prior approval of the parliament. *Post facto* control is weak: parliamentary commissions are rarely created on foreign affairs, and when they are, they do not have the powers of US Congress commissions to subpoena witnesses, nor their transparency: the French 1999 parliamentary commission on Rwanda has showed its limits (see Chapter 10). On 18 January 2005, the Commission on Foreign Affairs of the French Assembly rejected a request by the socialist group to create an inquiry commission on the situation in the Ivory Coast. In November 2004, following the death of nine French military soldiers in Bouaké, and the destruction by the French of the country's air force (two planes) as a reprisal, the French killed at least twenty Ivorians during a demonstration near the Ivorian presidential palace in Abidjan.[45]

France has recently weathered at least two major scandals amounting to two Watergates: the wiretapping operations and the Rainbow Warrior affair, both involving the President. In contrast with US practice, these have not reached the President, who did not have to respond to charges from the legislative nor from the judiciary.

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[44] 'France, patrie des droits humains? Le regard d'Amnesty International, France' 2004, pp. 24–25.

[45] *Le Monde*, 20 January 2005.

The other necessary counter-power to the executive power is the judiciary: French judges have assumed a more independent and 'aggressive' stance towards senior political and economic actors in recent years – a promising evolution. It is likely that this new tradition will take root in the new generations of French judges, in spite of the resistance of politicians of all parties and of the entrenched bureaucracies. The judges will need to continue their fight against abuses of national secret protection. British, US, Spanish and German judges have already won that battle.[46]

However, the French judges have not yet decided to challenge the quasi impunity of police officers. Judges need police assistance and support to carry out their work: however, police officers who do not abide by the laws and the rules should be punished according to the gravity of their offences. Discipline and control should be better exercised by the police authorities, with regular periodical training of the field officers in the relevant national laws and international human rights conventions. The judges should apply the law without closing their eyes to obvious, or thinly disguised, racial and other abuses.

European and UN human rights committees play an important role of monitoring France's compliance with international conventions it has ratified. Their reports, and France's replies, are an incentive to improving France's legislation as well as the administration and the police's adhesion to national and international rules and standards. They may also reinforce French judges' independence. Judgments of the European Court of Human Rights provide an essential supranational control over countries' compliance with the European Human Rights Convention. They provide an impartial assessment of relevant facts, a recourse over national courts' judgments and potential legal, moral and financial compensation to those 'mis-judged' at the national level.

Finally, NGOs such as the French-based International Federation of Human Rights Leagues (FIDH), the US-based Human Rights Watch, the UK-based Amnesty International and its French Branch, and others, play an essential role – with the support of the media – in exposing violations of human rights and international humanitarian law, revealing hidden offences, crimes and interventions, fighting for the rule of law, publicizing the reports of international monitoring bodies and judgments of the European Court of Human Rights.

[46] 'Opacité à la française, Cet archaïque secret d'Etat', Joseph K. (pseudonym of a senior French civil servant), *Le Monde diplomatique*, July 2000.

France is a democracy, not a perfect democracy: all democracies are constantly at risk of weakening some of the requirements of due process, particularly during periods of internal or external pressures. While the executive may be tempted to overstep constitutional limits and commit abuses, or allow abuses to be committed, the distinctive characteristic of democracies is that crimes and abuses are exposed, corrected or punished, through the intervention of constitutional counter-powers – the legislative and the judiciary – with the monitoring of international bodies, the sentencing by international courts, and the free and vocal support of the media and of human rights NGOs.

Abuses and crimes are not an exclusive preserve of developing countries: democracy and fair justice begin at home.

Succeeding Chapters will review past colonial crimes (all covered by amnesty laws), then Vichy's anti-semitic policy and complicity with the Holocaust, through the lens of important trials. These will show the interaction of government decisions and the role of the military, with national justice, and the influence of the media, influential critics and civil society constituencies such as human rights associations and the churches.

The following Chapter reviews the characteristics of French colonialism.

PART I

FRENCH COLONIZATION AND JUSTICE

(1830–1962)

After a few ventures in North America and in India in the 16th century, French colonialism developed essentially in the 19th century with the conquest of Algeria, other North African countries, territories in West Africa, and in Indochina. The independence of Algeria in 1962, after a long and bitter war, marked the end of the French Empire.
Chapter 2 reviews France's colonial expansion and decline, French colonial policies, the motivations of the colonizers, and the legal status of the 'natives'. The attitude of political parties, Christian churches, French public opinion and the protests of a few anti-colonialists are considered.

The next Chapters focus on a few selected French colonies, with reference to significant trials, showing the built-in conflict between colonialism and justice.

In Chapter 3, the conquest and loss of Indochina are related, as well as the attitude of French political leaders. Colonial crimes were denounced by courageous journalists, intellectuals and the French League of Human Rights. A few anticolonialists, Henri Martin, Jeanne Bergé and Georges Boudarel, were prosecuted and tried.

The history of the French conquest of Madagascar, then the 1947 rebellion and its repression are summarized in Chapter 4, followed by the trials of Malagasy parliamentarians.

Chapter 5 summarizes the history of the French conquest of Algeria, the rebellion which started in 1954 and ended with the independence of the country in 1962. During the war, atrocities were committed on both sides, but France first denied its own war crimes and the practice of torture by the French Army. Revelations and protests followed, issued by political parties, periodicals and books, a few Church officials, NGOs and individuals. Several Algeria-related trials are reviewed: those of Henri Alleg, Maurice Audin, the Jeanson network, who opposed the war, and, almost forty years after the end of the Algerian war, the trials of French Generals Aussaresse and Schmitt, who served in Algeria.

French colonization is over, except for a few small overseas territories, where minorities claim independence. However, a form of French neocolonialism has remained over former French colonies and French-speaking countries in Africa, as discussed in Chapter 10 on the genocide in Rwanda.

Chapter 2

French Colonialism

In 1931, an International Colonial Exhibition, held in Vincennes (near Paris) celebrated the second largest colonial empire after the British one, an empire which had the avowed mission of pacifying its territories and of civilizing the natives. The well-attended exhibition, supported by an enthusiastic press, was to convince the French of the noble mission and achievements of their country's colonizers. There were photographs of such colonial tributes as bridges, roads, administrative buildings, schools, hospitals, statistics, and shows of various exotic 'races' of the empire.

At its apogee, before World War II, the French colonial empire covered North Africa – Algeria, Morocco and Tunisia –, Lebanon and Syria in the Middle-East, West African countries from Mauritania to Congo (Brazzaville),[1] – in the Indian ocean Madagascar, the Islands of the Reunion and of the Comores, – Guyana (on the South American continent), the West Indian islands of Guadeloupe and Martinique on the Atlantic Ocean, Saint-Pierre and Miquelon, South of the Canadian Province of Newfoundland, – in Asia, Indochina (Vietnam, Laos, Cambodia), and five Indian cities (*les comptoirs français*) – New Caledonia, New Hebrides and a few other islands in the Pacific Ocean, Djibouti in the Gulf of Aden.

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[1] Including Senegal, Guinea, Ivory Coast, Togo, Cameroon, Niger, Chad, Gabon.

By the mid-1960s, almost all territories or countries had become independent. France was left with a few overseas territories: Réunion, Mayotte, Guyana, Guadeloupe, Martinique, New Caledonia and the 130 islands of French Polynesia.[2]

Conquests and Losses

Early ventures

France first conquered large territories in North America, and then lost them: Canadian territories were lost through military defeats to Britain, Louisiana was sold to the USA. Commissioned by French King François I, the explorer Jacques Cartier landed in the Gaspé Peninsula of Québec in 1534: he claimed possession of the territory for France. Another French explorer, Samuel de Champlain established the first settlement in 1604 on St. Croix Island. Other French colonists followed. In 1663, the colony, '*La Nouvelle France*' (the new France), was placed under the rule of a royal governor and a bishop. The series of wars between Britain and France in Europe were paralleled by the French and Indian Wars in Quebec. The Peace of Utrecht (1713) gave Britain Acadia, the Hudson Bay area and Newfoundland. In 1759, Quebec fell to the British, and Montreal in 1760. By the Treaty of Paris in 1763, France ceded all its North American possessions east of Mississipi to Britain (except for Saint-Pierre and Miquelon).

Voltaire wrote to the French King's Prime Minister, Choiseul: 'I am like the [French] public: I prefer peace to Canada and I believe that France can be happy without Quebec'. Voltaire also referred to the loss of Canada as only these 'few acres of snow', with no foresight of the future growth and value of the country.

In 1699, France claimed Louisiana (named for French King Louis XIV) as a colony. A secret 1762 treaty passed control of Louisiana from France to Spain. Napoleonic France retook the territory from Spain in 1802. Emperor Napoleon had a vision of a renewed western empire for France: taking control of this vast territory would halt the westward expansion of the young United States and would supply French colonies in the West Indies with needed goods. However Napoleon's plan collapsed when a revolt of slaves

[2] St Pierre and Miquelon off the coast of Newfoundland, Wallis and Futuna, Clipperton in the Pacific Ocean, Mayotte near Madagascar.

and free blacks in the French colony of Saint-Domingue (Haiti) succeeded, forcing French troops to return defeated to France. Napoleon initially refused (in 1801) the US proposal to purchase New Orleans: The US wanted to possess the whole of the Luisiana territory as many American settlers and merchants were already in the region. For the French, the loss of Haiti made Louisiana unnecessary: in April 1803, Napoleon offered to sell not only New Orleans but the whole of Louisiana. He then had little use for the territory, and, facing war with Britain, he needed funds to support his military ventures in Europe. The 'Louisiana Purchase Treaty' was signed in Paris on 30 April 1803, Louisiana was sold by the French to the US for $15 million. The purchase added 828,000 square miles of land to the US, for roughly four cents an acre.

France's early political and trade ambitions in India (since the 16th century) came to an end with the Treaty of Paris (1763), which gave to Britain almost all the French conquests, leaving France only five trading posts (*comptoirs*) in Pondichéry, Chandernagor, Karikal, Mahé and Yanaon. These were transferred to independent India in 1954.

Colonial expansion

In 1830, France took military control over coastal regions of Algeria and was expanding into the North African hinterland. In 1842, France had established a protectorate over Tahiti and others of the Society Islands and acquired the Marchesas chain. Other colonial possessions were limited to small parts of its former ambitious domain: Saint-Pierre et Miquelon, Guadeloupe, Martinique, Guyana, a few trading posts in Senegal, Ivory Coast and Gabon, Mayotte, the Reunion Island, the five Indian trading posts.

Tunisia was militarily occupied in 1881. Between 1883 and 1885, the French colonial domain expanded to Annam and Tonkin in the Indochinese peninsula, while the occupation or the conquest of the Congo (Brazzaville), previously 'discovered' by the French explorer Savorgnan de Brazza, Soudan (now Mali) and Madagascar, were initiated.

In 1887, a Secretariat of State for the colonies was created in the government. The French Colonial Party, a major parliamentary group, was founded in 1892. A professional colonial army was set up in 1900, which limited, in principle, colonial military action to volunteers.

In the Far East, the Indochinese Union, composed of Cambodia, Annam, Tonkin and Cochinchine, was set up in 1887, to which Laos was added in 1893. In 1895, the French West Africa (*Afrique occidentale française*) joined

in a federation Senegal, Mauritania, Soudan (Mali), Upper-Volta (now Burkina Faso), French Guinea, Niger, Ivory Coast and Dahomey (now Benin), with Dakar as its capital. In 1910, a similar federation, the French East Africa (*Afrique équatoriale française*), based in Brazzaville, joined Gabon, Congo, Oubangui-Chari (now Central-African Republic), then Chad.

After the French defeat of Fachoda in 1898, on 8 April 1904, a French-British agreement on colonies recognized Egypt's possession by Britain, while Britain gave support to French conquest of Morocco, which became a protectorate in 1912.

After the First World War, France gained League of Nations mandates over Syria and Lebanon – former Turkish territories –, and most of the former German colonies of Togo and Cameroon.

Loss of the colonies

The French Empire started its fall with the loss of French Indochina, after a long war – the 'Dirty War' – when the Viet Minh (the Communist Vietnamese nationalists) won a decisive victory at the battle of Dien Bien Phu in March 1954 (see Chapter 3). In the Final Declaration of the Geneva Conference on Restoring Peace in Indochina of 21 July 1954, France agreed to withdraw its troops from Cambodia, Laos and Vietnam and to respect the independence of these countries. Vietnam was partitioned into North – under Viet Minh control – and South – called the Republic of Vietnam – supported by the USA, the UK and France. Laos and Cambodia also became independent in 1954. This marked the end of France's involvement in the region.

In French Africa, Félix Eboué, the only 'black' colonial governor,[3] issued instructions in 1941, calling on colonial administrators to 'recognize African chiefs', to cooperate with them in bringing common law up-to-date, and to further the evolution of the colonial peoples, not by reference to 'our' standards, but 'on the basis of their own traditions'. A Conference in Brazzaville, held from 30 January to 8 February 1944, opened by De Gaulle, and consisting only of French governors and a few politicians, was later hailed as the origin of voluntary French decolonization. In fact, the Preamble of the final text dismissed any idea of autonomy, any possibility of

[3] Félix Eboué was a Frenchman from Guyana. The colony of Chad joined De Gaulle's resistance under his leadership.

evolution outside the framework of the French Empire; the possible setting up, even at a distant date, of self-government in the colonies was discarded. The agreements were largely designed to recognize African support for De Gaulle's Free French during the Second World war. They granted Africans representation in the French Constituent Assembly charged with drawing up the Constitution of the Fourth Republic. The Constitution of 1946 replaced the former colonial Empire by an *Union française*, *c*omposed of the French Republic and overseas territories on the one hand, and associate territories and states on the other. Among the latter, Algeria had a special status while the Indochinese territories, Morocco and Tunisia could become associate states. However, the Union's institutions were placed under French domination: its President was the President of France and its other bodies, a High Council and an Assembly only had a consultative role. The status of associate states was open to 'evolution' (without mention of self-government or independence), subject to a vote by the French Parliament.[4]

The *Lamine Gueye* law of 1946 offered French citizenship to all African subjects. Forced labour and the *indigénat*, a summary code of administrative justice exercised arbitrarily by colonial administrators, were abolished.[5]

France granted independence reluctantly to Morocco and Tunisia in 1956, following tensions, revolts and repression.

In 1956, the framework *Loi Deferre* granted more autonomy to the French possessions in 'Black Africa'. In 1958, De Gaulle offered the choice to these territories between secession and cooperation within a short-lived *Communauté française*, granting a broad autonomy to the colonies, with a later option to independence subject to negotiation France keeping control of the currency, defence and strategic natural resources. Except for Guinea, all these territories adhered to the French Community and then achieved independence in 1960. Algeria's independence was only obtained after a brutal military conflict which lasted from 1954 to 1962. Most of the European settlers then left Algeria for France.

The few 'overseas' territories retained by France in the Carribean and in the Indian Ocean, in the Pacific and in Antartica, are no longer 'colonies': they are part of France – as French Algeria was until independence – and their populations have the same civil, political and social rights as those in mainland France.

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[4] 1946 Constitution, Titre VIII, *De l'Union française.*

[5] 'The Encyclopedia of World History, 2001', West Africa 1944, 1946: http://www.bartleby.com/67/4321.html

Colonial Policies

Colonies were non-autonomous territories placed under a quadruple domination by the colonial power: (1) a military conquest and domination, through more potent weapons (guns and cannons against bows, arrows and machetes) and the forced recruitment of natives for European wars, – (2) a political domination, as government powers were retained by the colonial power and colonies were meant as an extension of the colonial country's strength, population and prestige – (3) an economic domination, whereby the colony paid taxes, provided manpower (forced labour) and basic commodities (agricultural and mineral products) while the colonial power held a monopoly over colonial products and over finished products sold to the colony, – and (4) a cultural domination, including historical and religious indoctrination and linguistic imposition.

Slavery

Colonialism was first associated with the slave trade. One of the reasons used by Europeans to launch colonial expeditions was to stop or prevent the slavery of Africans by Arabs. However the Europeans' transatlantic slave trade surpassed in numbers the slavery of Muslim traders. Historians currently estimate that 11.6 million slaves were deported from Africa across the Atlantic ocean by Europeans – the mortality rate during sailing reached 35 per cent in the 17th century. From the 16th to the 19th century, 5.15 million slaves were sold in Islamic countries.[6]

Slave trade was practised by Europeans from the 15th to the 19th century, on 5 000 kilometers of coast of West Africa. Trade bases were sited in territories corresponding to the current states of Angola, Benin, Ghana, Nigeria, Senegal and Togo. European ships brought merchandise to Africa, transported slaves to the Americas, then brought back cargoes of sugar or other commodities. Ports such as Nantes, Bordeaux and La Rochelle in France, Liverpool and Bristol in Britain, and others benefitted from the trade. African rulers, merchants and middlemen also participated in the trade, thus also acquiring wealth at the expense and suffering of their fellow Africans.

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[6] Estimates by P. E. Lovejoy, quoted in Reinhard, pp. 95–96. Historian Roger Botte estimates that Arab slave trade of Africans until the 20th century has involved from 12 to 15 million persons, with the active participation of African leaders: see *Le Monde*, 31 August 2001.

In 1685, the 'Black Code' (*Code noir*) promulgated under the authority of Louis XVI, defined the status of slaves, essentially the black, as opposed to the free (white) men. In 1794, a French revolutionary decree abolished 'Negro slavery in the colonies', a decree reversed by Napoleon in 1802. Slavery was finally abolished in France by the Second Republic in 1848.

French colonial policy

France's colonial policy was in principle 'assimilation', i.e. education of the local population to the level of the French, in contrast with the British policy of indirect rule, retaining traditional structures and cultures. However, assimilation remained an unfulfilled ambition as colonial administrators and settlers considered the natives as inferior beings incapable of becoming French. In practice, all power remained with the French authorities, with administrative delegations to French governors, who held wide political, military and judiciary powers in vast regions. France allowed no parliament nor executive by Africans in its African possessions. All calls for autonomy or independence were severely repressed. French citizenship was only granted sparsely. The colonizers were the superior breed, the natives were inferior, ignorant, pagan, their practices were barbarous. They had to be 'civilized'.

Legal status of the 'natives'[7]

The *Code de l'indigénat* (Code of the natives) of 1887 formalized the inequality of persons in the French colonies, between the French and the others, a practive already in force in Algeria at the time of its conquest in the 1830s. The Code defined two categories: French citizens and 'French subjects'.

French citizens were the French from the home country, the inhabitants of the French-speaking Carribeans, Réunion, Tahiti and four communes in Senegal. Jews in Algeria were granted French citizenship by the Crémieux decree of 1870. Persons of mixed parentage (*métis*) were citizens provided they were legitimate children of, or had been recognized by, a European parent. A decree of De Gaulle of 29 July 1942 allowed 'developed' ('*évolués*') prominent persons to be granted individually the status of French citizen. French citizens in the colonies retained all their rights under the Civil and Penal Codes.

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[7] The word 'native' is a translation of the French word '*indigène*', generally used to identify the local inhabitants of the colonies. The *indigénat* status describes the limited rights and many obligations of the natives.

French subjects were black Africans, Malagasis, Algerians, New Caledonians and others, as well as immigrant workers (workers brought in from other French colonies for specific work). French subjects were deprived of most civil and political rights. They retained their local status, of religious or traditional origin. French subjects were judged by local tribunals applying local customs. However, they were subject to a number of administrative obligations without recourse and punishment without trial. They were subjected to the discretionary power of the colonial authorities to impose forced labour, requisitions and taxes. They needed an authorization to change residence and to work. They were not allowed to go out at night. Infractions were punished by fines or jail. Governors could order internment or forced home residence.

French 'subjects' had no political rights. Governors and colonial administrators had absolute authority over the subjects. In the 1920s, *Conseils de Notables* (Councils of Prominent Persons) were appointed by Governors but only as advisory bodies. As from 1946, these Councils were generally replaced by district Councils, elected under the two-tiered *Double collège* system, which also applied to elections to the French National Assembly in Paris. Under this system, French citizens voted in the first tier (college), electing a parliamentary representative according to their numbers. Millions of French subjects, in the second tier (college), elected only a few representatives.

The law of 7 April 1946 abolished the Code of Indigénat, but the double tiered system continued until the Deferre law of 23 June 1956.

The colonizers' motivations

Colonization was initially due more to individual initiatives, mixing self-interest, greed, lust for power over 'inferior races' with civilizing or missionary idealism, than to deliberate government planning. Individual adventurers were searching for profit or fortune and expected to improve their social status. Ambitious military leaders hoped for glory on behalf of their country. Colonial administrators were bringing civilization and order, schools, roads, railways, hospitals, they set up administrative structures, they imposed labour and collected taxes. The construction of the railway connection between Brazzaville and Pointe-Noire on the Atlantic Ocean cost the lives of 20 000 natives forcefully employed between 1921 and 1934.[8] The mission of missionaries was to convert the pagans to the Christian faith,

[8] See Wolfgang Reinhard, *Petite histoire du colonialisme* (Belin, Paris, 1997), p. 269.

clothe them, and suppress their 'barbaric' customs. Missions often set up schools and clinics. Military medical doctors fought against epidemics through immunization and care.

Although trade interests were present in all the initial colonial ventures (furs in Canada, spices in Asia, rubber in Indochina, gold, silver, agricultural and mining resources), the conquest of Algeria in 1830 was not based on trade expectations, nor on a civilizing mission, but mainly on considerations of national prestige and internal politics. The unpopular Charles X counted on the military success of the expedition in Algeria to save his reign, but the 1830 revolution caused his abdication. For King Louis-Philippe (1830–1848), Algeria was a burden, which, however, could not be abandoned at the risk of reviving the 'Waterloo shame' (the last defeat of Napoleon) in the eyes of Europe. Tocqueville, a member of the parliamentary commission on Algeria said: 'I do not believe that France could consider abandoning Algeria. This would be, in the eyes of the world, the assured announcement of its decadence'.[9]

The expansion of French colonialism from the 1880s was motivated, similarly, by compensation for successive French military defeats: first, the defeat of 1870–1871 against Prussia and the loss of Alsace-Lorraine that triggered French military operations in Indochina, North Africa and West Africa.

Jules Ferry, twice prime minister (1880–1881 and 1883–1884), was a promoter of French colonialism.[10] He was willing to cooperate with the German Chancellor Otto von Bismarck (in spite of the 1871 defeat), in order to secure French expansion overseas. During his premiership, France occupied Tunis, entered Tonkin and Madagascar, and penetrated the regions of the Niger and the Congo. For Ferry, colonial expansion promoted the 'grandeur' of France. He linked it to an industrial policy: colonies offered basic commodities at low price, they provided new consumers. The colonial expansion was also a hedge against social disturbances in France.

During a debate on Tonkin at the Assembly on 29 July 1885, Ferry said that 'superior races have a right because they have a duty. They have the right to civilize the inferior races'. For Ferry, the Declaration of the Rights of Man

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[9] See François Maspero's Préface in Yves Benot, *Massacres coloniaux, 1944–1950: la IV e République et la mise au pas des colonies françaises* (La Découverte/Poche, Paris, 2001), p. viii.

[10] Jules Ferry is better known in France as having established the modern French education system, as Minister of Public Instruction (1870–1871): universal, free and compulsory education in the primary schools was adopted, and public state schools were secularized.

was not written for blacks of Equatorial Africa. Political opponents replied that this was only a justification for slavery and slave trade of the negroes.[11]

The second French defeat was the rout of the French army by the Germans in June 1940 which gave France's military chiefs an urge for a later military revenge and victories: this explains, together with De Gaulle's determination to restore France's 'grandeur' by retaining or recovering its colonial empire, the Indochina War. The Indochina debacle in turn explains the French Army's long and brutal war in Algeria, mixing peace-making with excessive force and torture.

Political parties

After the Liberation and until its demise in 1958, the Fourth Republic produced only weak governments with fragile centrist majorities, grouping socialists, radical-socialists (moderate centrists) and Christian democrats, and excluding gaullists and later communists.[12] The political majority, prodded by the colonial lobby, was in principle hostile to the independence of the colonies, but had no clear policy: faced with rebellions, they wanted the army to 'pacify' the concerned territories and, at the same time, continue or expand the contradictory assimilation or integration policy through reforms that were never implemented. Neither socialist nor Christian-democrats protested against the French army's massacres of Setif (Algeria) in 1945, or in Madagascar in 1947–1948. François Mitterand, as Minister of Interior in a Socialist government, declared in 1954 when the Algerian war started: 'Algeria is France . . . The only negotiation is war'.

The Gaullist party denounced and criticized any attempts to give more autonomy and rights to the colonies as a treacherous abandonment of the colonial Empire. The Communist party campaigned against the Spanish-French Rif war against Abdelkrim's fight for Morocco's independence in 1920–1926. Following World War II, the party tried to compromise between France's national defense requirements and its anti-colonialist stance. It did not opt for the independence of the colonies, probably in order not to divorce itself from French public opinion, but more generally

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[11] See 'Troisième République, la constitution d'un empire colonial', http://www.rabac.com/ELLIT/ELHIST/3REP/3REP06.htm and http://reference.allref.com/encyclopedia/F/Ferry-Ju.html, accessed on 4 February 2005, and Alain Ruscio, *Le Credo de l'homme blanc* (Editions Complexe, Paris, 2002), pp. 34–35.

[12] At the 1945 legislative elections, the Communist Party had 26 per cent of the votes, the Christian Democrats, 24 per cent and the Socialist Party, 23 per cent.

condemned the colonial exploitation by trusts and exposed American ambitions in French colonies. During the Cold War, the party started to criticize the French policy in Indochina, especially after its eviction from the government in May 1947. The party only formally recognized Algeria's right to independence in 1961, one year before the country became independent. Before then, the party advocated peace in Indochina, then in Algeria. Through its daily newspaper *L'Humanité*, it denounced French repression of rebellions, tortures and executions, and organized public demonstrations and marches for peace through negotiations. At the same time, it condemned the armed insurrection in Algeria. The French party was under close control of the Soviet communist party. Stalin had opted in 1923 for socialism in one country, the USSR, thus excluding the colonial revolution from his vision. The Soviet leaders still used the tactical tool of supporting decolonization as a means to weakening the capitalist world, and adding the newly independent countries to the communist group.[13]

Christian Churches

Brookfield[14] has aptly summed up the position of the Churches:

> Christian ideology provided (through the obligation to spread the Gospel) a justification for colonizing the newly 'discovered' territories. Because of the then territorial nature of Christendom, 'Christian mission . . . was inconceivable except as colonisation . . .', so that 'to evangelize was to colonize' and vice versa. Closely related to the duty to spread the Christian Gospel was the duty to civilize, and these, together with the moral right to appropriate under-used land, provided the fuller ideology that inspired and sustained the developing imperialism and creation of empires on into the 19th century'.

Portalis, the Councillor of State responsible for religion in 1802, said in a report to Bonaparte, the First Consul, that 'Missionaries have carried the glorious name of France to the ends of the earth, extended France's influence and built up links with peoples whose very existence was unknown'.[15]

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[13] See *Le Monde*, 29 October 2004, 'Cinquante ans après, la guerre d'Algérie reste un sujet d'embarras pour le PCF', C. Monnot – and 'Communism and colonialism' in *Esprit*, No. 250, May 1957, by A. Benningsen.

[14] *Waitangi & Indigenous Rights Revolution, Law*, by F. M. Brookfield (Auckland University Press, Auckland, 1999).

[15] Quoted in *Christianism and colonialism* by Robert Delavignette (Burns & Oates, London, 1964), p. 64.

Although colonization and Christian missions went hand in hand for centuries, and benefited from each other's presence and work, their objectives were different: colonizers exercized domination and economic exploitation by force over the conquered territories and peoples, together with a self-assumed civilizing mission, while the missionaries' task was to win hearts and converts for Christianity and, ultimately, to remain in former colonial countries even after their independence.

Catholic missions

The Vatican's position was expressed by Pope Pius XI in his *Rerum Ecclesiae* Encyclical on Catholic Missions, promulgated on 8 February 1926, showing a foresight not shared by most French politicians of the time, or later. He stressed the importance of building up a native clergy. For the Pope, 'anyone who looks upon these natives as members of an inferior race or as men of low mentality makes a grievous mistake . . . there should exist no discrimination of any kind between priests be they European missionaries or natives, there must be no line of demarcation marking one off from the other'. The creation of the network of a native clergy was important in case 'inhabitants of a particular territory, having reached a fairly high degree of civilization, and at the same time a corresponding development in civic and social life and desiring to become free and independent, should drive away from their country the governor, the soldiers, the missionaries of the foreign nation to whose rule they are subject'.

In his Encyclical *Evangelii Praecones* of 2 June 1951, Pope Pius XII said that in 1926 the number of Catholic missions amounted to 400, and was almost 600 in 1951. The number of Catholics in missions increased from 15 millions to almost 20,8 millions. The number of native and foreign priests in the missions went from 14 800 in 1926 to more than 26 800 in 1951. During the intervening 25 years, 88 missions had been entrusted to native clergy.

In his 1955 *Christmas Message*, Pope Pius XII, gave advice to the colonial powers faced with independence claims by their colonies:

> The peoples of the West, especially those of Europe, should not . . . remain passive, immobilized by barren regrets for the past, or indulge in mutual reproaches on the subject of colonialism. On the contrary, they should set to work in a constructive way to extend European or Western values to places they have not yet reached. The more they aim at this and nothing more, the more they will help the liberties of the young nations and themselves be preserved from the seductive charms of false nationalism'.

The missionary doctrine of the Catholic Church was therefore based in part on the development of the native clergy, thus admitting the departure of foreign priests, with the aim of maintaining the Church's presence in newly independent countries. Other principles were a rejection of racist discrimination, a requirement that the liberation of peoples should be carried out in order and in peace (a worthy but mostly unrealistic wish), the need to remedy to the inequalities of development as a condition for a durable peace, and a condemnation of communism. The latter was relevant to decolonisation, in view of the 'seeds of trouble being sown in various parts of Africa by the proponents of atheistic materialism', as expressed in the *Fidei donum* Encyclical of Pope Pius XII of 21 April 1957. This same Encyclical was still calling for more missionaries.

The Catholic Church thus practiced a flexible and step-by-step approach towards decolonization, without issuing solemn condemnations of the colonial countries, nor explicitly supporting the independence of the colonies, while condemning violence on both sides and encouraging a peaceful transition.[16]

Vatican doctrine is one thing, missionaries' and priests' practice in colonial countries is another, depending on the colonial country's own practices and attitude towards independence claims. The Christian mission and spirit came under severe strain (for both Catholics and Protestants) during independence wars, as seen in later Chapters.

The French colonial authorities favoured and supported Catholic missions, as the religion practised by most French people, and seemingly more loyal to them, while rejecting, and at times, persecuting, foreign Protestant missions, suspected of encouraging secession. Such negative feelings, were also addressed to Protestant missions from France.

Protestant missions

Protestants are a minority in France, outnumbered by the Catholics: before World War II, there were approximately 38 million Catholics and 600 000 Protestants out of a total population of 41.5 million. Their numbers could not compete with the power and influence of the Catholic Church, both in France and in its colonies, even after separation of church and state had been promulgated in 1905.

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[16] See 'Le Vatican et la décolonisation' by Christine Alix, in *Les Eglises Chrétiennes et la décolonisation*, sous la direction de Marcel Merle (Armand Colin, Paris, 1967), pp. 21–51.

In contrast with the statutory Roman Catholic unity, protestantism takes many colours. The many Protestant churches are independent, although most of the historic protestant churches of the Reformation and the Orthodox churches have joined the World Council of Churches (WCC) when it was created in 1948.[17] In 1903, there were 328 Protestant mission societies in the United Kingdom and the British possessions, and as many in the rest of the world. In addition, there were 140 specialized societies, for instance with medical or educational functions.[18] In the 21st century, federations of Churches[19] and the WCC still do not represent all Protestant churches. In 1956, it was estimated that one third of all Protestant missionaries were not connected with the WCC, nor with the International Missionary Council.[20]

The Vatican promulgates doctrine and adheres to the tradition of the *magisterium*, while Protestants base their faith only on the Bible and the work of the Holy Spirit: ecclesiastical authority comes from the base, the believers.

No supreme Church Council fixes doctrine on colonisation. However, the WCC has at times taken positions on the issue, and national Protestant Churches have also made specific assessments and given advice in specific situations.

In general, there is agreement between the Catholic and the Protestant Churches on such general principles as the repudiation of racism, the equality and rights of all persons, respect for the colonial countries' own culture, and to a lesser extent, recognition of their aspirations for national independence.

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[17] The World Council of Churches was founded in Amsterdam in August 1948 by representatives of 147 churches. It now includes nearly all the world's Orthodox churches, scores of denominations from the traditions of the Protestant Reformation such as Anglican, Baptist, Lutheran, Methodist and Reformed, and a broad representation of united and independent churches: altogether 340 churches representing some 400 million Christians in all continents. The Roman Catholic Church is not a member although it works with some WCC commissions. The WCC is not a 'super-church' but aims at deepening the fellowship of Christian churches, and provides a forum for cooperation, research and Christian policies and positions for its members.

[18] Quoted by Delavignette, p. 105.

[19] For instance, the Lutheran, the Baptist, the Presbyterian Federation, the World Reformed Alliance, missions federations.

[20] The International Missionary Council, founded in 1921, was one of the outcomes of the World Missionary Conference at Edimburgh in 1910. The Council became part of the WCC in 1961.

Protestant missions were initially created, not by the national Churches, but at the initiative of private Christian groups: the London Missionary Society, Societé des Missions of Paris, Baptist Societies and others. They are therefore, generally, not under the authority of international or national church entities. While having vigorously protected their autonomy, these societies and missions have nevertheless maintained a close working relationship with national and international church bodies.

On similar lines as the Catholic Church, in response to the appeal of the International Missionary Council, established in 1921, Protestant missions transformed themselves into local Churches, directed by national indigenous leadership. Between 1957 and 1962, the Paris Société des Missions granted autonomy to six out of nine of its missions.

During World War II, French, Scandinavian, Dutch, Belgian and German missions, cut off from their home country churches, were supported without conditions by anglo-saxon and other missions, creating a new spirit of cooperation.[21] After the War, federations of Protestant missions in French West Africa and French Equatorial Africa were created.

Protestant missionaries often intervened to promote or defend the respect of the natives' rights, particularly in respect of forced labour, hygiene, alcohol, opium, in part through local schools where teaching was done in the local dialects. Jean-Victor Augagneur, Governor of Madagascar between 1905 and 1910 gave a backhanded compliment to the President of the Protestant mission in the island: 'What we want is natives ready to be used as manpower. You, Protestant mission, you are producing men'.[22]

Before 1945, the missions recognized in principle, and at times supported, legitimate claims of the populations. In Madagascar, local pastors (Protestant ministers) often assumed political responsibilities, against the wish of the Paris Société des Missions, wary of the confusion between politics and religion.

At the international level, the involvement of the WCC in the struggle for human rights dates back from its inception in 1948. The human rights strategy of the WCC Commission of the Churches on International Affairs (CCIA), founded in 1946, involved the efforts to promote the advancement of dependent peoples to independence and to help bring

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[21] See 'Le protestantisme et la décolonisation' by R.-H. Leenhardt in Marcel Merle (Note 16 above), pp. 115–131.

[22] Ibid, p. 124.

national constitutions, laws, court decisions, and domestic practice into conformity with international standards.

In 1961, the CCIA's policy included aid towards political and economic independence.[23] One of its major aims was to further the 'acceptance by all nations of the obligation to promote to the utmost the well-being of dependent people including their advance towards self-government and the development of their free political institutions'. The main emphasis in the United Nations Trusteeship Council, and the UN as a whole, in this field has been on the voluntary acceptance of this obligation by the countries directly concerned. Consequently, the primary responsibility within the ecumenical movement has rested with national commissions in the administering countries, while the CCIA and the parent bodies acted as source of stimulus and means for consultation. CCIA also played a conciliatory role, proposing negotiated solutions to conflicts, as in 1957 for Algeria.

Public opinion

The French population was generally proud of France's colonial empire, of such explorers as Savorgnan de Brazza (in the Congo) and such conquerors as Marshall L.H. Lyautey (in Morocco), and of well-publicized French achievements in the colonies. Abuses were either unknown or ignored. In a book published in 1924, a French author affirmed that France already possesses the 'confident affection' of her colonized peoples', an unlikely illusion.[24] Revolts by the natives only showed them to be ungrateful for the French largesse. Rebellions were deemed to be only carried out by a small minority, supported by foreigners: the British colonial rival, the anti-colonialist USA keen to open colonies to their trade, the USSR intent on spreading communism, and such Arab countries as Egypt promoting the independence of French North African possessions.

In 1957, in articles published by the illustrated weekly *Paris Match*, Raymond Cartier analysed the responsibility and financial burden imposed

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[23] WCC 'CCIA Policy and Programme, A brief survey based on the working paper to be submitted to the World Council of Churches General Assembly, New Delhi, December 1961', *Brief* No. 8, September 1961.

[24] V. Beauregard, *L'Empire colonial de la France*, quoted by D.L. Schalk, 'Reflections d'outremer on French colonialism' (1998), *Journal of European Studies*, March–June 1998, v28 n1–2 p5(19).

on a colonial power by the economic and social equipment of its overseas possessions. The well-publicized thesis was that the 'colonial pact' whose one-sided terms obliged the colonial peoples to supply the mother-country with raw material and to buy all manufactured goods from it, was obsolete. The situation had changed: far from enriching the mother-country, the colonies were impoverishing it. By obstinately refusing to let the colonies be free, the colonial power would incur a heavy moral responsibility and a crippling financial burden. This appeal to national and tax-payer' self-interest, reflecting the views of sections in the economic and business establishment, started a change in the former prevalent colonialist spirit of the French people.

The lonely voices of anti-colonialism

A few famous writers and philosophers, a few Christian and leftist publications denounced the excesses of colonialism, without impact on the mainstay public opinion. In January 1905, Anatole France denounced the exactions and crimes committed by the administration of the French colonies: 'For four centuries, Christian nations dispute among themselves the extermination of the red, yellow and black races. This is called modern civilization'.[25] André Gide aroused the wrath of the colonial lobby in publishing his '*Voyage au Congo*' in 1927, where he condemns the abuses of the French colonists.

The philosopher Paul Ricoeur published an article on 20 September 1947 in the Protestant periodical *Réforme* defining his position, a revolutionary stand at that time, without necessarily convincing the Protestant minority nor the French:

- the aim of colonization is to suppress itself and to free the natives;
- the original sin of colonialism precedes all unilateral aggressions of the natives;
- the exigency, even if premature, of freedom has more moral right than all the civilizing work of the colonizers;
- the vice of of the French in the colonies is racism;
- minorities represent the fledging conscience of the colonial peoples.

[25] Quoted by Marc Ferro in *Le livre noir du colonialisme, XVIe–XXIe siècle* (Robert Laffont, Paris, 2003), p. 635.

As a Christian, he claims that he must say 'yes' to a movement of history creating liberty. The moderate Catholic writer François Mauriac called for peace in Indochina for 1954 in an article published in *Témoignage Chrétien* on 8 January 1954. In a meeting held in Lyon on 14 June 1954 with other Catholic friends, Mauriac explained his long silence over Indochina: he said that he had long been deluded by an education respectful of, and in admiration of the colonial conquests and deceived by the lies of the political leaders. 'Countries taken in charge by us have reached a degree of development where they have the right to independence'.[26] He wrote in the newsmagazine *L'Express* his '*bloc-notes*' (diary) a condemnation of French repression of the Moroccan rebellion and brought to the cause of decolonisation his authority as Nobel Price for litterature when he created the France-Maghreb Commitee.

The writer and philosopher Jean-Paul Sartre, an occasional fellow-traveller of the Communists, was an outspoken activist in combatting colonialism and its attendant racism. He founded the influential monthly review *Les temps modernes*, which stated, in 1946, that if France had the choice of staying in Indochina to fight a war, or leave, it should leave. In March 1947, the review denounced French atrocities in South Vietnam. It proclaimed in November 1955 that 'Algeria is not France'. Sartre expressed outrage at the oppression of the Moslem population and the torture by the French military.

Other anti-colonialist reviews include *Esprit*, founded by Emmanuel Mounier in 1932, inspired by leftist Christianism. As early as December 1933, Mounier wrote that Christians should separate themselves from colonialism. The same issue gave notes of the journalist Andrée Viollis denouncing torture by the French in Indochina, published in 1955 as a book, *S.O.S. Indochine*, with a foreword by André Malraux. In January 1934, the review denounced the brutal repression of a revolt in Annam, requested an inquiry and amnesty for the prisoners. In the April 1947 issue of *Esprit*, the Catholic Achille de Peretti explained his choice for negotiating Morocco's independence in agreement with France, in order to prevent war in North Africa. Morocco was only granted its independence in 1956. In May 1957, *Esprit* reviewed the failings of French justice in Algeria. In January 1961, it published the testimony of a group of conscripted soldiers called upon to fight the Algerian rebellion through abuses and torture.

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[26] Quoted by Sabine Rousseau in *La colombe et le napalm* (CNRS Editions, Paris, 2002), pp. 127–128.

Témoignage chrétien was founded in November 1941 in Lyon, during the German occupation, by a small number of Jesuit priests. Its clandestine, irregular issues affirmed the radical antinomy between Nazi oppression and anti-semitism, and the Gospel. After the Second World war, the weekly *Témoignage Chrétien* also took brave positions during the wars in Indochina and Algeria. It denounced torture in Indochina in July 1949, and in Algeria in December 1959.

With different approaches and assessments, *Esprit* and *Témoignages Chrétiens* opened Christian consciences to the inevitability of decolonization.

The Winds of History

Decolonisation was not only a French phenomenon. It was a worldwide movement, encouraged by the USA and the Soviet Union for different reasons, it had many causes. First, the decline of the European powers, as earlier shown by the Japanese victory over Russia in 1905. The same Japanese then humiliated the French in Indochina during World War II. British dominions became independent with their admission in the British Commonwealth in 1931. France's defeat in 1940 gave evidence that the former all-powerful colonial power could be defeated. The trusteeship system initiated by the United Nations, following the League of Nations' mandates, gave a measured opening to self-government or independence of the Trust territories (Art. 76 of the UN Charter). The independence granted by the United Kingdom to India in 1947 was a major blow to the colonialists and encouragement to those who claimed independence, although the lesson was not learned by the French. In the 1950s, the Nasser revolution in Egypt, the independence of Morocco and Tunisia gave force to African nationalisms. The birth of the 'Third World' gave additional impetus to independence claims. Representatives of 29 African and Asian countries met at the Bandung Conference (Indonesia) in April 1955 to promote economic and cultural cooperation and to oppose colonialism, at the initiative of Gamal Abdel-Nasser (Egypt) and Jawaharlal Nehru (India). Then the Nonaligned Movement grew out of Bandung, under the leadership of Egypt, India and Yugoslavia (Josip Broz Tito). Its members, mainly developing countries from Africa, Asia and Latin America adopted a policy of nonalignment with the US and Soviet Union. Under the leadership of the growing African-Asian group in the United Nations, the General Assembly adopted unanimously on 14 December 1960 the Declaration on the

Granting of Independence to Colonial countries and Peoples. It declared, in part, that:

> The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and cooperation.

Other domestic and foreign factors contributed to the historical decolonization movement: the rejection of domination by a foreign power, the growing aspirations of the colonized peoples to assume power in their own country, the appeals of charismatic leaders, often educated in Europe, the claim that Europe-born human rights and self-determination, should also apply to colonial lands and populations, and all of these abetted by rapidly developing means of communication and transportation. Brutal repression of revolts only nourished and increased the native populations' anger and determination for independence.

Conclusion

For most French people, for more than a century, colonization was the glory of conquests and civilization brought to the natives. In turn, the colonies opened the French to different lands, peoples and cultures. The colonizers were seen as providers of education and health care, they built an infrastructure of roads, harbours, railways, schools, hospitals. The selfless dedication of the brave administrators and missionaries was admired. Then the revolts and their repression, independence and the condemnation of all colonialization, with its luminous and dark sides.

What remains? France has retained political, military, economic, financial and cultural influence over most of its former colonial possessions in Africa, but has lost its presence in Indochina. It has military bases in several African countries, and has maintained close links with most of their leaders. However, this influence, started in the 1960s concurrently with the independence of these countries, has been denounced by some as an instrument of corruption and support for despots.[27] It is now weakening, as seen by the events in the Ivory Coast in 2004.

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[27] See F.-X. Verschave, *La Françafrique, le plus long scandale de la République* (Stock, Paris, 1999).

As a less controversial but minor asset, French has been retained as a first or second language by most of the independent African nations. Built on this asset, on the model of the British Commonwealth, the 'Francophonie', an intergovernmental organization mainly financed by France composed of 50 countries having a more or less common language, is a useful network for peaceful cooperation and contacts. France is also a strong attraction to would-be immigrants from North and black Africa.

French colonialism is now dead, except to a few independentists in French overseas territories in La Réunion, Guadeloupe, Martinique and Tahiti. However, the slate is not yet clean: there are deniers of history who believe that French colonialism was all positive, and ignore or reject its crimes, on the false grounds of mistaken patriotism and prestige. History should be recalled and recorded on the basis of contemporary, sound historical research in school textbooks.

Decolonization was a hard, uphill struggle in France. The contradiction between human rights for the French at home and their denial for the colonial 'natives' was slow to be recognized. Democratic representation was a right for the French, not for the peoples of its colonies. Self-determination was not allowed in colonial territories. Exploitation and repression by all means were considered acceptable overseas.

Shaken by its defeat in 1940, the French, led by General De Gaulle, believed in restoring the pre-war French colonial Empire after the Liberation, as a key element of its former world-power status, while rejecting claims for independence and ignoring the excesses of military repression. Political leaders of all parties (except for the Communist party) refused to initiate the necessary reforms which might have led more peacefully, in some territories, to autonomy and independence. They abused of the argument that keeping the colonies at all costs was an heroic defence on behalf of the Free World against a dangerous and expanding Communist imperialism.

Those who opposed colonialism in France were few, a small minority of Catholics and Protestants at odds with their own Church, a few liberals, a few writers, who took the risk of being labelled as unpatriotic, treators, defeatists. The Communist party was an opponent for its own purposes, in line with Moscow.

These minorities were not able to influence the political majorities, to make them change their views and policies. They however helped in publicizing the 'black' side of colonialism, in recalling the French values of human rights, and perhaps in giving bad conscience to the civil and military authorities.

Decolonization was imposed on France by political and military realities. Defeat in French Indochina, a long war in Algeria, national and international denunciations of French colonialist abuses, increasing pressures by the Third World, the two super powers and the United Nations. The end of French colonization, De Gaulle's late decision to grant independence to Algeria, was motivated by his will to engage a vigorous, independent foreign policy, for which Algeria was a burden to be rid of.

The following Chapters will focus on a few selected colonies, Indochina, Madagascar, and Algeria, with references to a few significant trials, showing the built-in conflict between colonialism and justice.

Chapter 3

The French Vietnam War (1946–1954)

L'Indochine[1] has long been an exotic love story for the French. The 'Pearl of the Empire', as it was called, was a strong attraction for colonizers, missionaries and adventurers for decades. The colonisation of Indochina and the war have involved Roman Catholic missionaries, governments and the Parliament with their enthusiastic or reluctant politicians, the Army, – the French Communist Party as an opponent, – the French League of Human Rights, Christian publications and independent journalists as observers and critics, Communist China as an ally to Ho Chi Minh, the USSR and the USA as background actors.

The far-away French 'Vietnam war', which was not a major concern for the French at home, ended in 1954. France and Communist Vietnam have since evolved in their own ways. French political, economic and cultural influence in Vietnam has all but disappeared: English is prevalent as a second language, while French is hardly known.

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[1] French 'Indochine' comprised the present Vietnam, Cambodia and Laos. Vietnam includes Tonkin in the North, Annam in the Center and Cochinchine in the South.

Conquest and Loss of Indochina

Vietnam emerged as a country under Chinese domination in the Third century B.C. China exercised its domination over the country for ten centuries as from 111 B.C. interspersed with many revolts. In 939, a Vietnamese victory liberated the country from Chinese rule. During the 13th century, a Mongol invasion was repelled, Chinese invasions were defeated by the Vietnamese in the 15th and 18th centuries. For about two centuries, there were two governments in Vietnam, one ruling the traditional homeland in the North and one ruling the southern border areas. In 1787, under the reign of Louis XVI, a French Catholic missionary, Mgr P. Pigneau de Bédaine signed a treaty of alliance and commerce with the Emperor Nguyen Anh between France and Cochinchina, the Treaty of Versailles. Also in 1787, the southerners conquered the north, and from 1802 onwards all Vietnam was ruled by a single government. Nguyen Anh founded the dynasty of the Nguyen which ruled from 1802 to 1945.

Between 1825 and 1851, the Emperor Minh Mang issued seven edicts of persecution, resulting in the execution, then the expulsion of French and Spanish missionaries, and the execution of Vietnamese Catholics. Napoleon III, encouraged by the Catholics and the French navy, authorized armed intervention in Vietnam. In 1859, a French fleet conquered Saïgon and within a decade, established control over the country. By the treaty of Hué (the capital of the Vietnamese empire) of 1862, the emperor Tu Duc ceded to France the southern part of Vietnam, Cochinchina. In 1883, another treaty granted the French the protectorate of the central (Annam) and northern (Tonkin) regions of Vietnam In 1887, the French Indochinese Union was created which included Cochinchina, Annam, Tonkin, Cambodia, and later Laos.

However, the French conquest of Indochina was never accepted by the Indochinese people. A moderate reformer, Phan Tru Trinh, was detained in the infamous convict prison on the island Poulo Condor from 1907 to 1913. During the First World War, France imported 49 000 Vietnamese for its factories (replacing French soldiers) and 43 000 Vietnamese soldiers, who were less engaged for combat than for work away from the front. Workers went on strike in many enterprises. In 1928, radical nationalists created their political movement, the Vietnam Quôc Dan Dang, and organized in February 1930 the mutiny of 200 Vietnamese soldiers, assisted by sixty civilians, in Yen Bay. Five French officers were murdered and six others wounded. Bombs were thrown in various parts of Hanoï. Repression followed and all leaders were executed.

Ho Chi Minh[2] founded the Indochinese Communist Party in 1930. His published programme included the overthrow of 'French imperialism, feudalism and the reactionary Vienamese capitalist class' and complete independence for Indochina. In the Summer of 1930, a worker – then peasant – communist revolt created a short-lived soviet system in the north of Annam: all taxes were suppressed, land was re-distributed, an education campaign against illiteracy and superstitions was launched. On 12 September, six thousand peasants participated in a Hunger March.

Another harsh repression by the Foreign Legion, the Colonial Infantry and native guards followed, the French air force bombed two meetings. Communist losses were estimated at 1 252 persons, and as many were the victims of the Communist revolt. A total of 10 000 suspects were jailed and thousands were condemned to various sentences.[3] Several of Ho Chi Minh's lieutenants were arrested, the Party's Secretary General died under torture. Ho Chi Minh, then in Hong Kong, was condemned to death *in absentia* in 1931. He escaped to China in 1933, then to the USSR, between 1934 and 1938. The Indochinese Communist Party joined the Moscow-controlled Third International in 1935. Ho Chi Minh went again to China in 1938 and returned to his country in 1941.[4]

France's defeat in June 1940 had left the colony vulnerable to the Japanese. On 19 June 1940, the French governor had to accept Japanese control of Vietnam's border with China. The Tokyo Agreement of 30 August 1940 maintained France's sovereignty over Indochina and its territorial integrity, while France recognized the primordial role of Japan in the Far East and granted Japan military facilities. The Darlan-Kato Agreement of July 1941 lifted any limit to the Japanese contingents in Indochina and set out a clause of 'common defence against aggression coming from abroad'. In May 1941, Thailand imposed on France the cession of several Laotian and Cambodian provinces. In March 1945, the Japanese attacked the French armed forces in Indochina and placed all military and police authorities

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[2] Ho Chi Minh (1890–1968), also named Nguyen Ai Quoc, was first a merchant seaman, then spent the early years of World War I in London. He moved to Paris in 1917. Ho Chi Minh attended the Socialist Congress in Tours (France) in 1926 when the Socialists broke with the Communist majority.

[3] See 'Indochine, La Grande révolte de 1930' par Pierre Brocheux in *Marianne*, Nos. 401-402, 25 December 2004–7 January 2005, pp. 54–57.

[4] *Ho Chi Minh*, by Jean Lacouture (Ed. du Seuil, Paris, 1967), pp. 22, 48, 50, 51, 54, 57, 61.

under their command. Japan recognized the independence of Annam-Tonkin, Cambodia and Laos.[5]

In accordance with the Potsdam Agreement of 1 August 1945 between the UK, the USA and the USSR, Japanese troops were to surrender to the British forces south of the sixteenth parallel while they had to defer to the Chinese nationalist forces in the north. The Agreement did not recognize the Republic of Vietnam.

Following the surrender of Japan on 14 August 1945, Ho Chi Minh ordered a national insurrection and proclaimed the independence of Vietnam on 2 September.

On De Gaulle's orders, an Expeditionary Force of 15 000 men was sent from France. Already in 1943, De Gaulle had asserted in Algiers the 'necessity' for France to re-establish itself in Indochina.[6]

In September 1945, French forces seized power in the south of Vietnam with British support. De Gaulle left power on 20 January 1946, but his imperial policy was maintained by the coalition governments of the 4th Republic.[7]

The Sainteny agreements of 6 March 1946 had France 'recognize the Republic of Vietnam as a free State having its government, its parliament and its finances, being part of the Indochinese federation and of the [newly created] French Union'. Friendly and frank negotiations would be started promptly on the future status of Indochina, taking into account French interests in Vietnam. The Vietminh then agreed to the return of the French army in the North, in principle for five years in accordance with the Sainteny agreements. However, the Fontainebleau Conference (6 July–8 August 1946) between the French government and Ho Chi Minh was a failure: Ho Chi Minh maintained his claims of total independence and unity of Vietnam, while the French only offered a limited autonomy under French sovereignty and divided the country into the three historic parts, Cochinchina, Annam and Tonkin.

On 23 November 1946, the Haiphong massacre of 6000 Vietnamese, mostly civilians, by a French ship's cannons, abruptly ended the negotiations:

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[5] *Les guerres d'Indochine*, Nicolas Regaud and Christian Lechervy (Presses Universitaires de France, Paris, 1996), pp. 92–94.

[6] Lacouture, p. 72.

[7] 17 governments from 1946 to 1954: facts and dates are in 'Les grandes étapes de la guerre d'Indochine', Pierre Montagnon and Charles Vaugeois, in *La Nouvelle Revue de l'Histoire*, No. 12, May–June 2004, pp. 39–44.

its origin was a minor customs dispute, which could have been settled peacefully.[8] On 20 December 1946, Ho Chi Minh proclaimed the insurrection against the 'French colonialists' aggression'.

In 1949, the former Emperor Bao Dai was recalled by the French to Vietnam from exile in Hong Kong and China as an alternative to Ho Chi Minh. He regained his title of Emperor and his government was recognized by the US and the UK. However, Bao Dai's government had been tainted by its collaboration with the Japanese occupying power, and he was also considered as a French puppet. The long war of French conventional forces against a people's guerrilla forces went on until 1954 with local defeats and military losses. On 8 March 1949, France made belated and ineffective offers of a limited independence of three 'associated states' within the French Union, Vietnam, Cambodia, Laos. In December 1949, the victory of Mao Tse Tung over Chang Kai Chek gave a powerful ally to the Vietminh, with Communist China offering training camps and armament. The Korean War, started in June 1950, gave a new dimension to the French war against a Communist enemy: the French government and the army's propaganda could then affirm that they were fighting for the 'free world'. The French defeat of Dien Bien Phu in May 1954, after 59 days of bitter fighting, which shocked France, signalled the end of the first Vietnam war.[9]

From 26 April to 21 July 1954, a Conference attended by 19 States including those in the Atlantic Alliance, the USSR and China met in Geneva to deal with the questions of Korea and Indochina. The Korea discussions failed but an agreement was achieved on 'Restoring Peace in Indochina'. Pierre Mendes-France, appointed as French Prime Minister in June 1954, had pledged that he would end France's involvement in Indochina within 30 days. In its Final Declaration of 21 July 1954, the Conference expressed satisfaction at the ending of hostilities in Cambodia, Laos and Vietnam. General elections would be held in July 1956 under international supervision. In the meantime, Vietnam was divided into two parts, the North and the South, along the seventeenth parallel. France had declared that it was ready to withdraw its troops from Cambodia, Laos and

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[8] See *Massacres coloniaux, 1944–1950: la IVe République et la mise au pas des colonies françaises*, Yves Benot (La Découverte/Poche, Paris, 2001), pp. 101.

[9] According to Montagnon and Vaugeois, the Vietminh captured 11 721 soldiers of the French coalition (French soldiers, Vietnamese, North African and Black African soldiers fighting with France). There were 1 293 French deaths and between 20 000 and 25 000 deaths of the Vietminh.

Vietnam, and accepted the principle of respect for the independence and sovereignty, unity, and territorial integrity of Cambodia, Laos, and Vietnam.

As recalled by Moïse,[10] the Accord was only obtained after considerable pressure on the Vietminh from China and the USSR, both of which wanted to reduce international tension. Ho Chi Minh decided to accept the Accord and gamble by giving up territory in the short run in order to win control of the whole of Vietnam in the 1956 elections. However, neither the USA nor the Bao Dai's government (in South Vietnam) endorsed the Agreement.

The losses of French and allied troops during the 1946–1954 Vietnam war are estimated at 100 000.[11] The Vietminh lost approximately half a million soldiers. Vietnamese civilian victims are estimated at one million.

The American Vietnam War followed the French one ten years later: it lasted from 1964 to 1973.

The Attitude of French Political Leaders

At the beginning of the French Indochina War in 1946, all political parties – from the right to the left, Gaullists, Christian Democrats (MRP), Radical Socialists, Socialists, Communists – agreed that overseas territories should remain as part of the Empire, believed to have been a factor in the victory over Nazism. The Empire was also considered as a necessary condition for France's future prosperity and power. The Empire was replaced in name by the *Union française* in the 1946 Constitution, whose ambition was to maintain the colonies under French authority, not to consider autonomy nor independence.

The Communist Party started criticizing the government's Indochinese policy in 1947, when it was excluded from the coalition government, and when the Comintern defined, in September 1947, an anti-imperialist strategy. Following the revolt and repression in Madagascar (see Chapter 4), the Party accepted the idea that some of the French possessions should become independent, including Indochina. In 1950, Henri Martin's trial signaled

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[10] Edwin E. Moïse, 'The Vietnam Wars, Section 4, The Geneva Accords', in http://hubcap.clemson.edu-eemoise/viet4.html, 4 November 1998.

[11] 100 000 dead in the French Expeditionary Corps which included, in addition to the French troops from France, 11 000 in the Foreign Legion, 15 000 Africans and 46 000 Indochinese: see Marie-Monique Robin, *Escadrons de la mort, l'Ecole française* (La Découverte, Paris, 2004), p. 56 n.a.

this evolution (see below). The Socialist Party had an opposite evolution: originally favourable to peace in Indochina and independence albeit within the French Union, its leader, Guy Mollet affirmed in 1949 that Vietnam should remain French in order to resist Bolshevism. Guy Mollet was also responsible in 1956 for a similar turnabout: a government elected to settle the Algerian war, stressed that the territory should first be 'pacified', thus reinforcing the bellicose elements in France in support of the European settlers in Algeria who only wanted to retain their own status and privileges.

In 1930, following the Yen Bay incidents and their repression, debates at the National Assembly showed that a majority believed that France's civilizing mission in Indochina should not be abandoned.[12] Military, administrative and social reforms were needed, but the idea of independence was rejected as an abdication. Some of the social reasons for the problems included the poverty of the population, the 'slavery' of peasants working for Chinese lords: for these reasons, the colonizers had moral, social and human duties. More courageously, Ernest Pezet (moderate center) said that the assimilation policy should give way to a policy of association under a protectorate. Edouard Daladier (moderate 'radical 'socialist)[13] also mentioned the fate of poor peasants, ill nourished, incapable to pay the required taxes. 300 000 Christians lived in extreme poverty and were suffering from famine. He thought that France's departure from Indochina would be followed by a civil war and a world war, or at least by a war in the Pacific region. However, repression would not remedy the serious situation: colonial domination can only be justified and maintained by the services given to the local populations which it must guide.

The Communists, through the voice of Jacques Doriot,[14] raised the issue of the legitimacy of colonization. He protested against the executions and condemnations of the Indochinese nationalists. He recalled the principal

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[12] See, for instance, verbatim records of *Chambre des députés, 2e séance du 27 juin 1930*, statements by E. Pezet for the Popular democrats, E. Daladier for the Radical Socialists, J. Doriot for the Communists.

[13] Edouard Daladier was several times a government Minister since 1924. He signed the 1938 Munich Agreements for France. He was one of the accused at the Riom Trial and was deported to Germany from 1943 to 1945. He later opposed the continuation of the war in Indochina.

[14] Jacques Doriot was excluded from the French Communist Party in 1934, then created the fascist *Parti Populaire français.* As a partisan of France's collaboration with the Germans during the Occupation, he helped create the *Légion des volontaires français contre le bolchévisme* and fought with the Germans on the Russian front.

causes of the revolts: the natives' degradation by the use of opium and the forced consumption of alcohol, the abusive taxes, the brutal requisitions, the unkept promises, the deportation of Indochinese natives to other colonies. From 1908 to 1918, about sixty political detainees were condemned to death and executed, twenty more between 1928 and 1930. Doriot protested against the bombing of villages based on the principle of collective responsibility: Indochina must recover its independence.

From 1946 to 1954, the Christian Democrats were members of all the governments' coalitions and their leaders, such as Georges Bidault, defined and applied the policies which started and continued the war until the Geneva Agreement of 1954, policies first initiated by De Gaulle and then supported by the Gaullist party.[15]

When the Assembly in charge of drafting the text of a Constitution for the Fourth Republic discussed the creation of an *Union française* to replace the former colonial Empire, the Christian Democrats led by Bidault and the Socialists defended the notion of a centralized Union, leaving no possibility of an evolution towards independence for the former colonies, now called Associated States. Bidault did not envisage the possibility of a unified and independent Vietnam and did not offer any concession during the Fontainebleau Conference, which was then due to fail.

Abuses and Crimes Denounced

The declared mission of French colonialism was to civilize races and peoples still 'enslaved by ignorance and despotism'. However, the colonizers took the territories by force, and maintained their domination by force. Besides the economic exploitation of the Indochinese peoples by the French administrators, the settlers, local landlords and French banks in rubber and rice plantations and mines, through forced labour at meager salaries, any form of organized dissent against the colonial authorities was ruthlessly repressed. The bright side of colonization was displayed and believed in France, and related in school books – the benevolent Empire, bringing French peace and

[15] See *La colombe et le napalm, des Chrétiens français contre les guerres d'Indochine et du Vietnam, 1945–1975*, Sabine Rousseau (CNRS Editions, Paris, 2002), pp. 9–11. Georges Bidault was President of the Provisional Government in 1946, Prime Minister (1949–1950) and several times Minister of Foreign Affairs.

justice, education and culture to these backward peoples, building schools, hospitals, roads and railways, evangelizing the pagans, – while its dark side – military abuses, double standards between the French and the natives, heavy taxes, abridged freedoms, forced labour, – was hidden or ignored.

However, the Indochinese people, who had fought against China for centuries, never accepted French domination. Revolts were repressed by killings and plunder. For instance, on 5 July 1885, when the French troops gave assault to the Hué citadel, the seat of the imperial palaces, 1500 Vietnamese and eleven French soldiers were reported killed.[16]

The real situation in French Indochina was revealed to the French public, first by a journalist, Andrée Viollis, in 1933 – then during the Indochina War by the French League of Human Rights and by several periodicals.

Andrée Viollis' book

Andrée Viollis, an independent journalist, accompanied the French Minister for the Colonies in Indochina in 1932, and made numerous contacts outside the official ones. Her book, *Indochine S.O.S.*[17] denounced the free sale of opium – a French state monopoly – as well as the forced consumption of alcohol, another state monopoly. It gave precise information on the humiliations imposed on the cultured Vietnamese, when back in their country following university training in France, where they were well received. There was no freedom of the press: journalists were harassed, sued and condemned to jail sentences. Vietnamese needed a passport to travel in their own country.

Accused Vietnamese were often subject to torture in police stations that involved deprivation of food and water, blows, body suspended by the arms, and torture by electricity and water. Women were often raped. Detainees were tortured until they confessed to being members of a Communist group.

Jail conditions for Vietnamese political detainees were different from those enjoyed by French and Indian detainees: 1500 were kept in jails intended for 500. The jails were dirty, no visits were allowed, no reading

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[16] See 'Le colonialisme français en Indochine', Pierre Brocheux in *Le livre noir du colonialisme, XVIe–XXIe siècles: de l'extermination à la repentance* (Robert Laffont, Paris, 2003), p. 355.

[17] Les Editeurs français réunis, Paris, 1933. The book was re-published in 1949 with a few additions.

provided, insufficient food (no food packages allowed from the outside), blows, detainees were shackled and beaten in response to collective complaints. No legal representation nor support was authorized.

Following the February 1930 revolts, from 9 000 to 10 000 were arrested and thousands condemned to death or to jail. Three thousands peasants were killed. The air bombing of 13 September 1930 was ordered by a circular of the Governor (*Résident supérieur*) in Annam: bombing made villages responsible for the political revolts carried out locally. Viollis mentions the atrocities committed by the Foreign Legion, whom she calls as 'often bandits' who steal, loot, rape, kill at random, decapitate natives and set houses on fire.

The book records the trial of three Foreign Legion sergeants and soldiers accused of murder (including beheadings), attempted murder and complicity of murder, held in Hanoï in June–December 1933. One of the accused replied that oral orders were to kill three prisoners out of four, or nine out of ten, and keep one for interrogation. A commanding officer said that in repression, errors are committed. It was regrettable to find soldiers being tried, as those responsible for ordering killings were the civilian authorities, not the military. All the accused were acquitted.

In May 1933, 120 Vietnamese were tried: six were sentenced to death, 19 to life penal servitude, 79 to time-limited penal servitude.

The only recorded 'bright spot' in the book is the work carried out by the independent Pasteur Institute in Saïgon in immunization against malaria, tuberculosis and syphillis. A young French official who travelled with Viollis told her later: 'I have toured Indochina. The results are wonderful! Everything is now going admirably well, isn't it?'.

The French League of Human Rights

Created in 1898 to defend Captain Alfred Dreyfus, the Paris-based League extended its work to the defence of all citizens victims of injustice or of breach of their rights. Between the two World Wars, the League was divided on several issues, including colonization.[18]

[18] Still, a letter of 6 October 1926 to the French Minister of the Colonies was found in the League's archives referring to the situation in Cambodia, where the Governor (*Résident supérieur*) has formidable (*redoutables*) police powers, including the authority to expel anyone from the territory without administrative or judicial control. The unpublished letter also mentioned the lack of press freedom.

After World War II, it focused more clearly and firmly on repression and violations of human rights in the French colonies.

On Indochina, in 1947, the League expressed its deep concern about the events – guerrilla and repression – and took position against a military campaign. It pressed for freely-negotiated accords, applied in good faith, and for the independence of the Indochinese peoples within the French Union (*Union française*). Its proposal for a Parliamentary commission to be sent to Indochina to determine the responsibilities for the conflict and to prepare a constitutional framework for the future Indochinese federation was not considered.[19]

In 1948, the League denounced the setting up of a French Officers' School for torture (to obtain 'spontaneous confessions') in Indochina. In 1949, as new evidence of inhuman questioning methods was revealed, the League requested the government to take appropriate action and regretted that the Parliament did not initiate an investigation. The League deplored France's disastrous strategy and proposed that the Vietnamese people should be consulted under United Nations control.[20]

French periodicals

The mainstream media, reflecting and comforting French public opinion, expressed constant support for the government's policy of maintaining French colonies under French domination. They denounced the atrocities committed by the Vietnamese (but not those committed by the French), treating the rebels as a minority supported by China, the USSR and the USA. Only a few periodicals dared break the wall of silence, at the risk of being labelled as treacherous, unpatriotic, of being taken to court, or having their copies seized.

Politicians replied that the facts denounced were not true, the French Army could not practice torture. At the same time, they exhorted journalists to be 'prudent', a warning and a recognition that facts may be true but should not be revealed when the country was at war.

On 22 December 1945, the journalist Georges Altman denounced in the daily leftist *Franc-Tireur* the 'savage reprisals that the defenders of a certain colonial order exert on the Vietminh men'. A detailed description of the

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[19] *Les Cahiers des Droits de l'Homme*, January–February 1947, No. 22.

[20] *Les Cahiers des Droits de l'Homme*, May 1948, No. 44-48 and October–November 1949, No. 7-8.

torture methods applied daily and routinely by the French army in Vietnam was given by Jacques Chegaray in an article published by *Témoignage chrétien*, a minority Catholic liberal periodical, on 29 July 1949. The article was first rejected by *Aube*, the daily centrist newspaper of the Christian Democrat political party, then in power in a coalition government, and leader in the government's colonial policy. Chegaray refers to the 'machine to make people talk' (an electrical generator), placed beside the typewriter and other pieces of furniture in a non-commissioned officer's office. All those he talked to felt that torture was appropriate and 'normal', the practice was admitted and practiced daily. The journalist challenged the arguments of the Army: 'If the enemy uses savage means, is this a reason why an organized army uses the same methods? . . . In the Indochinese climate, one does not ask whether these methods are those of a civilized nation'.

A few more isolated voices were heard. Paul Mus, an eminent professor at the high-level, independent *Collège de France*, published also in *Témoignage Chrétien* a few days later (on 12 August 1949), an article entitled *NON, PAS CA* (NO, NOT THAT) in the style of Emile Zola's *J'accuse*, condemning torture as a nightmare. He rightly affirmed that a vast conspiracy of silence had falsified all the facts in metropolitan France. The writer Pierre-Henri Simon wrote in *Esprit* in July 1949 an article where he condemned torture for whatever reasons, although he still believed that the war was justified. The Minister of Defence denied that torture had occurred, while saying that such actions are punished by tribunals.

Three Trials

Trials conducted in Indochina, as reported in Viollis' book, did not attract interest in France. Most of them concerned political dissidents and Vietminh rebels, who were harshly condemned. A few trials concerned French military personnel, who were generally acquitted.

The first two trials summarized below, that of Henri Martin and of Georges Boudarel, were conducted in France, and became *causes célèbres*, in view of their political implications. The trial of Jeanne Bergé in Vietnam remains less known. Martin and Bergé opposed the French war in Indochina, exposed French atrocities, and received jail sentences. Boudarel went further: he joined the Vietminh, was first condemned to death but benefitted from an amnesty. Later complaints submitted to a French court against him exposed inhuman conditions in Vietminh prisoners' camps.

Henri Martin

The trial started on 17 October 1950, before the Military Maritime Tribunal in Toulon. The case ended on 2 August 1953, when Martin was pardoned.[21]

At the age of 16, during the German occupation of France, Martin joined Communist-led resistance groups (*Franc-tireur et partisans, FTP*), then the regular army. In June 1945, Martin enlisted for five years as a navy mechanic for the campaign against the Japanese in Indochina. In his letters, he deplored the atrocities committed by the Foreign Legionnaires who burn one village for one French soldier killed and plunder villages. He wrote: 'In Indochina, the French army behaves as the Huns (*les Boches*) did at home. I am completely disgusted to see that. Why do our planes machine-gun every day defenceless fishermen? Why do our soldiers loot, burn and kill? *To civilize?*' He mentioned the famine (two million dead) due to the organized blockage of rice stocks, which were then sold at a higher price. On three occasions, he asked for the cancellation of his navy contract, without success. Back in France in April 1947, he was assigned to the Toulon naval yard, where he created a clandestine group of sailors and distributed his first anti-war propaganda leaflets. He was appointed quarter-master, then master in 1949. Martin was arrested on 13 March 1950, charged with complicity in the sabotage of a war ship, the *Dixmude*, and the distribution of his leaflets. His trial before a maritime military tribunal in Toulon started on 17 October 1950. On 19 October, he was condemned to five years in jail and to military dismissal. He was acquitted of the charge of complicity in the sabotage of the Dixmude. The judgment was annulled by the Court of Cassation in May 1951 on procedural grounds who returned the trial to the maritime tribunal in Brest. During the new trial, Martin said that the 'dirty war' should stop and that France should negotiate with Ho Chi Minh: 'The Vietnamese people is now fighting the same battle we [the French] fought against the Germans'.

Héron de Villefosse, a retired navy captain, testified that 'eminent personalities, not extremists, confirm today Henri Martin's opinions'. He underlined the 'terrible drama of a young man who, after having asked three

[21] See 'L'affaire Henri Martin', in *Ces procès qui ébranlèrent la France*, Jean-Marc Théolleyre (Ed. Bernard Grasset, Paris, 1966), pp. 75–117, and Rousseau (see Note 15), pp. 74–82. See also 'Le procès de la guerre d'Indochine, l'Affaire Henri Martin', *L'Humanité*, 7 January 2004.

times the cancellation of his military contract for the Far East, was nevertheless obliged to burn villages, to disembowel women'. On 19 July 1951, the Tribunal confirmed the five-year sentence.

The French Communist Party gave him full support and initiated an aggressive campaign to publicize his case and have him freed. The Communist press showed him as a hero, a resistant at the age of 16, a volunteer to fight in the Far East, then a militant for peace and freedom. Jean-Paul Sartre wrote a pamphlet in his favour. The non-Communist press, *Esprit* (a Catholic social review), *Témoignage Chrétien* and others, joined the fight, but separately from the Communists, with frequent references to the *Affaire Dreyfus.*[22] Several groups, including the League of Human Rights and individuals, including Martin's mother and father, petitioned the President of the Republic to pardon Martin. The President replied that no such requests would be considered during campaigns of propaganda and pressures.

However, on 2 February 1953, Martin was pardoned and released from jail.[23]

Jeanne Bergé

Born in 1920, Jeanne Bergé married in 1938 an officer who took her to Indochina where she worked as a telephonist.[24] During the Japanese occupation of the country, she was jailed in 1942 for resistance activities against the Japanese, for which she was later decorated. She found that France's war in Indochina was not justified and she reacted violently against the French atrocities. Denounced, she was arrested by the French police and peace propaganda leaflets were found in her domicile. Bergé was then judged by a military tribunal in Saïgon and condemned to 20 years of forced labour for 'voluntary enterprise of demoralization of the army and nation'. Sick, she was repatriated to France in July 1952. A campaign for her liberation was launched by organizations close to the French Communist Party, not by the Party itself. Pardoned, Bergé was released from jail in Pau in January 1954.

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[22] *Esprit* in January 1952, *Témoignage Chrétien* on 1 February 1952.

[23] Royal pardon was codified by a criminal edict of August 1670. Pardon was abolished by the Revolution in 1791, then re-established by senatus-consulte of 16 Thermidor An X. All later Constitutions have retained the pardon granted by the head of state.

[24] Rousseau, pp. 83–84.

Georges Boudarel

Born in 1926, Boudarel joined the French Communist Party in 1946. He came to Indochina in 1948 and taught in several high schools in Laos and in Vietnam. He became member of the Indochinese Communist Party and joined the Vietminh in December 1950. He was first in charge of a radio broadcast in French at the Saïgon-Cholon station. He was then designated to serve as political instructor, assistant to the political commissar, in camp 113 in North Vietnam, holding French Expeditionary Force prisoners. From February 1953 to February 1954, his task was to 'politically re-educate' the prisoners in Marxism and the Communist campaign for peace. From 1954 to 1964, he worked in Hanoï with the Vietminh government, then at the Soviet-dominated World Federation of Trade Unions in Prague. Condemned in France *in absentia* to death for desertion, he returned to his country in 1966, following the adoption of the amnesty law of 17 June 1966 concerning the 'events' in Algeria, to which a Communist amendment extended the amnesty to all crimes and offences committed in connection with the event following the Vietnamese insurrection and before 1 October 1957 (Art. 30). He became an Assistant Professor at Paris VII University.

The *Affaire Boudarel* started on 13 February 1951 during a conference on Vietnam at the French Senate in Paris. When Professor Boudarel was about to speak, Jacques Beucler, prisoner of the Vietminh during four years accused him of having been the political commissar of a death camp, camp 113. During Boudarel's work at camp 113, 278 prisoners died out of 320.

On 3 April 1991, one of the former detainees of camp 113 and the National Association of former prisoners and internees of Indochina introduced a formal complaint against Boudarel for crimes against humanity. The plaintiffs submitted that Boudarel had been responsible for the death of many war prisoners from February 1953 to January 1954 in his position of assistant to the political commissar. They alleged that Boudarel released prisoners only when they showed that they had been properly indoctrinated with the Communist propaganda.

On 23 May 1991, the Prosecutor rejected the complaint on the basis of the law of amnesty of 18 June 1966. On 20 December 1991, the Appeals Court of Paris recognized the facts of which Boudarel was accused as crimes against humanity, but maintained that the legal action could not be pursued in view of the amnesty law. The Court of Cassation, in its judgment of 1 April 1993, confirmed this decision. The Court had decided that the principle of the imprescriptibility of crimes against humanity applied only to

crimes committed in the context of World War II in Europe and could not concern other conflicts such as the war in Indochina.

Another appeal came to naught: again, on 9 September 1998, the Appeals Court of Paris rejected the same complaint in view of the law of amnesty, a decision confirmed by the Court of Cassation on 9 September 1999. Another request to the European Court of Human Rights was rejected in March 2003 as irreceivable on procedural grounds. According to Clopeau,[25] out of 16 429 French Expeditionary Force war prisoners, 8 146 were reported dead or disappeared, including 2 793 French prisoners. According to a confidential report of 11 March 1955, 9 000 Vietminh prisoners died in French army camps.

Conclusion

Even before the French Vietnam war started in 1946, the conquest of Indochina and its pacification involved military action with its brutality and abuses, together with the economic exploitation by the French administrators, settlers, plantation owners and landlords, and French banks. The colonial administration imposed forced labour and heavy taxes. The Vietamese were subjects, not French citizens. Calls for independence were brutally repressed, or, at best, ignored.

The 1946–1954 war opposed guerrillas against the regular French forces, whose armament superiority was defeated by the more agile Vietminh forces. The latter were fighting for independence and gained more and more willing or forced support from the local population, while the French forces were foreigners perceived to be only fighting to maintain colonialist domination and to safeguard home country economic interests. From the testimonies mentioned above, there is ample evidence that the French forces committed war crimes and crimes against humanity in the war period. Breaches of the Geneva Conventions included wilful killings, torture or inhuman treatment, extensive destruction of property not justified by military necessities and lack of protection of prisoners of war. If the armed conflict was deemed not to be of an international character, article 3 common to the four Geneva Conventions of 12 August 1949 prohibited, concerning

[25] Jean-François Clopeau, reporting on a 1985 thesis of Colonel Bonnafous: http://maron.ouvaton.org/Colonialism/courrierJFC09mai04.htm, 9 May 2004.

persons taking no active part in the hostilities, violence to life and person, murder, mutilation, cruel treatment and torture, outrages against personal dignity, executions without previous judgment pronounced by a regular constituted court. War Crimes were defined in the Nuremberg Charter as violations of the laws and customs of war. They include murder, ill-treatment of civil population of and in an occupied territory, murder or ill-treatment of prisoners of war, killing of hostages, plunder of public or private property, wanton destruction of towns or villages, or devastation not justified by military necessity.

The Nuremberg Charter had been approved by France on 8 August 1945, together with the United Kingdom, the USA and the USSR. The Geneva Conventions of 1949 were ratified by France in 1951, thus three years before the end of the French Vietnam war. While the conflict was not labelled by France as a 'war' but only as military operations not subject to the Geneva or The Hague Conventions, and even if crimes against humanity were then only punishable in France if related to the World War II conflict, the trial reported by Viollis of the Foreign Legion soldiers shows that military personnel could or should have been tried by military or civilian tribunals in Indochina for murder or complicity with murder, if such facts were reported and evidence brought forward. In the event, no French military personnel were sentenced for such acts, nor for cases of torture, also punishable under French criminal law, but subject to a ten-year statute of limitation.

All such crimes were later, retroactively covered by the 1966 amnesty law.

The French officers'experience of the Indochina war was at the origin of the concept of 'Modern Warfare', as 'counter-revolutionary, or counter-insurgency war'. The French army had been humiliated by France's defeat in 1940. After the Liberation, for the officers' corps, the stake of colonial wars was to erase the image of a defeated army, by showing its strength in territories which should not, under any circumstances, be separated from the French Colonial Empire. French governments then remained blind to the historical evolution towards decolonization and were left with only a military option, entrusted to expeditionary forces.

In Indochina, faced with an invisible but efficient guerrilla force, operating like 'fish in the ocean' in the words of Mao Tse Tung, French Colonels Charles Lacheroy and Roger Trinquier 'invented' the principles of Modern Warfare, which involved taking control of the local population through psychological action and the search for information. Lacheroy's theory was a 'global vision of the revolutionary war led by international communism against the free world'. The psychological weapon was to conquer the 'soul'

of the populations through information campaigns, the building of schools and vaccination programmes. Searching for information was through the 'legitimate' and controlled use of torture. Lacheroy said: one does not fight a revolutionary war with the Napoleonic Code'.[26]

In his book published in 1961,[27] Trinquier described the 'Modern Warfare' as an 'interlocking system of actions – political, economic, psychological, military – that aims at the overthrow of the established authority in a country and its replacement by another regime'. He was critical of the traditional army's ability to adapt to this new warfare. His experience in Indochina and, later, in Algeria, demonstrated that the basic weapon that permits the enemy to prevail is terrorism. For Trinquier, the terrorist is not an ordinary criminal but a soldier.

> . . . [w]hen he is captured, he cannot be treated as an ordinary criminal nor like a prisoner taken on the battlefield. What the forces of order who have arrested him are seeking are not to punish a crime, for which he is otherwise not personally responsible, but, as in any war, the destruction of the enemy army or its surrender. Therefore he is not asked details about himself or about attacks that he may or may not have committed but rather for precise information about his organization. In particular, each man has a superior whom he knows, he will first have to give the necessary information to make it possible to proceed with the arrest without delay . . . No lawyer is present for such an interrogation . . . Specialists must force his secret from him . . . as a soldier, he must face the suffering, and perhaps the death . . . certain unnecessary violence ought to be rigorously banned . . . Interrogation in Modern Warfare should be conducted by specialists perfectly versed in the techniques to be employed . . . Science can easily place at the army's disposition the means for obtaining what is sought . . . In Modern Warfare, as in the traditional ways of the past, it is absolutely essential to make use of all the weapons the enemy employs. Not to do so would be absurd.

Once the information is obtained, torture must stop and the terrorist is then treated as any other prisoner of war.

Trinquier concluded:

> If, like the knights of old, our army refused to employ all the weapons of modern warfare, it could no longer fulfill its mission. We would no longer be

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[26] Robin, p. 40.

[27] Roger Trinquier, *La guerre moderne* (La Table Ronde, Paris, 1961). In English: *Modern Warfare, A French View of Counterinsurgency*' available online at the *Command and General Staff College*: Chapter 2.

> defended. Our national independence, the civilization we hold dear, our very freedom would probably perish.

Trinquier's theory was based on practice. Torture had been widely practised in Indochina well before the start of the war in 1946. General Jean de Lattre de Tassigny,[28] then commander of the French Expeditionary Corps, decided to turn the Vietminh's skill in fighting behind the lines into his own tactics. Trinquier received command of such operations in Indochina as head of the Composite Airborne Commando Groups (*Groupement des commandos mixtes aéroportés*), created in 1951. Their mission was to penetrate the Vietminh zones by initiating sabotage operations of counter-guerrilla, and setting up Vietminh-free zones, with combatants recruted in the mountains from minorities opposed to the Vietnamese. Financing was obtained through opium trade. Prisoners' camps were created specializing in 'political de-intoxicating and re-education', on the Vietminh model.

'Modern Warfare' techniques did not prevent the Dien Bien Phu defeat nor the compromise Geneva settlement of 1954 which gave independence to Indochina. This new military and political defeat enraged the officers' corps, who blamed it (as for the 1940 defeat) on the politicians. They used the Modern Warfare model more widely and extensively in the next and last French colonial war, in Algeria, with the same results: Algeria was granted independence. French military experts later gave secret advice and training on the theory of Modern Warfare and counter-revolutionary practices, including systematic raids, summary executions, torture, death squadrons and disappearances, to Latin American dictatorships (Argentina, Chile).[29]

The Modern Warfare doctrine was briefly taught at the Higher War College in Paris (*Ecole supérieure de guerre*) and stopped by De Gaulle in 1960. The doctrine condoned violations of international human rights and humanitarian law which had tried to 'humanize' war and had given protection to individual human rights: this intolerable step backwards for the 'homeland of human rights' was finally revoked.

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[28] De Lattre de Tassigny headed the First French Army in 1943–1944. From 1950 to 1952, he was High Commissioner and Commander-in-Chief in Indochina.

[29] See Robin, Chapters 1–4.

Chapter 4

Madagascar: Revolt and Repression 1947–1948

Madagascar, another prized French possession, was conquered by France in 1885. Its rebellion in 1947 was brutally repressed by the French forces. Situated in the Indian Ocean, the 'Great Island' (*la grande ile*), as called by the French, finally became independent in 1960.[1]

Brief Historical Notes

The Malagasy are a mixture of Asians and Africans.[2] Most immigrants were Malay-Polynesians, who crossed the Indian ocean from Indonesia and South-East Asia, but some came from eastern Africa as well. The island was 'discovered' by the Portuguese in 1500. French sailors landed on the island in the 16th and 17th centuries. In 1810, the Malagasy monarch Radama I conquered two-thirds of the territory. With British support, he introduced Christianity, encouraged education and promoted literacy. The British

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[1] Madagascar's area is 587 041 square meters.

[2] See http://www.lonelyplanet.com/destinations/africa/madagascar/history.htm, accessed on 13 March 2005.

signed in 1817 a treaty of friendship with Radama I, recognized as King. In 1869, Protestantism was declared state religion by Queen Ranavolona II.[3] In 1883, France occupied part of the island and, on 17 December 1885, signed a treaty placing Madagascar under its protection. In 1890, in a typical colonial trade-off, Great Britain recognized the French protectorate in exchange for French recognition of British sovereignty over Zanzibar. On 6 August 1896, Madagascar was declared a French colony. In 1897, the French government sent Madagascar's Queen Ranavalona III into exile in Algeria, effectively abolishing the monarchy. The rebel nobility were executed. French Governor General Joseph Gallieni (1896–1903) started a development policy, building bridges and roads, a railway, hospitals, a local school of medicine, and elementary schools. British influence in the island came under attack. On the religious front, British Protestant missions were gradually replaced by French Protestant missions, and Catholic missions were introduced. Madagascar remained under French domination when the Vichy régime replaced the Third Republic after France's defeat by Germany in 1940. British forces invaded the island in 1942, in order to prevent Japan from using Madagascar as an Indian Ocean base. Britain handed it back to the De Gaulle's Free French in 1943.

In 1946, a political party, the *Mouvement démocratique de la rénovation malgache* (MDRM, Democratic Movement of the Malagasy Renovation) replaced the Party for Malagasy Independence. It had an electoral majority in the country. Three Malagasy representatives were elected to the French Parliament also in 1946: they proposed a bill for the creation of a 'Malagasy state having a government, a parliament, an army and its own finances, within the French Union', which was ignored by the French government.[4] Distrustful of the MDRM, the French government and the settlers favoured the Party of the Underprivileged of Madagascar (PADESM, *Parti des déshérités de Madagascar*), a party based on a minority tribal basis, in an attempt to deflect independance claims.

In 1947, a visitor[5] from France described the local colonial society as expecting to last for ever and being unwilling or unprepared for any change.

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[3] Current estimates give 52 per cent animists, 20.5 Catholics, 20,5 Protestants, 7 Moslems.

[4] Pierre Montagnon, *La France Coloniale*, *Retour à l'Hexagone* (Pygmalion *Gérard Watelet*, Paris, 1990), Chapter XVII, 'Révolte à Madagascar', 175–183.

[5] Marc-André Ledoux, *Pasteur en mission avec les éclaireurs unionistes de Madagascar (1947–1954)* (Les bergers et les mages, Paris, 1955), p. 35.

A very diverse society, divided into separate categories, which was found similarly in other French colonies. At its lowest level, the small-size French settlers, often married to native women, mixed with the local population, and not better off than them. Then, small shopkeepers, mostly Chinese, Indian, Lebanese, were in a separate world. In the capital, Tananarive (now Antananarivo), the French elite consisting in the high administration, the business leaders, the military, the judges, the professors, meeting at cocktail parties, dinners, at the swimming pool or at the tennis club, divided into clans, as in a small town in France. There were few large plantation owners in Madagascar. The country's economy was dominated by several large French trade companies and banks, represented by their agents.

Local administrative and economic leaders, with the blessing of the government and Parliament in Paris and with the support of the army and the police, felt assured of their permanence and their superiority over the native peoples and territories.

An administrative decree of 4 December 1930 applicable only in Madagascar, the '*décret Cayla*', provided for the punishment of those responsible for 'ploys and acts likely to jeopardize public security or to cause grave political disturbances, to provoke the hatred of the French government or to violate the laws of the country' by sentences of one to five years' jail, and optionally ten years' prohibition of residence in the island. The broad and vague scope of this decree allowed the Administration to punish any speech or writing considered negatively by the authorities. It was used extensively during the repression following the rebellion.[6]

Colonial judges and police had different, lower, legal and ethical standards than those practised by their colleagues in France. Their function was primarily to maintain the colonial status quo, at the cost of leaving aside the rule of law, fair justice and due process.

In France, a person arrested could only be detained by the police for 24 hours. The suspect would then have to be handed over to the investigating judge and could choose a lawyer. In the colonies, the time limit was often extended arbitrarily to five, ten or even 17 days.

For the colonial administration in Madagascar, order had to be maintained at all costs.

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[6] Pierre Stibbe, 'Le mécanisme de la répression politique', *Esprit*, No. 206, September 1953, pp. 298.

The Rebellion

Rumours hinted at the end of March 1947 as the date for a possible uprising.[7] On 27 March, the MDRM leaders, then in Paris, sent a telegram to all their local sections in Madagascar to warn then against any provocation that would cause unrest in the Malagasy population or sabotage the peaceful policy of the movement. The authorities later used this telegram as the alleged proof that it was the order for the insurrection. On 29 March towards 22 hours, about 2000 insurgents killed French officers at their hotel and then attacked the nearby military camp but they were repelled. In the countryside, European plantations were attacked and a few Europeans killed, the railways were blocked for a limited time. Peasants joined the rebellion, which accounted to about one million participants at its peak. The revolt was hard, bloody, ferocious: it degenerated into massacres of French civilians including children, devastations exercised with fury. Madagascar Governor General Marcel de Coppet said:' If the Malagasy want war, they'll get it!'

During the Council of Ministers held on 2 April 1947, the Prime Minister,[8] Paul Ramadier supported the assertion of the Minister for the Colonies, Marius Moutet, (both Socialists) that the MDRM was a tribal, racist and nationalist party intent on oppressing part of the population after the elimination of the Europeans. Newspapers such as *Le Monde* (leftist) and *France-Soir* (popular centrist) condemned the insurgents. Also in *France Soir*, a journalist stated that extra-legal measures were justified to stop the rebellion, to protect French sovereignty and the lives of French citizens. However, another article in the same newspaper revealed, on 8 May, the massacres committed by the Senegalese troops and generally the Army's reprisals.

In early May, Moutet opposed the Communists' request for a parliamentary inquiry, which was rejected by the Parliament.

Ramadier expelled the Communists from the government in May 1947, thus ending the tripartite experiment initiated after the Liberation of France from the Germans, a coalition of Christian Democrats, Socialists

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[7] Yves Benot, *Massacres coloniaux, 1944–1950: la IVe République et la mise au pas des colonies françaises*, La Découverte, Paris, 2001), Chapter 5, '1947–1948: insurrection et guerre à Madagascar', pp. 114–145.

[8] Under the Constitutions of the Third and Fourth Republics, heads of governments were called *Président du Conseil*.' They became *Premier Ministre* under the Constitution of the Fifth Republic: we are using the latter term for all periods.

and Communists. While the immediate reason was salary claims in the Renault car factories, the Communists had dissented from the government's colonial policy concerning the Indochina War (see previous Chapter) and Madagascar. The Communists denounced the economic exploitation by the banks, the French trade companies and the settlers, and the excesses of repression. However, they did not take a position for the independence of Madagascar.

The new parliamentary majority (Christian Democrats, Socialists and Gaullists) was determined to support the repression by all means, including extra-legal and inhumane military actions.

The Repression

In April 1947, a French expeditionary corps landed in Madagascar: it raised the level of forces from 6000 to 18 000, and later to 30 000. The better armed French forces included the Foreign Legion, paratroopers and colonial troops, mainly Senegalese and North Africans, with the support of tanks, the navy and airforce. Against the some 15 000 to 20 000 poorly-armed rebels, the military and police repression was ferocious: summary executions, villages set afire, villagers burned alive, suspects thrown from flying airplanes (as later practised by the French army in Algeria and by the Pinochet forces in Chile). As one incident, in May 1947, 165 Malagasy hostages were executed in their train carriages in Moramaga. The rebellion lacked a credible leader and did not receive hoped-for support from the Americans and the British. In the cities, with the full support of the French government, Marcel Baron, the dreaded Chief of Security, implemented a planned operation against the MDRM: all its leaders were arrested and the rebellion was finally defeated in December 1948.[9]

The insurgents were responsible for the death of 550 Europeans out of 35 000 residents, including 350 military from France and Senegal, and 1600 to 1900 Malagasy in a civil war between the MDRM and the PADESM. Estimates of deaths caused in part by the rebellion but mainly by the French forces against the Malagasy people range from 20 000 to 89 000 deaths in a

[9] See *Le Monde*, 16–17 March 1997, 'Les 100 000 morts de l'insurrection malgache', J.-P. Langellier.

population of 4.5 million. Whatever figure is adopted,[10] the numbers show a disproportionate balance, which could be due to a lack of control by the officers in charge and discipline on the part of the soldiers and police, or, more likely, a general order to suppress the rebellion by any means, without concern to the laws of war, nor to generally accepted common standards of humanity.

Factors which Led to the Rebellion

Following World War II, the spirit of the times was decolonization, a trend well understood by the colonized peoples but ignored or rejected by French politicians, while a peaceful evolution towards independence was still possible. Madagascar had to go through a revolt, a repression and biased trials before independence was finally granted. As in other parts of the French Colonial Empire, France's defeat in 1940 revealed the weakness of the colonizer, previously considered invincible. The British successful invasion of Madagascar in 1942 confirmed the new perception that France was vulnerable.

After France's defeat in 1940, Marshall Pétain was first hailed in the island as the saviour of a defeated France and accepted as the new leader.[11] However, Vichy's spokesmen had endorsed racism. The reason for France's defeat was claimed to have been caused by a corrupt and decadent democracy and its liberal spirit. France should follow the German (Nazi) path.

When the Gaullists took over from the British in 1943 and replaced the Vichy authorities, their appointee as Governor, General Legentilhomme, shocked the population by publicly chastising the 'atavistic laziness of the Malagasy' and their 'propensity to indiscipline'. Then followed abusive

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[10] Before an Enquiry Commission of the French Union, end 1948, General Gabay said that victims of the repression were 89 000: Benot, p. 122, N. 7. Governor General Pierre de Chevigné said in a speech of March 1949 that the rebellion made perhaps 80 000 victims, 3/4 of whom killed by the rebels: E.-J. Duval, *La révolte des sagaies, Madagascar 1947* (L'Harmattan, Paris, 2002), p. 334. Jean Fremigacci, professor at Paris-1 Sorbonne, counts 2000 Malagasy victims of the insurgents, 5000 to 6000 Malagasy victims of the colonial forces. Additionally, he counts about 20 000 to 30 000 deaths by 'physiological misery', i.e. malnutrition and illness, in shelter zones: '1947, L'insurrection à Madagascar' in *Marianne*, Nos. 401–402, 25 December 2004 to 7 January 2005, pp. 74–77.

[11] These comments are based on a typewritten 'Note sur la situation à Madagascar' (1947) by Gabriel Rafintsalama and Charles Rajoelisolo, part of the CIMADE archives in Paris.

requisitions of men, women and children for forced labour, in principle, to support the war effort, but often only for the private profit of trading companies or settlers. Another popular grievance was the failure of the government-run Rice Office to feed the population at reasonable prices.

De Gaulle's Conference in Brazzaville in January-February 1944 (see Chapter 2) seemed to open hopes for liberalization in the French colonies. The adoption of the United Nations Charter in 1945 was erroneously taken by Malagasy leaders as a recognition of the right of self-determination of the colonial territories. The creation of 'associate territories and states' within the French Union by the 1946 Constitution was unduly delayed.

About 15 000 Malagasy soldiers had taken part in World War II as part of the French army, but after the War, their return home was slow and their indemnities were paid sparingly, another source of dissatisfaction.

The official political parties, the MDRM and the PADESM, had chosen the electoral process to gain at least autonomy, and preferably independence, as an associate state within the French Union. However secret societies had been created earlier: the Panama, in 1941 and the JINA, in 1943, whose objective was to free Madasgascar by a general armed insurrection, prepared by some of its members late 1946 and early 1947. Some members of the secret societies joined the official parties, without declaring their membership.

The Trials

The Malagasy parliamentarians, Joseph Raseta, Joseph Ravoahangy and Jacques Rabemananjara, and other leaders of the MDRM were arrested shortly after the beginning of the rebellion and later judged as rebels in the French Criminal Court of Tananarive in Madagascar.[12] The first two, medical doctors, represented Madagascar at the first French Constituent Assembly in November 1945. They were re-elected at the second Constituent Assembly in June 1946 and at the National Assembly in November 1946. The third leader joined them at the National Assembly.

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[12] See Pierre Stibbe, *Justice pour les Malgaches* (Ed. du Seuil, Paris, 1954), – and Jean-Marc Théolleyre, *Ces procès qui ébranlèrent la France* (Ed. Bernard Grasset, Paris, 1966), Chapter I, 'L'affaire malgache', pp. 25–74, The French Court was composed of a Presiding Judge, a former prosecutor, and two judges, magistrates seconded from Dakar (Sénégal), then still a French colony. They were assisted by two assessors.

The day after the rebellion, on 30 March 1947, the Director of the Security Marcel Baron, with the support of the Governor General Marcel de Coppet, gave an address in Madagascar on the government radio stating that the MDRM was responsible for the revolt.

On 1 April, the two parliamentarians in Madagascar, Ravoahangy and Rabemananjara (Raseta was still in Paris), issued a proclamation condemning the acts of barbary and violence and affirming that the MDRM had never participated in the plot and execution of these 'odious acts'. The political objective of the MDRM was and remained to be a French-Malagasy entente within the French Union. The two parliamentarians were arrested by Baron on 12 April, an arrest denounced on 16 April as illegal only by the French Communist newspaper, *L'Humanité.*

The accusations against the MDRM and its leaders were based first on the telegram of 27 March signed by the three leaders and the political Bureau, sent to all the local sections of the Movement. The police and the courts interpreted this text, not as a warning by the leaders to stay out of any provocations, but as a hidden order to start the insurrection. Forced confessions were obtained from several lower-level leaders by Baron through beatings, torture and death threats. The confessions confirmed the authorities' version, thus allowing the prosecution of the three parliamentarians and other MDRM leaders at various levels. Proof of the physical damages caused by the police on the accused was given to the court, but it did not affect the final verdicts.

An obstacle remained: the parliamentarians were protected by their immunity. According to Article 22 of the 1946 Constitution, members of the Parliament could not be prosecuted during their term of office without an authorization of their Assembly, except in case of a *flagrante delicto* (being caught in the act). The accused rejected this charge and asked to be provisionally released: this was rejected. Their complaint for abuse of authority by the officials concerned was not even recorded. Raseta was still in Paris and free, while his two colleagues had been jailed in Madagascar. The local Bar Association had forbidden its lawyer members to act as counsels to the accused, leaving it to the judges to appoint lawyers. A Paris counsel, Pierre Stibbe went to Madagascar to defend the accused, at Raseta's request. A hand grenade was thrown from a police car against Stibbe's residence in Madagascar, without harming him. His request for an investigation was denied. The investigative judge, M. Vergoz, delayed any examination of Stibbe's clients, in his presence. Henri Douzon, another Paris lawyer who came to replace Stibbe temporarily, was kidnapped in Madagascar and beaten. His aggressors, widely known, were not prosecuted.

The French National Assembly voted by 324 votes against 195 in June and July 1947 to lift the parliamentary immunity of the accused: the minority included Communists, liberals and Socialist overseas members. Raseta was arrested at the end of the vote at the National Assembly in Paris.

The Assembly limited the prosecution to a breach to the security of the state, in accordance with Articles 91 et seq. of the Criminal Code, an offence not punished by death. As the Constitution of 1848 had abolished the death penalty for political offences, the maximum sentence would be limited to detention in a fortress.

However, the Prosecutor in Tananarive extended the prosecution to crimes of instigation to rebellion and complicity of murder, punishable by death , grounds which were admitted by the Court in Madagascar, a clear abuse of authority.

On 26 June 1947, the French League of Human Rights raised its lonely and weak voice. It recorded various judiciary irregularities and violations to the rights of the defence and of constitutional principles. It challenged the theory of '*flagrant délit*', which would allow the arrest of any parliamentarian under the allegation of a conspiracy, a theory which is a threat to the independence of Parliament guaranteed by the Constitution. It denounced the fact that the defendants were deprived of the right to choose a lawyer of their choice. It objected to a local law that, in violation of French law, allowed the investigative judge, after the beginning of his investigation, to send defendants back to the police to be further questioned, without the presence and assistance of their lawyers, thus allowing them to claim that their confessions had been obtained through torture. The League asked that exemplary punishment be applied to any magistrate or police member who had used illegal constraint. None of these objections or requests was considered by the French authorities. In November 1947 and May 1949, the League asked, to no avail, that the trial should be transferred to France in view of the irregularities committed in Madagascar.[13]

On 5 July 1947, the High Commissioner in Madagascar wrote to the French Minister for Overseas France (the former Minister for the Colonies), recalling that, for several months, the files of 17 Malagasy condemned to death were under review for possible pardons. He had asked for a rejection of pardon for four of them. It was urgent to carry out the judgments, as

[13] *Les Cahiers des droits de l'homme* (Paris), 1 July 1947, No. 28, – November 1947, Nos. 32–34, May 1949, Nos. 1–6.

otherwise the power of 'intimidation' by the French authorities would be greatly decreased. Rakotondrabé, the main witness for the prosecution was executed on 19 July 1948, in the absence of his counsel, three days before the start of the main trial in Tananarive on 22 July 1948. Stibbe affirmed that all evidence showed that Rakotondrabé and another suspect, Ravelonahina were the main leaders of the rebellion and insisted that they should be heard together with the accused parliamentarians. Ravelonahina denied that they, and the MDRM, were involved in the rebellion.

At the beginning of the trial, the Court decided to judge 32 accused persons, including the three parliamentarians, leaving for a later trial the cases of 45 others.

In his initial statement at the trial, the presiding judge said that there was a direct causal relation between the political attitude of the three accused, champions of the independence for their country, and the 'incidents' of 29 March, although this was not a criminal charge.

Stibbe submitted that the prosecution against the three parliamentarians should be considered null, insofar as the charges had exceeded the limits set by the National Assembly. The Court rejected this request, which was then referred to the Court of Cassation. This referral was not considered by the Criminal Court as a cause for deferment of the proceedings.

Following detailed testimonies and debates, the judgment given on 4 October 1948 by the Criminal Court condemned six of the accused to death, three to forced labour for life, one to 20 years' forced labour, two to ten year, two to five year, two to ten year-detention. Fifteen were found not guilty.

Those condemned were sentenced for having directed, organized and initiated an aggression aimed at promoting civil war, resulting in devastation, massacre and pillage. On the other hand, the Court found that there was no proof that the accused had been accomplices to the murders committed by the rebels. The death penalty was pronounced in accordance with Article 313 of the Criminal Code of 1910, which punishes the incitement to seditious meetings. This text had not been applied before since its approval during the first Napoleon Empire.

Raseta and Ravoahangy received a death sentence, Rabemananjara, a sentence of forced labour for life. They submitted their cases to the Court of Cassation.

On 10 May 1949, Paul Coste-Floret, Minister for Overseas France, declared in the *Figaro* newspaper that 'the trial had a very healthy effect. One must, especially in overseas possessions, of course practice justice, but when necessary, show authority . . . If the Court of Cassation felt obliged to

annul the judgment on legal grounds, this would cause a most regrettable effect on the natives'.

On 7 July 1949, the Court of Cassation rejected the complaint of breach of the parliamentary immunity, as the National Assembly itself had not requested the deferment of the proceedings against Raseta, Ravoahangy and Rabenananjara and thus had implicitly agreed to the extension of the scope of the indictments intitiated by the prosecution.

On 15 July 1949, the defendants' lawyers submitted a request for pardon for the six accused condemned to death, asking for their transfer to France and recognition of their status of political prisoners, pending revision of their trial. On the same day, the six detainees' sentences were changed into a sentence of life detention in a fortress, first in the Comore Island, then in Corsica.

On 5 December 1949, the lawyers submitted a request for revision of the trial to the Court of Cassation for new facts. The request was rejected in April 1952.

On 31 July 1953, almost five years after the judgment of the Malagasy parliamentarians, a law was adopted by the Parliament prescribing that the waiver of parliamentary immunity be limited to the facts listed in the Parliament's resolution.

In 1956, the parliamentarians were finally released from jail.

Conclusion

The 1947 Madagascar revolt and its repression in 1947–1948 have been left out of public record and memory for both the French and the Malagasy for many years.

The French authorities were naturally not keen to publicize and recall a revolt which showed that all was not well in that colony, and that at least some of its native population were so repelled by their treatment by the French authorities and settlers, and so frustrated in their efforts to attain at least the autonomy of their country, and now or later, its independence, that they chose a violent path to achieve their aims.The excesses of a disproportionate repression, causing thousands of deaths, were hidden, as well as the use of torture by the police to extort confessions. The illegal arrests of parliamentarians, the faulty trials and their unfair sentences, were largely ignored in France.

The French Parliament dealt with the question in a colonialist and patriotic fashion, against a minority of mainly Communist Party members. The

government's interest was to keep the lid on news, and, as noted above, few periodicals in Paris raised questions as to the scope of the repression thanks to military and administrative censorship. French public opinion was generally in favour of keeping the colonies in the Empire, now called French Union. The claims for the independence of the colonies were not supported except by a small fringe of a few intellectuals. Madagascar was not generally known in France, and French public opinion was more informed about, and more concerned by, the 'events' in Indochina than by those in Madagascar. French leaders and the military did not want Madagascar to be 'another Vietnam'.

In an interview published by the French Protestant periodical *Réforme* in September 1947, Pasteur Marc Boegner, President of the French Protestant Federation, following his visit to Madagascar, did not refer to the conditions in which the repression of the revolt was being carried out. He mentioned the 'horrendous massacres of hundreds of Europeans'. He said that the military operations had been carried out successfully, restoring confidence to the populations, previously terrorized by the rebels. However, he said that for the knowledgeable Malagasy, 'if the fire had been lit by the mad campaigns for an immediate independence led by their compatriots, the ground had been prepared, during previous years, by the [French] Administration as well as by the Colonization'. He rejected the charge that foreign Protestant missions had any responsibility in the start of the revolt. He still recognized that the political and moral problems were to be solved. This assessment by the respected Church leader left out the excesses of the French army, probably because of a lack of information given to him by the French authorities. It probably had been too early to know the scope of the on-going massacres committed by the French military, but it showed how such a well-informed and influential personality, who demonstrated courage during the German occupation of France (see Chapter 6) could have been misled by the official censorship.

In parallel, the Malagasy practised 'self-censorship', as noted by historian Françoise Raison-Jourde.[14] The 1947 revolt was a failure, an ill-fated event

[14] Françoise Raison-Jourde, 'Le soulèvement de 1947: bref état des lieux, IV. De la commémoration ambiguë de 1967 à la commémoration 'révolutionnaire' de 1987: 1947 est devenu un événement fondateur', Colloque AFASPA 'Madagascar 1947' à l'Université de Paris VIII-Saint Denis, 9–10. 11 October 1997, No. 4 de Clio en Afrique, http://www.up.univ-mrs.fr/.~wclio-af/numero/4/thematique/raison/5.html, accessed on 25 October 2000.

that many Malagasy preferred to forget, as it created deep divisions among the population. No commemoration took place when Madagascar became independent in 1960. The first one, in 1967, was ambiguous: it did not give an image of patriots fighting in a war of liberation. The 1987 ceremony was centered on the construction of a national image and of a memory, the transformation of the failed revolt into a successful war of national liberation.

The prosecution of the defendants and their trials were a parody of justice, the trials were political and biased against the defendants. The MDRM leaders were judged guilty before the start. There were grave legal and judicial irregularities, which were ignored by the Court of Cassation.

The aim of the French authorities was to break the popularity and legitimacy of the three parliamentarians by falsely accusing them of being the leaders of the ferocious rebellion. Their arrest in breach of their immunity was condoned by a weak Parliament, influenced by the colonial lobby. Raison-Jourde compares the trials carried out by French 'Justice' to the Stalinist trials, except for the commutation of the sentences: same interrogations of individuals without the presence of independent lawyers, tortures and threats causing terror, forced confessions and repentance.

The French judges were defending the established colonial order, an order challenged by the defendants. Independence claims were due to break and destroy the French Empire. Independentists were outlaws and had to be punished, even though they claimed to pursue their aims through peaceful means.

The French political and military leaders who ordered or allowed the brutal repression by any means, and thus encouraged lower level- military officers and troops to commit numerous war crimes and crimes against humanity were never prosecuted nor otherwise judged.

Police chiefs who exacted confessions through torture were never indicted nor judged. The 'honour' of the Prime Minister and Minister of Colonies (or of Overseas France) responsible for the colonial policies and the repression, the Governors General of Madagascar who ordered or encouraged the brutal repression and the commanders of the French armed forces and police, has not been tainted by the Madagascar 'events' of 1947–1948. They probably believed that they had fulfilled their duty to France fairly and felt no regrets nor remorse for the way it had been carried out.

In a visit to Madagascar on 21 July 2005, President Chirac did not offer an apology or repentance as he did for Vichy's role in the Holocaust, but said more generally that 'One should accept one's history . . . neither forget events nor forever feed bitterness and hate: history is made of confrontation and

reconciliation'. More specifically, he referred to the 'tragic events' of 1947, 'dark pages' of the common history of France and Madgascar. He denounced the 'inacceptable character of repressions caused by the excesses of the colonial system'. 'Nothing or no one can erase the memory of all those who lost unfairly their life, and I associate myself with respect to the homage they deserve'. 'The citizens of both countries should carry on a work of memory to establish facts and pacify hearts'. The President of Madagascar, Marc Ravalomanana, born two years after the repression, replied that he preferred to focus on the future: France is the first economic partner of Madagascar.

A number of local NGOs protested: they asked for the unrestricted opening of all French archives on the period of the repression.

The colonial history of Madagascar does not raise in France the same emotions and controversies as that of Algeria (see next Chapter). Most of Madagascar's nationals do not seem overly interested in or incensed by the 1947 repression. It is still important that historical research and assessment of facts be continued and carried out openly in order to 'clear up' memories in both countries.

Chapter 5

French Algeria: The 'Dirty War' (1954–1962)

The Algerian war started in November 1954 and ended with the Evian Accords of 1962 by which Algeria was granted independence from France. Giving independence to colonies had never been easy for the French. It was even harder for France to give up Algeria than other territories because more than a million French settlers had lived in Algeria for a century and a half, and Algeria was considered as part of France itself, not a colony or a protectorate as with other colonial possessions. The process towards independence required a painful re-assessment of French history and of the perception of Algeria as no longer part of France. It was carried out by General Charles De Gaulle against the will of French military officers and of the European population in Algeria, and resulted in the repatriation to France of most of the French settlers.

The war was fierce, bitter, cruel: the Algerian rebels committed many atrocities against the French military, civilians and other Algerians who had chosen France's side. The French troops committed collective reprisals, summary executions and systematic torture. The extent to which torture was practised by French officers and soldiers in Algeria became widely known and acknowledged in France only after almost 40 years following Algeria's independence.

So much has been written about the Algerian war, and more recently, about French war crimes and torture in Algeria, that this Chapter will focus on, and summarize, only a few significant events and trials.

Brief Historical Notes

Algeria, situated in North Africa between Morocco and Tunisia, extends over 2.381.741 square km (including petroleum-rich and desert part of the Sahara). Its first inhabitants were Berber-speaking people. Following Roman invasions, it was conquered, in part, by the Byzantine Empire which was, in turn, ousted by Muslim Arabs in the 7th–8th centuries. Algeria came under Ottoman domination in the 15th century and was ruled, as from 1671, by the Dey of Algiers.

In 1830, an expeditionary force of 37 000 French soldiers occupied Algiers: a few weeks later, the Dey signed an Act of Capitulation. The conquest of the entire country took more years: all resistance was crushed in 1885. A large scale colonization followed, deemed a tool to consolidate the conquest. Colonization by Europeans (half French, others mainly Spanish, Italian and Maltese) began around 1840, with the support of state subsidies. After the French defeat by the Germans in 1870, a number of inhabitants of Alsace-Lorraine settled in Algeria. By 1880, European settlers numbered about 375 000 and they controlled most of the better farmland. In 1954, when the war started, Algeria had a total population of 9 530 000, including 8 450 000 Moslems (89 per cent). In 1848, the French Constitution had declared Algeria a French territory. Only the settlers were represented in the Parliament. In 1900, the country was given administrative and financial autonomy and placed under the authority of a Governor-General appointed by the French government. In 1926, the first independentist movement was created, calling for a fully-independent, Muslim-controlled Algeria. Another movement sought assimilation with France and the equality of Muslims and Europeans in Algeria, a claim which was never fulfilled.

In World War II, Algeria first came under the Vichy regime until the Anglo-American landing in North Africa of 1942, when it became the Allied headquarters and served as the seat of General De Gaulle's Free French government until the Liberation of France from German occupation in 1945.

On the day of the German surrender, 7 May 1945, an independentist demonstration in Sétif and surrounding region developed into riots, which was brutally crushed by the French Army: 88 to 105 settlers had been killed

by the rebels. The number of Algerian casualties varies according to the sources: the French Army's estimate is 6 000 to 8 000, present Algerian authorities quote a figure of 45 000. The indiscriminate and disproportionate repression encouraged Algerian nationalism and its claims for independence. In France itself, 8 May 1945 was a day of joy and relief: the Germans had surrendered and war had finally ended. The street demonstrations and the newspaper headlines about the victory of the Allies obfuscated the limited and censured news reports from Algeria.

The war of independence started on 1 November 1954 under the direction of the *Front de Libération nationale*, the FLN. On 1 April 1955, the French Parliament voted a 'state of emergency' status for Algeria. On 12 March 1956, the Parliament granted 'special powers' to the government in order to fight the rebellion.

Following demonstrations in Algiers against the French Socialist government and French army pressures, General De Gaulle was called back to power as head of the government in June 1958, then elected as President of the Republic in December 1958.[1] In September 1959, against the wishes of the French settlers in Algeria and part of the army, De Gaulle proclaimed Algeria's right to self-determination. On 19 December 1960, the United Nations General Assembly recognized Algeria's right to independence. On 8 January 1961, the referendum on self-determination was approved in France and in Algeria by a large majority. In February 1961, the military and settlers' partisans of keeping Algeria French set up a terrorist group, the *Organisation armée secrète* (OAS), which organized a coup in Algiers (later defeated), and armed attacks against De Gaulle, politicians and journalists in France. On 18 March 1962, the Evian Accords were signed by the French and Algerian representatives, and approved on 8 April by a referendum in France by 90.7 per cent of the voters. In May, in a panic, the European settlers left Algeria in large numbers. Following another referendum in Algeria, France recognized Algeria's independence on 3 July 1962.

On 22 March 1962, two government decrees were issued: one granting amnesty of offences committed related to the Algerian insurrection, and the second one granting amnesty of offences committed within the context of operations of maintenance of order directed against the Algerian insurrection.

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[1] De Gaulle resigned in January 1946 of his functions as President of the Provisional Government of the French Republic, to which he had been appointed by the First Constitutive Assembly in November 1945, because of his rejection of the planned Constitution of the Fourth Republic.

On 31 July 1968, the French Parliament adopted a law granting amnesty for all offences committed in connection with the events in Algeria, including those committed by military personnel serving in Algeria.

On 10 June 1999, the Parliament finally recognized that the 'events in Algeria, the operations to maintain order' could belatedly be qualified as a war.

French military casualties during the Algerian war amounted to approximately 25 000 deaths (one third through accidents), 7541 wounded and 875 disappeared. The Algerian authorities give an estimate of 'one million and a half martyrs', while French sources count about 200 000 Algerian deaths.[2]

Two million French men born between 1932 and 1943 did their military service in Algeria bertween 1955 and 1962. Its duration was extended from 18 to 27 months. At the apex of the war, 400 000 French military, including 80 per cent of conscripts, were fighting in Algeria.[3]

French law in Algeria

The emergency law of 1 April 1955 was applied progressively to Algerian regions. It contained various limitations to fundamental rights and freedoms: the authorities were authorized to order a curfew, to forbid meetings, to close theatres or cafés, to search domiciles at night, to censure the press, publications, and radio broadcasts. A key measure was the confinement to residence (house arrest) which could be ordered by the prefects (*préfets*, the French government-appointed administrators in each region) without judiciary control on 'any person . . . whose activity proves to be dangerous for public security and order'. Confinement to residence often meant assignation to police stations or paratroopers' barracks, where torture or executions were carried out secretly. A provision in the law according to which '[i]n no case, confinement to residence will result in the creation of camps' was violated by the government and military authorities in Algeria with impunity, as early as May 1955.

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[2] See *Reports on the foreign scene, Algeria*, July 1962, No. 3, published by the American Jewish Committee, New York, – *Algeria: History*, http://www.infoplease.com/ce6/world/A0856564.html, accessed on 16 April 2005, – *Algeria history, French colonisation (1830–1962)*, http://www.arab.net/algeria/history/aa_french.html, accessed on 19 February 2001. *Le Monde*, 28 October 2004, '1954–2004: il y a cinquante ans, la guerre, France, Algérie, Mémoires en marche', –

[3] *Le Monde*, 20–21 May 2001.

The law voted by Parliament on 12 March 1956, the 'special powers' law, replaced the emergency law. It authorized the French government to take all exceptional measures with a view to re-establishing order, to protect persons and goods, and to safeguard the territory. Detention camps were then authorized. There were more than 20 500 detainees in camps in March 1958.[4]

A government decree of 17 March 1957 authorized the Resident Minister in Algeria (a new post of government minister assigned to Algeria) to suspend all collective freedoms – freedom of the press, of meetings, of associations – and individual freedoms – freedom of movement, to host a stranger in the privacy of one's home.

On the same day, another decree decided that most offences and crimes were transferred from the jurisdiction of civil courts to that of military tribunals: these offences ranged from traffic violations and theft to association of criminals, rape, and murder. Military tribunals thus became the primary jurisdictions for the repression of the rebellion in Algeria.[5]

These tribunals were presided over by a civilian judge or by civilian judges called to military service, its members were officers or non-commissioned officers designated by the Army, often from troops engaged in fighting the rebellion. Appeals were submitted to the Cassation [Appeal] Tribunal of the Armed Forces in Algiers, not to the Court of Cassation in Paris.

In March 1958, the Council of State, France's highest administrative judicial body, ruled that internment camps were legal.[6]

In August and November 1959, the Court of Cassation, the highest judiciary court, refused to rule on judgments adopted by lower-level courts based on confessions obtained through torture, on the grounds that 'torture which was practised in one or the other camp was a political problem on which judges cannot reflect without betraying their mission to rule on law'. As remarked by Thénault, torture, 'a political problem' was to be excluded from judiciary review.[7]

A government decree of 12 February 1960, demanded by the army, eliminated civilian justice in Algeria, suppressed the pre-trial investigation process (*l'instruction*), gave the Permanent Tribunals of the Armed Forces

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[4] Sylvie Thénault, *Une drôle de justice, Les magistrats dans la guerre d'Algérie* (La Découverte/Poche, Paris, 2004a), p. 106.

[5] Only two Algerian cases were transferred by the Algiers-based Military Criminal Court of Cassation to tribunals in France: the Audin and the Boupacha cases.

[6] Thénault (2004a), p. 302.

[7] Thénault (2004a), p. 302.

jurisdiction over all acts committed by the nationalists and their supporters. It created three posts of Military Prosecutor, filled by civilian judges conscripted into the army. The Military Prosecutors had one month to conduct investigations concerning persons arrested by the army. Their broad competence included all crimes and offences of attacks against the security of the state and all common crimes aimed at bringing a direct or indirect assistance to the rebellion. In a letter of 20 June 1960 to the Minister Resident in Algeria, Michel Debré, the Prime Minister,[8] emphasized that the new provisions intended to ensure a legal and efficient repression should have as a corollary the assurance that, in all circumstances, persons arrested would be treated humanely, and that whatever methods of physical coercion, during interrogations, would totally disappear. This directive was forwarded to the military commanders five months after it was issued and was generally ignored. Another directive placed the military prosecutors squarely under the hierarchical authority of the military commanders: the former should not observe nor control the latter. Worse, the judiciary investigation should allow the 'operational investigation' to take place first, without judiciary supervision. The new provisions therefore hardened the repression, and left the military free to carry out its arrests, detention, and summary executions outside the legal/judiciary framework.[9]

Justice in Algeria

French justice was applied differently in France and in rebellious Algeria. The government refused to acknowledge that a war against France had started. It was only a rebellion *within* France itself, as Algeria was part of France.

Moslem Algerians had not been allowed to become judges until 1944. By 1951, only seven were judges in Algeria. In 1955, the French born in Algeria constituted 57 per cent of all judges: 147 out of 258, with 98 of the total being judges from metropolitan France, and 13 from other colonies or born abroad. The 'Algerians' of European origin also occupied the highest posts of the judiciary hierarchy.[10]

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[8] Under the Constitutions of the Third and Fourth Republics, the head of the government was the *Président du Conseil.* He became Prime Minister with the Fifth Republic. The latter term is used throughout this book.

[9] Thénault (2004a), pp. 212–217.

[10] Thénault (2004a), pp. 16–17.

The judges never challenged the methods of the police or of the military paratroopers. Complaints by victims of forced sequestration or torture-induced wounds were rarely recorded or hardly ever prosecuted. On the other hand, attempted murder or complicity with attempted murder by the rebels were punished by a death sentence.

The army expected justice to participate in the repression by providing a quick, severe punishment. Suspects were presumed guilty: they were to be treated as delinquents or criminals. Those detained were not prisoners of war and did not enjoy the protection of the Third Geneva Convention. Even if few of the arrested or detained persons were delivered to the judiciary, the Algerian jails were overpopulated and thousands of cases were submitted to prosecuting judges.[11] Trials were shorter than in France. Since February 1957, all the lawyers who used to defend the Algerian independentists were arrested or assigned to residence. Lawyers assigned by the courts or lawyers from France had no possibility to watch over the prior investigations of suspects. Defence lawyers in Algeria were interned in February 1957 for a few months, and four lawyers from France were detained in Algeria in May 1958 for a few weeks. Several were suspended from office by their own professional 'order' (statutory association), or by courts. Two were murdered.[12]

During the war, military tribunals rendered almost 1500 death sentences, of which 198 were carried out. Only one Frenchman was executed, Fernand Iveton.

In January 1962, a tribunal acquitted three officers who had tortured to death a young Algerian woman. No French army officer or soldier was convicted nor sentenced for acts of torture and/or summary killings committed during the Algerian war.

Breaches of due process

Thibaud,[13] in the periodical review *Esprit* of May 1957, gave a number of examples of serious breaches of humanitarian law. Among these, an Algerian

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[11] Sylvie Thénaud reports in *La Guerre d'Algérie, 1954–2004, la fin de l'amnésie* (Robert Laffont, Paris, 2004,b), M. Harbi and B, Stora Eds, 'La justice dans la guerre d'Algérie', that Algerian jails held up to 21 000 detainees for a capacity of 14 000 persons. Between 1960 and 1962, 20 629 cases were treated and 15 773 persons were judged by military tribunals.

[12] Ould Aoudia was murdered by the French Special Services in May 1959, and Popie by the Organization of Secret Army (OAS) in January 1961: see Thénault (2004a), p. 227.

[13] Paul Thibaud, 'Comment fonctionne la justice en Algérie', *Esprit*, No. 250, May 1957.

lawyer, Ali Boumendjel, was arrested on 9 February 1957 by the paratroopers: theoretically assigned to 'residence', he was in fact retained and tortured in the paratroopers' barracks. After an attempted suicide and an hospitalization, Boumendjel was returned to his torturers on 28 February. On 23 March, his death by a 'fall from a terrace' in a building occupied by the paratroopers was announced.

The FLN leader Benalla Hadj, arrested on 16 November 1956, explained how he had been tortured to force him to make a radio statement agreeing to France's policy in Algeria. In spite of this acknowledgement, he was condemned to death and guillotined. *Fernand Iveton* was the only European guillotined during the Algerian war. Of French/Spanish origin, he was a member of the Algerian Communist Party. He joined the FLN only when the Party was integrated with the FLN. Ordered by the FLN to plant a bomb at his workplace, the Algerian Gas and Electric Company, he placed it in his locker and timed it to explode when the factory was empty. Arrested, he was tortured, but did not reveal the names and whereabouts of his partners. He was condemned to death and guillotined on 11 February 1957.

Hiding War Crimes and Torture

During the Algerian war, both government authorities and the army denied that war crimes and torture were being committed. Official instructions to prohibit torture were ignored. Official reports watered down accusations and judges ignored torture allegations.

However, confidential reports of the International Committee of the Red Cross should have alerted the government to those abuses and enticed it to take effective measures to stop them. It appears that the government was either unable or unwilling to follow and apply the recommendations of the Committee.

Official instructions and reports

Before the war started, Marcel-Edmond Naegelen, then Governor-General of Algeria, issued a circular to the *préfets* on 21 October 1949 referring to complaints by jailed nationalists who alleged that they had been subjected to brutality and torture in order to obtain their confessions. He wrote: 'Violence must above all, absolutely, be prohibited as a method of investigation in a criminal trial'. The authors of acts of violence not justified by a legal

necessity would be accountable on civil and criminal grounds, as these acts constitute an offence against human dignity. Another similar instruction was issued by another Governor-General, Roger Léonard, on 4 March 1952.[14]

During the Algerian war, attempts by politicians and judiciary officials to curtail or stop torture, illegal detention and summary killings proved illusory and ineffective, in front of the army's insistence on repression of terrorism and defeating the rebellion by any means. On 7 January 1957, General Jacques Massu, Commander of the 10th paratrooper division, was given by Robert Lacoste, the Minister Resident in Algeria, all police powers in the Department of Algiers, to eliminate the urban terrorism and break a general strike planned by the FLN. The army was in charge. Massu was in favour of the use of torture in compelling circumstances, in order to obtain information which would prevent attacks against civilians. In a Note of 19 March 1957, he wrote: 'The *sine qua non* condition of our action in Algeria is that these methods be admitted, in our souls and consciences, as necessary and morally valid'. In March 1959, Massu issued an unpublished 'general directive on subversive war' codifying the various methods of interrogation of suspects.[15]

In a meeting held on 18 April 1957 with Generals Raoul Salan and Marie-Paul Allard, Robert Lacoste, Minister Resident in Algeria, Jean Reliquet, the newly-appointed Prosecutor general in Algeria imposed by François Mitterand, then Minister of the Interior, proposed various measures against torture: closing 'torture villas' and prohibiting the opening of new ones, forbidding abuses and torture, and identifying and punishing such acts. These proposals met with active or passive opposition from all sides.[16]

On 5 April 1957, the French government created the Commission to Safeguard Individual Rights and Liberties (*Commission de sauvegarde des droits et libertés individuels*). The government's decision was aimed at dealing with a malaise caused by allegations and polemics raised by French publications and the resignation of high-level civil servants that revealed grave breaches of human dignity. The government's statement was not neutral: even before the Commission had started its work, the government protested with indignation against a 'campaign organized by the enemies of the

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[14] See *Le Monde*, 5 February 1999, 'Dès 1949, des mises en garde contre l'usage de la torture'.

[15] General Massu applied to himself some of the electricity torture methods which he claimed to be 'the best method to obtain information quickly'. See Pierre Vidal-Naquet, *La torture dans la République (1954–1962)* (Les Editions de Minuit, Paris, 1972), pp. 44–45.

[16] Thénault, (2004a) pp. 140–141.

Republic presenting 'our army and administration as using systematically in Algeria repressive methods contrary to the respect of the human person's dignity'. The government expressed 'the admiration of the country to the 700 000 men who served in Algeria to ensure the return to peace and French-Moslem friendship, while a few people would present them as so many torturers'

In its report submitted on 14 September 1957, the Commission recalled that the present situation was one of war, although the official terminology was that France was carrying out 'police operations', not war, which would have raised the status of the rebels to that of national combatants.[17] The report said that the rebels had committed acts of barbary and cruel crimes. Parliament had granted exceptional powers to civilian and military authorities in Algeria. 'Acts which would appear, in normal circumstances, exorbitant, were now perfectly legal in Algeria, and not arbitrary . . . Certain practices, inconceivable in France itself or even in Algeria in happier times, are justified by the extraordinary circumstances stemming from the law of 12 March 1956 [law granting special powers to authorities in Algeria]'.

In spite of these considerations, the Commission said a system of tortures to exact confessions was rigorously prohibited. It quoted a report by a senior police officer of 13 December 1955 which said in part: 'As Chief of the National Security body, I find it intolerable to think that the French police might recall by their behaviour the methods of the Gestapo. Similarly, as a reserve officer, I cannot stand to see our French soldiers compared to the sinister SS of the Wehrmacht'.[18]

The Commission was given by the military a list of 274 cases reviewed and punished by military tribunals or the military hierarchy. The Commission acknowledged cases of torture, but believed that the senior administrative and military authorities were not informed of abuses committed at lower levels. The Commission formed the impression that there was not a generalized system of abuses, but sporadic, individual acts. De Gaulle came back to power in June 1958. On 24 June, his Minister of Culture, André Malraux told journalists: 'No act of torture has occurred, to my knowledge nor to yours, since De Gaulle came to Algiers [on 4th June]. There must not be any more from now on'. This wish was not satisfied.

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[17] 'Le rapport de synthèse de la Commission de sauvegarde des droits et des libertés individuels'. The report was submitted to the government on 14 September 1957 but not made public until *Le Monde* published its contents on 14 December 1957.

[18] Ibid: Report of Mr. Mairey of 13 December 1955.

In a visit to the military in Saïda, Algeria, on 27 August 1959, De Gaulle ordered Colonel Bigeard in the presence of the Minister Resident, Delouvrier, to stop the practices of torture. On 29 October, contradictorily, Bigeard told his officers: 'No more torture, but still torture', adding that De Gaulle's policies should only be followed when they were reasonable.

Although De Gaulle as a Catholic and a traditional officer could not condone torture, he never condemned it publicly. His priority was, after a period of observation and 'reality-testing', to lead France towards negotiations with the Algerian rebels and the later independence of the territory. To this end, he did not oppose the army frontally until the failed military putsches in January 1960 and April 1961. The same illegal practices continued until the independence of Algeria in July 1962.[19]

Reports of the International Committee of the Red Cross (ICRC)

Early in 1955, the ICRC offered its services to the French government in order to start its traditional humanitarian activities in Algeria, Morocco and Tunisia.[20] On 2 February 1955, the government authorized the ICRC delegates to visit internment camps in Algeria and Morocco for short periods not exceeding one month and to interview the detainees without witnesses. The government however refused ICRC's request to be given the list of persons arrested following the 'events' in North Africa (those condemned, prosecuted, and possible suspects). In accordance with ICRC policy, reports on these visits would be given only to the government – the government delegation in Algiers, the Ministers of Foreign Affairs and Justice in Paris – without any publicity.

France did not recognize the applicability of the Geneva Conventions of 1949 to the 'situation' in Algeria, as these Conventions concern *international* armed conflicts and, for France, the Algerian war was a non-international conflict to which Article 3 common to the four Conventions could not apply. On 23 June 1956, the French government finally recognized formally the applicability of Article 3 to the conflict. Article 3 provides minimum protection to persons taking no active part in the hostilities, the wounded and the sick 'in the case of armed conflict not of an international

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[19] Vidal-Naquet, pp. 84–87.

[20] See: 'L'action du Comité international de la Croix-Rouge pendant la guerre d'Algérie (1954–1962), by Françoise Perret, *International Review of the Red Cross, Reports and Documents*, 2004, No. 856, pp. 917–952.

character occurring in the territory of one of the High Contracting Parties . . .'.[21] However, France still did not observe these obligations.

In February 1956, the ICRC asked the FLN to abide by the principles of the 1949 Conventions, in particular those contained in Article 3 common to the four Conventions. On 23 February 1956, the Algerian delegation in Cairo (Egypt) replied that they would apply these provisions to all the French prisoners of war, under the condition of reciprocity by the French government. For France, accepting this condition would have meant giving national and international legitimacy to the rebellion, which was unacceptable.

The first visits by the ICRC in Algeria took place in the period 12 May–28 June 1956, followed by seven other visits. Confidentiality was strictly observed by the ICRC, but on 5 January 1960, the daily Paris newspaper

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[21] Article 3 common to the four Geneva Conventions, states:

– In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

   To this end, the following acts are and shall remain prohibited at any time and in any place whatsover with respect to the above-mentioned persons:

   a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
   b) taking of hostages;
   c) outrages upon personal dignity, in particular humiliating and degrading treatment;
   d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

2) The wounded and sick shall be collected and cared for.

   An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

   The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

   The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

Le Monde published an analysis of the ICRC reports on its eight visit to camps and places of detention in Algeria, from 15 October to 27 November 1959.[22]

Reports on the Military Detention Centers were generally favourable, except for one (*Camp du Casino de la Corniche d'Alger*), where the responsible colonel of police (*gendarmerie*) explained that the fight against terrorism makes certain interrogation techniques indispensable, the only ones able to save human lives and to avoid new attacks. However, he assured the ICRC delegates that these 'methods' were reserved only to a few special cases and were carried out under an officer's responsibility, and were in no way generalized.

The reports on the Transit and Selection Camps (*Camps de transit et de triage*) were less complimentary: conditions were satisfactory in less than one third of the camps visited, fair or mediocre in another third, and very bad in more than one third. Severe findings and numerous criticisms were detailed by the ICRC delegates. Among those findings were the number of deaths allegedly following escape attempts; torture by electricity and water, and terrorized detainees begging the delegates not to quote them for fear of reprisals by beatings or death. Sixty ill or injured detainees had suddenly been taken out of one camp just before the delegates' visit. The delegates noted that the negative attitude of the responsible officers confirmed their impression that these had firmly set views and that any request for improvement was useless. The delegates believed that conditions in the camp were part of a short-sighted system aimed at obtaining a few results, but these practices were inhuman and in flagrant violation of elementary humanitarian principles. The government replied in *Le Monde* that this was the eighth mission of the ICRC in Algeria. Its report showed that some 'errors' or abuses continued to occur, but it noted very clear improvement in the conditions of detention. The government and the army would 'naturally' take largely into account the ICRC conclusions, but deplored the fact that the ICRC reports were used in a polemical fashion.

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[22] According Pierre Vidal-Naquet, Gaston Gosselin, a close colleague of the Minister of Justice Edmond Michelet, leaked the ICRC report to *Le Monde.* Michelet, Gosselin and another colleague in the Ministry had been deported to Dachau: the latter two were strongly opposed to the practices carried out by the Army and police in Algeria: Pierre Vidal-Naquet, *La raison d'Etat* (La Découverte, Paris, 2002), p. 6.

Protests Against Torture

The French population was generally in favour of keeping the colonies in the Empire, then in the French Union, and certainly to keep the Algerian territory as part of France. French public opinion supported the government, as Algeria was perceived to be a part of France, it had a large European population, and the French people's patriotic duty was to support their Army in its efforts to pacify the territory. To this end, they supported the special powers granted by the government to the administrative and military authorities in Algeria. Those who believed that Algeria should become independent were very few, and they were opposed by the great majority of the population.

Political parties

All political parties wanted to keep Algeria French: by its vote of March 1956, the coalition government headed by the Socialist Guy Mollet had given 'special powers' to the French authorities in Algeria. These had given free rein to the Army which used it without civilian or judicial control. Summary executions and torture were widespread and accepted as the norm, even by young conscripts.

The Communist party had voted the 'special law' in solidarity with the Socialists, to the anger of some of its supporters. The main slogan used by the Communists during the war was 'Peace in Algeria', while independence was not a Communist objective until 1961. The revolt in Sétif in 1945 was attributed by the French Communists to a provocation by Nazi agents, not as a rebellion against the colonial status of Algeria. In 1954, the Party condemned France's violent repression but also the armed insurrection. The Party was more involved in the combat against the Atlantic Alliance and the re-armament of Germany than in the Algerian conflict. The Algerian Communist party, as noted above, joined the FLN in 1956 and was not supported by the French party in its fight for independence.

However, a few French Communist party members took sides for the FLN during the war: among them, two gained prominence when their cases revealed publicly that torture was routinely inflicted in Algeria by the French paratroopers. Henri Alleg was tortured but remained alive, Maurice Audin was tortured and 'disappeared'.

Henri Alleg: torture and escape

Henri Alleg, the former director of the Communist daily *Alger Républicain* (whose publication was banned in September 1955), went into hiding in

November 1956 to avoid being interned in a camp, as were most of his collaborators. He was arrested on 12 June 1957 by the paratroopers who held him at El-Biar, near Algiers, for one month where he was severely tortured. He refused to give any information on where he had hidden and which and where were his contacts. The story of his detention, hand-written and hidden in his jail, was leaked to France where it was published, on 12 February 1958, by the *Editions de Minuit* under the title '*La question*'.[23] Alleg described vividly acts of torture on himself and other victims and named his paratrooper torturers. Sixty-five thousand copies of his book were sold in a few days, before it was seized on 27 March. It was then re-published in Switzerland. Following a press campaign, Alleg was presented to a judge and jailed for three years in a civil prison in Algiers. Condemned, *in camera*, to ten-years' jail for 'damage to the security of the state and association of lawbreakers', he was transferred to a prison in France, from which he escaped in 1961 with the support of the Communist Party. He went back to Algeria as, again, director of the *Alger républicain* in March 1962.

Maurice Audin: torture and murder

Maurice Audin was a promising young mathematician who taught at the University of Algiers. He was member of the Algerian Communist Party. Arrested late in the night of 11 to 12 June 1957 at his domicile, Audin was taken to the same army barracks near Algiers as Alleg and severely tortured by the paratroopers until 21 June. On 19 June, Audin, Alleg and other tortured detainees were temporarily transferred to a neighbouring building when the inspection visit of General André-Marie Zeller, member of the Safeguard Commission, was announced. The torturers were hoping to extract from Audin information about the Algerian Communist Party and its leaders. Audin did not give in, and according to a testimony, was strangled on 21 June by a lieutenant in fury, in the presence of several senior officers, whose names were later revealed. Audin was allegedly buried clandestinely in a nearby army barrack in the presence of two named officers.[24]

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[23] Les *Editions de Minuit* started publishing resistance books clandestinely during the German occupation of France. 'La question' means both 'The Question' and the medieval interrogation under torture.

[24] See 'La mort de Maurice Audin', *Les Cahiers des droits de l'homme*, Nos. 7–8, November–December 1959, quoting the text of the statement made by the *Comité Audin*, created in 1957, following its investigation. See also Pierre Vidal-Naquet, *L'Affaire Audin* (Les Editions de Minuit, May 1958, – and 'Complément à l'Affaire Audin, *Témoignages et Document*, No. 11, April 1959.

The military then created a fictitious escape scenario, an escape alleged to have taken place on 21 June 1957. Audin, who never re-appeared, was considered as having fled. The paratrooper colonel asked Paul Teitgen, the secretary of the *Préfecture* to destroy the file and the house arrest, which he refused to do.

On 4 July 1957, Josette Audin, his wife, submitted a complaint charging voluntary homicide. Following the amnesty decreed on 22 March 1962, the court rejected the suit for insufficient charges. Following a second amnesty law, the Court of Cassation decided in December 1966 that the Audin case was definitely closed. A claim for indemnity submitted by Josette Audin and her children to the French administrative courts was rejected by the Council of State in January 1978.

Twenty-three years later, on 16 May 2001, Josette Audin submitted another complaint for illegal detention and crime against humanity. On 10 July 2002, the prosecuting judge refused to investigate the case. For the judge, the definition of the crime against humanity in the Criminal Code of 1994 could not be applied retroactively. The charge of illegal detention, even though not covered by amnesty, was also rejected, as she had accepted an earlier indemnification for the death of her husband.

In July 2001, the name of Maurice Audin was given to a street in Paris.[25]

The French 'League of Human Rights'

Born in 1898 during the *Affaire Dreyfus*, the League of Human Rights was created with the aim of defending the 'rights and freedoms of man and citizen' in the face of the arbitrariness of justice and of political powers. It first worked, together with leftist circles, to affirm Alfred Dreyfus' innocence and the revision of his trial condemning him for treason. It later took position for the secularity of the state, political democracy, freedom, equality, and, between the two World Wars, pacifism. It generally opposed nationalism, racism, colonialism. The League, since the Dreyfus trials, consistently demanded a reform of military justice, which should limit its jurisdiction to breaches of military discipline only.

During the Algerian war, the League warned the political authorities against a policy of strength, which could not solve the problems, but also the Algerian Moslim population, against the 'blind furors of a self-proclaimed

[25] 'Maurice Audin, torturé à mort et disparu en Algérie', *Le Monde*, 14–15 July 2002, – *L'Humanité*, 11 July 2001.

"arab nationalism", masquerade of an intolerant and retrograde fanaticism, inspired from abroad'.[26] In July 1956, its Congress recalled its two major concerns: maintaining close links between Algeria and France, and uniting in a real and lasting community the various elements of the Algerian population. However, 'pacifying [Algeria] should not degenerate into a war of reconquest'. It noted that 'the situation was getting worse and worse in Algeria and felt that the government should not reject any honourable opportunity to substitute negotiation to war'. In 1957, it deplored that its frequent interventions with the government and the Minister Resident in Algeria, to inform them of precise and certain abuses of the military or police repression, had met only dilatory replies or justification of arbitrary measures by the law on 'special powers' of 16 March 1956 and 'reasons of state'. It also protested against that law which had transferred civilian police authority to the military, and allowed the secret internment of suspects in police stations, in concentration camps without access to the outside world. In September 1958, the League, the Maurice Audin Committee[27] and allies published the '*Dossier sur la torture et la répression*', In 1959, as the League had received precise and concurring information concerning torture in Algeria aimed at obtaining confessions or information from suspects, it suggested that sanctions be taken and made public against the torturers. In 1960, it asked its president to convey the indignation of the League to the President of the Republic regarding torture schools in the French army, asking him to take sanctions and to stop such practices.[28]

The League's inquiries and warnings to the governments were well-founded, courageous and well-taken, but they constituted only a minor nuisance for the authorities. None of the League's recommendations was followed by the governments.

A few journalists and intellectuals

Military and police abuses and acts of torture were denounced by a few individuals only, who failed to raise a significant popular movement against the war.

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[26] *Les Cahiers des droits de l'homme*, No. 8, 9, 10, September–October–November 1955.

[27] The *Comité Audin* was born from the Audin case. It then developed into a center of denunciation of torture and war. Composed of 9 members from the political left and extreme left, its president was Laurent Schwartz, mathematician.

[28] Ibid, Nos. 1, 2 and 3, October/November/December 1956, Nos. 8 and 9, June/July 1957, No. 10, October/November 1957, Nos. 3, 4, March/April/May 1959. No. 1, January/February 1960.

On 6 December 1951, almost three years before the war started, Claude Bourdet, a former resistant during the German occupation and a journalist, published an article in the periodical *L'Observateur* (later *France Observateur*) entitled 'Is there an Algerian Gestapo ?' He denounced the interrogation methods used by the French police in Algeria with the complicity of magistrates. In another article published by the same periodical on 13 January 1955, 'Your Gestapo of Algeria', Bourdet gave specific examples of persons who had been tortured. Following an investigation ordered in Paris and an unpublished report, the Minister of the Interior, Maurice Bourgès Maunoury, declared at the National Assembly: 'Following the completed investigations, I do not know any fact of torture such as those denounced [in Bourdet's article]'. On 14 April 1957, in a Socialist meeting, Guy Mollet said that 'acts of violence, extremely rare, are to be deplored . . . these acts could almost be counted on the fingers of one hand'[29]

On 15 January 1955, the well-known Catholic writer François Mauriac denounced in the weekly liberal periodical *L'Express* the torture in Algeria and the government's inaction. On 5 April 1956, Henri Marrou, a Sorbonne professor, denounced in *Le Monde* the torture laboratories set up in Algeria as a shame for the country of the French Revolution and of the Dreyfus Affair. He also denounced the criminal practice of collective reprisals. Other university law professors, magistrates and lawyers joined the fight against torture through articles. A few lawyers, mostly Communist, took up the defence of Algerian nationalists. On 13 March 1957, the Editor of *Le Monde*, Hubert Beuve-Méry, wrote an article, 'Have we been defeated by Hitler?', presenting the book '*Contre la torture*' (Against torture) by Pierre-Henri Simon.

In 1956 and 1957, a number of journalists were prosecuted by the military justice for their articles in *France-Observateur, Le Monde, Consciences maghrébines, Demain, L'Express* and *Témoignage Chrétien*, on the grounds of damage to the army's morale by participation in an enterprise to demoralize the army. The homes of those charged indictees were searched, they were summoned to the judge. Only a few were jailed temporarily, then released under pressure from public opinion.[30]

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[29] '13 janvier 1955: Claude Bourdet: "Votre Gestapo d'Algérie." (Algérie) http://perso.wanadoo.fr/jacques.morel67/ccfo/crimcol/node12.html, accessed on 24 April 2005.

[30] Thénault (2004a), p. 304.

Christian protests

Both Catholic and Protestant churches in France watched the events in Algeria closely, in part through their priests, parishes in Algeria, and in response to individual appeals for assistance and guidance, particularly from the young military recruits being sent to Algeria. As for most of the population in France, and all the Europeans in Algeria, the general feelings among these groups were pro-French Algeria, the rebels were to be fought and defeated through all possible means. However, a few Catholic and Protestant publications and church leaders or groups took firm position against the abuses and torture committed by the French army in Algeria, and supported economic and social reforms in favour of the Muslim population, without going as far as to accept the concept of independence for Algeria, until De Gaulle's pronouncement in this direction.

The Catholic liberal periodical *Témoignage chrétien (TC)*, created clandestinely during the German occupation of France, published in February 1957 the 'files of Jean Muller', a former Catholic boy scout leader killed in Algeria in October 1956 who described in detail tortures carried out daily in a camp by ten officers, four non-commissionned officers, and a section of conscripts in order to obtain 'confessions'. Another part of the files identified the official and hidden camps run by the army. The testimonies of four officers, published by *TC* on 18 December 1959, said that no one in the Army could ignore that torture was practised on the basis that the end justifies the means: 'Algeria was the reign of fear, lies and terror'.

TC, like other publications which revealed acts of torture, was often banned for ignoring censorship rules, and its stocks seized. Its director, Georges Montaron was prosecuted as a result of a complaint of the Minister of the Interior.

A few church dignitaries protested against abuses and torture. Léon-Etienne Duval, archbishop of Algiers published in the *Semaine religieuse* (the Religious Weekly) an explicit condemnation of torture, based on a text by Pius XII. This was, however, not generally conveyed to army chaplains, whose dual status, as priests and military personnel, did not encourage freedom of thought and expression. Duval wrote to General Lorillot on 17 July 1956 referring to thefts by soldiers during search operations, heinous treatment inflicted on suspects, summary executions of prisoners, use of torture during interrogations, and collective measures of repression. He affirmed: 'Ends do not justify means . . . The consequences could be redoubtable'. On 22 January 1958, Cardinal Liénart, Prelate of the Mission of France, said that 'The Christian ethics formally reject these methods'.

Only one paratroopers' chaplain , P. Delarue, in an un-christian interview with *TC* on 21 June 1957, publicly conveyed the views prevailing among French officers. He justified the use of torture on 'criminals': between two ills, allow innocents to be slaughtered or 'submit [to torture] for a short time a bandit caught in the act, who deserves death, in order to overcome his criminal obstination by the means of an obstinate, harassing interrogation', 'one must choose without hesitation . . . an effective interrogation without sadism'.

One army general and one senior state administrator resigned their functions in a protest against abuses, torture and summary killings committed by the French in Algeria, based on their strong Catholic beliefs.

Jacques de Bollardière was the only high-ranking French officer to condemn openly the practice of torture during the Algerian war. He fought the Germans with the Free French from 1940 to 1944, then served in Indochina. Assigned to Algeria in 1956 and promoted to the grade of general, in March 1957 he asked to be released from his assignment. He was jailed in a fortress for sixty days for having written a public letter endorsing the articles published by one of his former lieutenants in Algeria, Jean-Jacques Servan-Schreiber, which described the latter's service and denounced the attitude of the government. De Bollardière had underlined the 'frightful danger resting with us to lose sight, under the fallacious pretext of immediate efficacity, of the moral values which, alone, have made the grandeur of our civilization and of our army'.[31]

Paul Teitgen, secretary-general of the *préfecture* in Algiers, also a former resistant during the Occupation, resigned when he finally realized that the army had used his house arrest orders of suspects as a prelude to summary killings: out of 24 000 arrest warrants signed by him, 3 024 persons had 'disappeared'.[32]

As noted above, the Catholic writer François Mauriac wrote articles in the weekly periodical *L'Express* denouncing torture and more generally the government's Algerian policy.

Protestant churches in France and in Algeria issued public statements on Algeria since 1955. On 10 February 1955, the Social Commission of the

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[31] De Bollardière's letter was published in *L'Express* of 29 March 1957. Servan-Schreiber, then Director of the periodical, was prosecuted for an 'attack on the morale of the army' for his series of articles. They were later published in a book '*Lieutenant en Algérie*' (René Juillard, Paris, 1957).

[32] According to a statement by General Paul Aussaresse in *Le Monde* of 23 November 2000.

Reformed Church of France expressed its alarm concerning 'the tortures inflicted by certain police agents in Algeria' and protested against such treatment. Already in 1953, the French Protestant Synod (the assembly of delegates – ministers and believers – from Protestant parishes) had 'reminded the faithful that their rights as citizens demand that they should use all means in their power to fight against unjust practices, such as violence and blackmail on the part of the authorities, against natives of the country, foreign visitors, and all those who come under French authority'. In October 1955, the General Assembly of French Protestantism expressed, in part, 'its horror at terrorism, counter-terrorism, and all the atrocities connected with such behaviour . . .' It condemned the principle of collective reprisal and called for a common understanding with regard to human rights and the right of all communities living together in North Africa. This message was addressed to the President of the French Republic, the government and Parliament. Messages published in '*Algérie Protestante*' in 1955, 1956, 1957 called on Algerian Protestants to work for peace and justice, and stressed the need to improve relations between the two parts of the Algerian population: 'We must realize that everything that we do or say honours or dishonours the name Christian' .[33]

The 'Common declaration on the Algerian war' issued by the General Assembly of the French Protestantism held in Montbéliard on 1 November 1960 was more forthright. It underlined, again, the 'moral and legal deterioration which undermines the very notion of the state'. It called for broad negotiations. 'No one should accept moral and physical torture'. The Assembly assured those who would legitimately refuse such acts of its moral, material and legal support. A similar support was assured to those who refuse enlistment in the army on the grounds of conscientious objection. Military defaulting would however only be justified in case of a 'fundamental perversion of the state'. It appears that the World Council of Churches

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[33] Résolution de la Commission Sociale de l'Eglise Réformée de France, 10 February 1955, – Message de l'Assemblée du Protestantisme français réuni à Montpellier', 29–31 October 1955, – Message du Conseil régional – Algérie, 10 April 1956, – Message du Conseil National de la Fédération Protestante de France, 17 April 1956, – Résolution du Conseil de la Fédération Protestante de France. 12 March 1957, – Message aux Protestants algériens du Conseil régional des Eglises Réformées en Algérie, 19 June 1957, published in *Algérie Protestante*, November 1957, – *Déclaration commune sur la guerre d'Algérie*, Assemblée Générale du Protestantisme Français, Montbéliard, 1 November 1960: documents available in the archives of the Cimade in Paris.

(WCC) did not intervene directly in the Algerian conflict in accordance with its policy of leaving such issues to national churches. In a statement issued during the meeting of the Fourteenth Executive Committee of the WCC Commission of the Churches on International Affairs held in August 1959, the Committee recognized the continued deterioration of the situation in Algeria, expressed its hope for a peaceful settlement of the conflict by means of free negotiations, asked the French churches to exert every effort in support of such a peaceful solution. It noted the role played by Christian churches and individuals in France in denouncing and opposing abuses of various kinds developing out of the conflict and assured them of its support.[34]

Supporters of the FLN

'Manifeste des 121'

Rare were those French persons who actively helped the FLN in France itself. On 6 September 1960, in a public declaration, the *Manifeste des 121*, 121 personalities stated that they respected and accepted as justified the refusal to take arms against the Algerian people and the conduct of French persons who believe of their duty to provide assistance and protection to the Algerians oppressed in the name of the French people. Additionally, they said that the cause of the Algerian people, who contribute in a decisive fashion to ruin the colonial system, is the just cause of all free men. For the 121, the war in Algeria was not a war of conquest, not a war of national defence (for the French), not a civil war, but was due principally to the army which was carrying out this 'criminal and absurd fight', at times acting openly and violently outside of any legality. The 121 were mainly composed of left-leaning historians, university professors, musicians, comedians and writers.[35] The support given by the *Manifeste* to insubordination and desertion was a public scandal, condemned by French public opinion, the government and all political parties, including the Communist party that had a different strategy. The impact of the *Manifeste* on the recruits was limited: altogether,

[34] Statement dated August 1959, summarized in the WCC *Brief* No. 3, October 1959.

[35] The text of the *Manifeste des 121* is found in *Le Monde diplomatique*, July–August 2001 p. 19, – see also 'Ceux qui ont fait la guerre à la guerre', Claude Liauzu in *La Guerre d'Algérie, 1954–2004, la fin de l'amnésie*, Mohammed Harbi and Benjamin Stora Eds. (Robert Laffont, Paris, 2004), pp. 161–170.

the number of army recruits who deserted during the Algerian war is estimated at 500, from a total number of about two million.

The Jeanson trial

The Jeanson network was started in 1955 by Francis Jeanson, a philosopher and journalist, with a small group of intellectuals, workers, priests, artists, university professors, called the 'suitcase bearers' (*les porteurs de valise*).[36] Almost all joined the network on an individual basis, not as members of any political party, in a common effort to give practical, concrete support to the FLN. They gave transport, hid, hosted and helped FLN leaders in France to meet. They ensured their legal defence, they carried large amounts of cash, provided false identity papers. They also helped FLN members to cross borders, and to escape from jails.

The Jeanson trial, that started on 5 September 1960, was rightly called 'an impossible trial'. One intrinsic difficulty for the court was that the defendants were six Algerians and seventeen French persons from metropolitan France: the organizer of the network, Francis Jeanson, was in hiding. While the motivation and activities of the Algerians were clear – fighting for Algeria's independence, which they considered their own country –, the motivations of the French and their participation in FLN actions also varied greatly. It was difficult for the judges to treat them all alike, Algerian 'patriots'and French 'treators', and for the lawyers to have only one common defence.

A second, larger difficulty was that France was then in a transition period: General De Gaulle had come to power in 1958 as a defender of a French Algeria, but already in September 1959, had announced the principle of self-determination for Algeria which, in March 1961, led to negotiations with the FLN. In April 1961, De Gaulle alluded to a sovereign Algerian state. The Evian Accords granting independence to Algeria were signed in March 1962.

The army-supported revolt of the Europeans in Algeria against De Gaulle's independence moves (*l'Affaire des barricades*) started on 24 January 1960. The trial of their leaders by the same court hearing the Jeanson case,

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[36] The Jeanson Trial is related in detail in Jean-Marc Théolleyre, *Ces procès qui ébranlèrent la France* (Bernard Grasset, Paris, 1966), pp. 139–194, – see also 'Révolution-Cinquantenaire: les 'porteurs de valise', militants de l'ombre de la lutte de libération nationale', *Ambassade d'Algérie à Ottawa*, http://www.ambalgott.com/html/porteurs_de_valises.htm, 30 October 2004. '*L'affaire des barricades*' and their trial is in another chapter of Théolleyre's book, pp. 195–266: it is not part of the present book.

the Permanent Tribunal of the Armed Forces in Paris (albeit with a different composition) took place from 4 November 1960 to 2 March 1961.

The Tribunal thus first started judging those who were fighting for an independent Algeria, then moved on to judge those who were fighting to keep Algeria French, while the political/military independence process was slowly progressing. The burden for the judges proved both challenging and schizophrenic at times in a changing political environment, although they had to judge in accordance with the letter of the written law. In the Jeanson trial, the prosecutor accused the defendants of writing and circulating a clandestine bulletin, transporting funds and propaganda material for the FLN, renting of appartments for wanted Algerian activists, and generally damaging the external security of the state. The defence lawyers started with a long procedural battle, in order to prolong and discredit the trial and use it as a propaganda tool against the war in Algeria. Defence witnesses included, among others, the philosopher Jean-Paul Sartre, the writers André Malraux (and Minister of Culture) and François Mauriac. Two judges, accused of partiality, had to be replaced. Defence lawyers were temporarily suspended for insulting the judges. Paul Teitgen, former secretary general at the *Préfecture* in Algiers from August 1952 to 12 September 1957, testified that abuses and tortures were the reasons why he left his position. In a written statement, Jean-Paul Sartre assured the defendants of his total support. In part, he said that Algeria's independence was already acquired, but what was not yet assured was the future of democracy in France: 'the Algerian war has rotten this country'.

On 13 October 1960, fourteen defendants – including the six Algerian defendants, Jeanson and three other fugitives – were sentenced to ten years' imprisonment. Three others received sentences of five years, three years and eight months. Nine defendants were acquitted.

The Trial of the Barricades, or the trial of French Algeria, followed on 4 November 1960.[37] The judgment, rendered on 2 March 1961, included one death sentence issued *in absentia.* Six others received fixed-term sentences, also *in absentia*: ten, seven, five, three years, a suspended two year sentence. All twelve defendants who were present at the trial were acquitted.

Evolving national politics had influenced both trials.

[37] An armed revolt of French Algerians against De Gaulle's policies took place in Algiers from 24 January to 1 February 1960. Eight gendarmes and 11 rebels were killed, 141 were wounded.

The Algerian War Revisited

38 years after the Evian Accords and the independence of Algeria, memories of the Algerian war, its brutality and of the army's role in the repression came back to the French conscience, and opened way to confessions as yet untold, and new denials.

On 20 June 2000, *Le Monde* published the testimony of Louise Ighilahriz, an independentist militant during the war. Captured by the French army on 28 September 1957, the one woman (then age 20) in a nine-person commando, she was transferred, wounded, to the barracks of the 10th paratroopers' division of General Massu. She spent three months there in a room, continually naked, from end September to end December. She said that both General Jacques Massu and – then – Colonel Marcel Bigeard visited her several times. She was later saved by an unnamed military doctor who had her transferred to a jail. She did not speak under torture. Her story, entitled '*Algérienne*' was published in France in 2001.[38]

In an interview in *Le Monde* on 22 June 2000, both French officers responded. General Massu (then age 92) said that the principle of torture was admitted, although he now regretted it: 'torture is not indispensable in wartime . . . one could have done things differently'. He said that he never tortured anyone personally. He identified the military doctor as a Dr Richaud, chief medical officer in his division, then deceased. In 1971, Massu had admitted the use of torture in his book, *La Vraie Bataille d'Alger* (The Real Algiers Battle),[39] in which he assumed responsibility for a broad use of torture by his subordinates, allegedly justified by the need to stop terrorist attacks and avoid the death of innocent people. Massu believed that if France recognized the practice of torture and condemned it, it would be an 'advance'.

General Bigeard (then age 84) denied all the accusations of Ighilahriz, as a 'pack of lies'. However, an interview with General Paul Aussaresse, published in *Le Monde* on 23 November 2000 confirmed the systematic practice of torture and summary killings by the French army during the Algerian war. Aussaresse, then 82, a combatant with De Gaulle's Free French during World War II, a former commander in Indochina, and member of French secret

[38] Louisette Ighilahriz, as told to Anne Nivat, *Algérienne* (Fayard/Calmann.Lévy, Paris, 2001).

[39] Jacques Massu, *La Vraie Bataille d'Alger* (Ed. Plon, Paris, 1971).

services, came to Algiers early in 1957 at the request of Massu, to act as a liaison officer between the tenth paratroopers division and the police and justice services. He confirmed the practice of obtaining house arrests of suspects, many of whom were then killed: out of 24 000 such arrests, 3024 had disappeared. He said that government ministers as well as the Minister Resident were aware of the 'system' but that they did not give orders to apply it: this was a responsibility of the military. He said that when he arrived in Algeria, torture was already widely practiced. He had not tortured personally but did not have 'clean hands': he had personally killed 24 men. He was against any general repentance by the French state.

On 3 May 2001, Aussaresse's book, *Services spéciaux Algérie 1955–1957*, went further. He described in detail the many acts of torture and hundreds of summary executions committed by the military unit under his direction, and recognized that he, himself, had tortured suspects and killed at least two persons, the lawyer Ali Boumendjel and the FLN leader, Larbi Ben M'Hidi. He expressed no remorse for these actions, deemed patriotic and justified by him, as a necessary unofficial 'counter-terror' toward the destruction of the FLN. He confirmed that torture was tolerated even if not recommended by the government.[40]

These detailed memories contradicted and destroyed General Bigeard's denial.

The trial of General Aussaresse

General Paul Aussaresse was not tried for torture and summary killings. War crimes (breaches of Geneva Conventions) had been covered by the ten-year statute of limitation. Crimes against humanity (summary executions, kidnapping of persons followed by their disappearance, torture and other inhuman acts) are not subject to prescription. However, prior to the new Penal Code of 1994, crimes against humanity were only prosecuted if related to 'persons acting in the interests of the European Axis countries', before or during World War II, as stated in Article 6 (c) of the Nuremberg Charter. Crimes against humanity committed during the period 1954–1962, after World War II and before 1994, could therefore not be prosecuted by French justice. Furthermore, all offences committed during

[40] See *Le Monde*, 3 May 2001, with excerpts from Aussaresse's book *Services spéciaux Algérie 1955–1957* (Perrin, Paris, 2001).

operations carried out against the Algerian insurrection had been amnestied by the decrees of 22 March 1962 and the law of 31 July 1968.

The trial instituted against General Aussaresse was, therefore, limited to a complaint for the 'apology of war crimes' as contained in his book '*Services spéciaux Algérie 1955–1957*', not for his acts during the Algerian war, nor more generally for the conduct of colonial wars.

On 4 May 2001, three French human rights non-governmental organizations – the League of Human Rights (*Ligue des droits de l'homme – LDH*), the International Federation of Human Rights (*Fédération internationale des droits de l'homme, FIDH*) and the Movement against racism and for friendship between peoples (*Mouvement contre le racisme et pour l'amitié entre les peuples, MRAP*) – introduced a complaint before a Paris civil court (not a criminal court) against Aussaresse's two publishers, Perrin and Plon, for apology of war crimes, and against Aussaresse himself for complicity of apology of war crimes. During the three days' trial (26–28 November 2001), Aussaresse maintained his position and his acts, with the support of several other military colleagues. Witnesses for the prosecution included Jacques de Bollardière's widow and Henri Alleg. The prosecutor requested a fine of 100 000 francs from each of the defendants.

On 25 January 2002, the Court pronounced a sentence of €15 000 fine against each of the two publishers for apology of war crimes, and €7500 against Aussaresse for complicity of apology of war crimes. The Court recognized that the crimes committed in Algeria, although outlawed, appeared to have been known and tolerated by the highest military and political authorities of the French state, never punished and amnestied for more than 30 years. This was an amazing statement by a French court, after so many years of political, military, and judiciary denial. It found that several parts of the book justified acts of torture as unavoidable, unacceptable in ordinary times, and becoming legitimate in cases when urgency required it. By expressly legitimizing the use of torture and other abuses, and permitting the immediate physical elimination of the enemy, the book gave value to a general apology of war crimes. It thus took away 'the moral reprobation inherent to these acts condemned without reserve by the international community'.[41]

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[41] See 'Condamnation du général Aussaresse pour "apologie de crimes de guerre"', Section de Toulon de la Ligue des droits de l'homme, et *Communiqué* de la LDH, 25 January 2002, http://www.ldh-toulon.net/article.php3?id_article=359, accessed on 26 April 2005.

On 25 April 2003, the Appeal Court of Paris confirmed the judgment of the trial Court. During the hearing in February, the prosecutor had supported the initial sentence, considering that the author had not only described acts of torture and executions but had also justified them, made them ordinary and 'had re-opened the wounds of a painful memory'. Aussaresse's lawyer pleaded for an acquittal on the grounds of freedom of expression. Aussaresse himself confirmed that he claimed responsibility for all acts committed in Algeria. Torture and executions were carried out within the context of the fight against terrorism, he admitted, in order to end the blind attacks of the FLN against civilians. After the trial, he told journalists that he had neither remorse nor regret.[42]

On 7 December 2004, the Court of Cassation rejected Aussaresse's request for revision of his sentence, making the sentence of the Appeal Court final. The Court found that freedom of information, foundation of the freedom of expression, does not imply adding to the facts comments justifying acts contrary to human dignity universally reproved'. The Court emphasized that 'what was in question was not the revelation of acts of torture and summary executions, but their glorification.'

The League of Human Rights hailed the Court's decision, but regretted that French courts had not judged the facts themselves and those responsible for them.[43]

The trials of General Schmitt

On 10 October 2003, General Maurice Schmitt was condemned by a court in Paris for defaming the authors of two books of testimonies on the Algerian war. General Schmitt, then 74, had fought in Indochina and had been detained for four months in Vietminh prisoners' camps, after having been captured in Dien Bien Phu in May 1954. In July 1957, he was lieutenant during the battle of Algiers, – colonel in 1974 and general in 1979. From 1987 to 1991, he was Chief of Staff of the French Armed Forces, the most senior military commander in the country at that time.

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[42] 'Condamnation confirmée pour le général Aussaresse' http://fr.news.yahoo.com/o30425/85/35y06.html, 25 April 2003.

[43] 'La condamnation du général Aussaresse est maintenant définitive', *Communiqué*, Section de Toulon de la Ligue des droits de l'homme, 11 décembre 2004, http://www.ldh-toulon.net/ article.php3?id_article=411, accessed on 26 April 2005. On 16 June 2005, Aussaresse was excluded from the Legion of Honour: *Le Monde*, 21 June 2005.

On 27 November 2001, he had testified in favour of General Aussaresse. He had said that the FLN members, beyond being terrorists, were first torturers. He admitted that torture took place in Algeria, but justified it as the legitimate defence of a population in mortal danger. He suggested that Louisette Ighilahriz' story of rape and torture was a lie: it was a 'set-up' story.

During a television programme on the France 3 state channel on 6 March 2002, Schmitt qualified Ighilahriz' book *L'Algérienne* as a pack of fabrications and lies. He also said, in a film of Patrick Rotman shown on television on the France 2 state channel on 6 March 2002, that Henri Pouillot, the author of a book *La Villa Susini*[44] which described acts of torture carried out in that villa, was a criminal and a liar.

Both authors had introduced a complaint for defamation against Schmitt. During the hearings, Schmitt denied all acts of torture reported by Pouillot and the torture to which Ighilahriz had allegedly been subjected. On 10 October 2003, the Court condemned Schmitt for defamation and sentenced him to pay a symbolic one euro to Ighilahriz, the text of the judgment to be published in three newspapers. He was sentenced to pay €1500 to Pouillot for damage. An Appeal Court confirmed the condemnation of Schmitt in the Pouillot case on 15 October 2004, but reduced the indemnity to €500, in view of inaccuracies in Pouillot's dates of service in Algeria. On 3 November 2005, another Appeal Court dismissed the case of Ighilahriz for defamation. The Court (oddly) gave Schmitt the excuse of 'good faith' without taking position as to the accuracy, or not, of Ighilahriz' story.[45]

Recent political response

International human rights non-governmental organizations pressed the French government to take legal action following the revelations in *Le Monde* in November 2000.

On 24 November 2000, Amnesty International (AI) called on the French authorities to prosecute those responsible for war crimes and crimes against humanity, criticizing the lack of political will of successive French

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[44] Henri Pouillot, *La Villa Susini, Torture en Algérie, Un appelé parle, juin 1961-mars 1962* (Ed. Tiresias, Paris, 2001).

[45] 'Le général Schmitt et la torture', Section de Toulon de la Ligue des droits de l'homme, http://www.ldh-toulon.net/imprimer.php3?id_article=210, 21 March 2005, – 'Torture: nouvelle condamnation du général Schmitt', ibid. http://www.ldh-toulon.net/article.php3?id_article=358, 18 October 2005. *Le Monde*, 5 November 2005.

governments.[46] On 14 May 2001, Human Rights Watch (HRW) wrote a letter to President Jacques Chirac calling on him to initiate an independent investigation into General Aussaresse's allegations that the French government ordered or tolerated the use of torture and summary executions against supporters of Algerian independence in the mid-1950s. HRW also called on the President to initiate criminal proceedings against the General. If General Aussaresse's allegations were true, HRW said that the French government could be implicated for violations of Common Article 3 of the 1949 Geneva Conventions, ratified by France in 1951. The alleged acts would also appear to constitute crimes against humanity, subject to universal jurisdiction, allowing no immunity from prosecution or amnesty. Any person found to have committed serious violations of humanitarian law should be brought to justice. HRW added that the importance of Aussaresse's atrocities demanded more than President Chirac's declaration that he was 'horrified by General Aussaresse's statement' and asked that disciplinary sanctions be imposed and that he be suspended from the *Légion d'Honneur*.

Other political reactions were not supportive of the proposals made by Amnesty International and HRW, except for the Communist Party, that called for a parliamentary commission to investigate torture during the Algerian war, to propose repentance by France and compensation for its victims.

On 4 November 2000, Prime Minister Lionel Jospin rejected any act of repentance but seemed prepared to associate himself to 'a duty of memory' in support of the call by twelve intellectuals for the recognition and the condemnation of the use of torture in Algeria: this would best be the work of historians. On 25 November, he rejected the Communist Party's request for a parliamentary commission. Jospin said that the practice of torture did not require a collective repentance nor judiciary procedures, but a search for the truth: 'Why should hundreds of thousands of young soldiers drafted [for service in Algeria] who were placed in very difficult conditions in the conflict repent' while they helped put down the putsch in Algeria. He used similar arguments in the National Assembly on 28 November, implicitly ignoring the responsibility, not of young soldiers, but of those actually responsible in high political and military positions.

On 14 December 2000, in a television interview, President Jacques Chirac rejected the call for an official apology concerning the practice of

[46] Amnesty International, *Press Communiqué 224*, 24 November 2000, Index: EUR 21/007/2000, 'France/Algérie: Les crimes contre l'humanité sont imprescriptibles'.

torture by French soldiers during the Algerian war, as it might 'revive the wounds of the past'. He blamed both the French army and the FLN for atrocities which should be condemned, but they were 'only committed by minorities'. He advised to 'take time and let history do its work'.[47]

On 26 April 2001, an administrative circular liberalized the access to archives related to the Algerian war.

On 29 June 2001, Jean-Pierre Brard (Communist Party) submitted a draft resolution (no. 3215) to the National Assembly's Commission of Constitutional Laws, Legislation and General Administration of the Republic proposing the creation of a commission of inquiry 'on the importance and responsibility of arbitrary arrests, illegal detention, acts of torture and summary executions attributed to the French authorities, during the Algerian war'. The proposed resolution was rejected by the Commission on 10 October 2001. One argument for the rejection was that 'the function of Parliament is to make laws and control the government's action: it is not to establish an official reading of [French] history'.[48] In fact, the Parliament should have established the proposed commission of inquiry, in order to assess the government action during the Algerian war: 'government action' may include past actions, particularly so if they have been hidden and distorted by the authorities for decades.

The National Assembly adopted a law on 23 February 2005 on the 'Gratefulness of the nation and national contribution in favour of repatriated French persons', authorizing compensation for the *harkis*, those Algerians who fought with the French against the FLN and settled in France. Its Article 4 requires that school programmes 'recognize the positive role of French presence overseas, mainly in North Africa.'

On 13 April, French historians issued a petition asking for the abolition of this law which imposes an official history contrary to school neutrality and to the respect of freedom of thought. By retaining only the 'positive role' of colonisation, they said that the law imposes an official lie on crimes,

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[47] 'La torture pendant la guerre d'Algérie/1954–1962, 40 ans après, l'exigence de vérité, 26 April 2001 http://www.aidh.org/faits_documents /algerie/verite.html accessed on 6 May 2005.

[48] Assemblée nationale Doc. No. 3313, 10 October 2001, 'Rapport . . . sur la proposition de résolution (no. 3215) de M. Jean-Pierre Brard visant à la création d'une commission d'enquête . . . par Mme Nicole Feidt, Députée.

massacres, slavery and racism. Thousands of university professors and school teachers signed the petition.[49]

The French Ambassador to Algeria recognized on 27 February 2005 that the Sétif massacres were 'an inexcusable tragedy'. French troops and settlers killed between 6 000 Algerians – a French estimate – and 45 000 Algerians – an Algerian estimate. However, the Minister of Foreign Affairs, Michel Barnier, during the Algerian ceremony of remembrance on 8 May, only promoted research by historians of France and Algeria on the 'most painful pages for our two countries'. There was no acknowledgement of any French responsibility for the massacres.[50]

Death squadrons: the French school

A film by Marie-Monique Robin, *Escadrons de la mort: l'école française* (Death squadrons: the French school) was shown in France on a private television channel, Canal+, on 1 September 2003. It was honoured by a prize for the 'best political documentary of the year', given to the author in the French Senate. The film documents the cooperation given by a few French military officers with Algerian experience to the dictatorial regime of General Videla in Argentina, as well as in Chile and Brazil between 1973 and 1984. The theory and practice of 'Modern Warfare'[51] were taught in Argentina by French officers, where a permanent French military mission was set up from 1960 until the end of the 1970s. General Aussaresse gave lectures in Fort Bragg, the United States Army Training Center in North Carolina (USA) on his experiences during the Battle of Algiers, including the use of torture, and was French military attaché in Brazil from 1973 to 1975.

On 10 September 2003, three parliamentarians submitted a draft resolution (No. 1060) for the creation of a commission of inquiry on the role of France in the support to the military regimes of Latin America between 1973 and 1984. The Commission was to assess the truth of allegations on the role of French military staff in Latin America during these years, – to expose the responsibility of the French authorities in this matter which severely harms the image of France, – and to study, in particular, the role of the Ministry of the Armies, and the implementation of the agreements of

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[49] *Libération*, 26–27 March 2005, – *Le Monde*, 15 April 2005. The petition was on http://www.hns-info.net/article.php3?id_article=3358, accessed on 14 February 2005.

[50] *Le Figaro*, 9 May 2005.

[51] See Conclusion in Chapter 3.

military cooperation between France, Chile, Brazil and Argentina during this period. The Chilean Senate had expressed the wish that such a commission be created in France, while a similar one would be created in Chile. The French resolution was rejected by the Commission of Foreign Affairs of the National Assembly on 16 December 2003.[52]

Conclusion

Historical research and findings on the French side of the Algerian war tragedy (the present review focuses on France and leaves the Algerian side to others) has advanced considerably over the last few years. Archives have been more open and young, erudite researchers[53] have added new historical data to the pamphlets and memoirs of the first witnesses, participants of the war and to the earlier research of historians. A few observations can be made from the summary given in this Chapter.

First, it is now well established that the French army, with the explicit or implicit support or encouragement of the political establishment in Paris and Algiers, committed acts of torture and summary executions against Algerians.

Secondly, these acts are deemed to constitute violations of the Common Article 3 of the Geneva Conventions, as well as crimes against humanity. The argument that the enemy also carried out atrocities is not a justification for the army of a 'civilized country' to use the same methods, particularly when it has committed itself not to do so by ratifying the Geneva Conventions in 1951.

Thirdly, French courts have considered that the actions committed between 1954 and 1962 were covered by either the ten-year statute of limitations of war crimes and/or by amnesties, and thus could not be prosecuted. So far, no French court has allowed criminal prosecutions against such acts to proceed, even though crimes against humanity should not be subject to statutory limitations.

The French people seem to have been in a state of amnesia about the Algerian war until the public revelations of generals in 2000, which then triggered other testimonies, describing the reality of the war, denying or acknowledging that the military misbehaved, stressing the atrocities committed by the FLN.

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[52] Resolution No. 1060 was proposed by Noël Mamère, Martine Billard and Yves Cochet on 10 September 2003. See http://www.assembleenationale.fr/12/propositions/pion1060.asp

[53] For instance, see the Bibliography in Thénault (2004a).

During the war, reporting on events in Algeria, called '*pacification*' (peace-making), not war, was subject to censorship stressing the positive and hiding the black side. Periodicals or books telling unpleasant facts were banned, their stocks destroyed. A few authors were prosecuted.

For most French people, Algeria was France and it was inconceivable that it would be separated from the home country. Rebels had to be fought, to allow the good work of French civilization and assimilation to proceed. All should support 'our troops'. Those who protested against the war or against torture were unpatriotic, accused of demoralizing the army in wartime and defiling their country's name. They were either Communists whose allegiance was to Moscow, or a few intellectuals, professors, journalists, or Christians far from reality.

Europeans in Algeria wanted to maintain their privileged position: they resisted all attempts from the French governments to grant a better or equal status to the Moslem population.

French military officers had a revenge to take over France's defeat against the Germans in 1940 and the loss of Indochina in 1954. They thought that they knew how to fight an insurrection, but misunderstood the strength of a national uprising (both in Indochina and in Algeria) and the rebels' successful strategy of provoking French repression in order to enlist and expand more popular support for their cause.

Young military conscripts from France to fight in Algeria joined the army reluctantly but were soon indoctrinated and reacted against the killing of their friends and the atrocities committed by the rebels. They obeyed orders, carried out collective reprisals, summary executions, and assisted the officers in acts of torture. When they came home, they kept their memories to themselves, either because of the war stresses and horrors, or because friends and families were not interested, or because they wanted to get on with their life and to forget Algeria, or for some of them, feeling ashamed for what they had done. Experts estimate, in 2005, that 350 000 French military personnel having served in Algeria suffer from psychological problems, such as anxiety crises, insomnia, repeated nightmares.[54]

In 1962, in spite of the exodus of most of the Europeans from Algeria to France, the French people were generally grateful to General De Gaulle for having ended the war. De Gaulle could then tackle more important diplomatic tasks, and the French could stop worrying about decolonisation and

[54] *Le Monde*, 28 December 2000.

focus on improving their lives. They did not want to delve into the abuses and horrors of the Algerian war, although these had been revealed by a number of writers during and after the war.

When General Aussaresse came out with his frank testimonies, vociferous denial came from many sources in various modes. Generals Bigeard and Schmitt denied it all: the army was above suspicion, those who say that the army committed war crimes were blackening its name and that of France. Then, General Massu, who had earlier denied what he had witnessed personally, recognized that torture had been a generalized practice in Algeria, and had become an institution with the establishment of an inter-army coordination center, and operational 'protection' units (*dispositifs opérationnels de protection, DOP*).

President Chirac and Prime Minister Jospin have supported the 'duty of memory', but strictly reserved to historians, not open to justice. They still used the argument also used to cover up Vichy crimes during the Occupation, of 'not reviving the wounds of the past', and suggested that the use of torture was carried out only by a minority of the military.

Then, it seemed that the French people opened themselves to the facts and wanted the truth. According to opinion polls in 2000, 59 per cent felt that Algeria's independence had been, all considered, a good thing for France, and 60 percent recognized that France had practised torture during the Algerian war, a significant evolution from the 1960s to the end of the twentieth century.[55]

French colonization is (almost) dead, with the possible exception of actual or potential claims for independence by New Caledonia, Guadeloupe and Martinique. The potential for extensive warfare in those territories is most unlikely.

The French army who fought in Algeria in 1954–1962 is not the present French army. The generals, former lieutenants and colonels of the war, are retired or dead. The doctrine of Modern Warfare was set aside many years ago.

There is still a 'duty of memory', to establish and communicate historical facts about the Algerian period, as well as for other controversial periods of French history. School history books need to be updated regularly on the basis of new findings from historical research.

Some of the weaknesses in the French institutions need review.

Governments still seem to overly protect the army, by accepting too many of its claims and rejecting any independent investigations of its past actions.

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[55] *Le Monde*, 29 November 2000.

The army is subject to the authority of the governmental authorities, not the reverse. The army itself should not fear the truth: its honour is not to hide or deny unpleasant past realities, but to accept a fair review and assessment, to ensure that past excesses and violations will not be repeated, and that new violations are identified and punished.

The new French army has re-assessed its objectives and methods, following decolonization and the end of the Cold War. Its operations now include humanitarian, peace-keeping and peace-making operations at the European, NATO and United Nations levels, in addition to potential traditional war operations. Two Directives of 15 April 1991 and 4 January 2000 have reinforced the information and training of military personnel in international humanitarian law, the Geneva and The Hague Conventions. The upper echelons of the officers' corps attend each year the training sessions organized by the International Humanitarian Law Institute in San Remo. France has ratified the Rome Statute of the International Criminal Court (see Chapter 12). Article 8 of a law adopted by the Parliament on 15 March 2005 on the 'General status of military staff' (*Loi portant statut général des militaires*) prescribes that the military must obey orders of their superiors, but that 'it cannot be ordered and they cannot perform acts which are contrary to laws, customs of war and international conventions'.[56]

The excessive dependence of the Parliament on the executive needs to be corrected. This may not require another Constitution, but the assertion by more courageous and independent parliamentarians of their rights: the Parliament's role, including the party in power, is not to follow blindly the executive and approve all its initiatives and decisions. It is to determine its own positions, and create independent investigation commissions as may be required, without shying away from politically or militarily sensitive issues. The National Assembly's record in this area to date is poor.

The third power, justice, long dependent on the executive, has started to claim its autonomy by allowing the prosecution of senior French political and economic personalities. Its record during the Algerian war was totally inadequate: it wrongly considered that its duty was to support the war, not

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[56] *L'exercice du métier des armes dans l'armée de terre, Fondements et principles*, January 1999, – *Loi portant statut général des militaires, adoptée par le Parlement le 15 mars 2005,* – *Manuel de droit des conflits armés,* Ministère de la Défense, – see also *Déclaration de M. Jacques Floch, secrétaire d'Etat à la défense*, 27 November 2001: http://discours-publics.ladocumentationfrancaise.fr/rechlogos/servlet/GetFiche?fiche=01300, accessed on 8 May 2005.

to render fair justice. These inadequacies are a good ground for analysis and assessment by the French Magistrates' School. The Magistrates' Union (*Syndicat de la Magistrature*) should be complimented for its work in monitoring and bolstering the independence of the French judiciary. Most of the media have been complacent during the Algerian war: they have served the short-term interests of the government, not the longer interests of the French people. There is a need to encourage the development of more responsible investigative journalism, in the press, radio and television, and the emerging internet.

Paradoxically, the 'honour' of France was upheld by those, in a small minority, who wanted the truth to be told, even though it appeared damaging to those in power or in action during the war.

Present French leaders need to gather their strength and recognize that the past actually happened. They also need to promote the necessary internal reforms to make France a better and more accountable democracy.

PART II

VICHY FRANCE
THE LATE RECKONING

(1940–2004)

The Vichy government of Marshall Philippe Pétain ruled France from June 1940 until August 1944. It adopted anti-semitic legislation, organized the persecution of Jews and assisted the Germans in the deportation of French and foreign Jews residing in France to extermination camps.

While the Vichy leaders, Marshall Pétain and Pierre Laval were judged shortly after France's Liberation from the German occupation, and many others were judged and sentenced for their collaboration with the Germans, treated as 'treason', their role in the persecution and deportation of the Jews was hardly mentioned in charges and judgments. The first and only senior Vichy official formally charged with 'complicity with crimes against humanity' (facilitating the deportation of Jews from the Bordeaux region to Germany in 1942–1944) and tried, Maurice Papon, was sentenced to ten years' jail only in 1998, more than 54 years after the acts were committed.

Why this long delay? Why has it taken so many years for the French governments and population to recognize Vichy France's responsibility in participating with the Nazis in their policy of exclusion and extermination of the Jews, and to identify and punish those senior French officials mainly responsible for implementing French anti-semitic policy?

Chapter 6 recalls the key elements of Vichy France's regime, legislation and justice, including a few significant trials carried out during this period.

Chapter 7 reviews the 'Gaullist myth' of a victorious France, following the Liberation of France from the Germans, considering that Vichy France and its actions could not be blamed on the 'real' France. The myth, and other factors, served to hide and long delay the fact that Vichy had initiated its own antisemitic policies and had willingly and efficiently collaborated with the German persecution and, later, extermination of the French and foreign Jews resident in France. The Chapter also describes post-Liberation legislation and court system, the purges of those who had collaborated with the Germans. Three exemplary trials are reviewed: the trial of Pierre Pucheu, a former Vichy Minister, in Algiers before the Liberation of France, and the two major trials of Marshall Philippe Pétain and of Pierre Laval.

In Chapter 8, the indictment of René Bousquet, the trials of Touvier and of Maurice Papon, the prosecutions for crimes against humanity, show that, at long last, France had come to terms with the dark pages of its history: The Gaullist myth was finally destroyed.

Chapter 6

Vichy's Regime, Legislation and Justice

On 17 June 1940, Marshall Philippe Pétain, appointed the day before by Albert Lebrun, President of the Republic, as head of the government,[1] gave a radio speech heard by millions of French people, including hundreds of thousands who had left their homes in the north of France to flee the German army, and the demoralized, scattered French military forces. He said, in part:

'. . . Sure of the affection of our admirable army who was fighting with heroism . . . against a more numerous enemy, . . . I offer France the gift of my person to alleviate its misfortune . . .' But the key part of his message was that he had asked the enemy to end the hostilities, 'between soldiers . . . after the battle and in honour'. The armistice was signed on 22 June in Rethondes in the train carriage where the defeated Germans had signed the armistice with the Allies on 11 November 1918.

The sudden defeat of the self-proclaimed 'most powerful army in the world' acknowledged by Pétain was a shock and a humiliation to many. Others felt relieved: fighting will stop, the soldiers will be back at home, life

[1] Pétain replaced Paul Reynaud, who had resigned, as President of the Council of Ministers, the term used during the Third and Fourth Republics, then replaced by the term 'Prime Minister' during the Fifth Republic: the latter one is used in this book for all periods. The text of the 17 June 1940 speech is in http://www.herodote.net/histoire06160.htm

will become normal again. They were all let down by the conditions of the armistice and by the long years under German occupation.

France and the UK had declared war on Germany on 3 September 1939, following Hitler's attack against Poland on 1st September.

Denmark and Norway were invaded on 8 April 1940. The Dutch army surrendered on 14 May, Belgium capitulated on 28 May. The French and the British armies were defeated in a six-week period starting on 10 May. Contrary to Pétain's assertion, the Germans did not have overall numerical superiority in tanks and troops, but had an advantage in aircraft. However, the decisive factor in the German victory was their coordinated use of motorized ground troops, mobile tanks with air support and their morale. The French government had relied on a defensive strategy, the protection of the Maginot line, a stretch of fortified defenses along the French-German frontier, which were circumvented by the Germans. The French population was not ready for a new war, only 20 years after World War I with its millions of casualties and destructions. The many pacifists opposed war, supported the Munich Agreements[2] and thought that an accommodation could be found with Hitler. Others wanted to oppose the Nazi aggressions. Political and military leaders were divided over these issues. The French Third Republic was discredited. Its politicians were thought weak, divided, incapable of taking strong action, some of them corrupt. There was a large current hostile to parliamentary democracy, deemed decadent; parties or individuals on the right or extreme right admired Mussolini's and Hitler's regimes. They wanted to replace the Republic with a strong regime on the lines of the Fascist or Nazi regimes.

When the national military disaster struck and shattered France's spirits, when the French military seemed unable to counter the German invasion, when roads were cluttered with military personnel and millions of French and Belgian civilians fleeing the Germans from their homes, the only option seemed to come to terms with the Germans. The political establishment then turned to Pétain as the 'saviour', the prestigious marshall who won the Verdun battle during World War I, but was also known as a humane commander, who, unlike others, did not expose his soldiers' lives unnecessarily. Not a political leader, he was close to the right, with conservative and

[2] During a conference held in Munich in 29–30 September 1938 between Daladier (France), Chamberlain (UK), Mussolini (Italy) and Hitler (Germany), the French and the British agreed to Hitler's annexation of part of Czechoslovakia (the Sudeten region).

anti-communist views. He exploited his past military success: he was an old soldier, not a conniving politician, a grand-fatherly protecting figure.

Leading to Vichy: The Political Process

Paul Reynaud (centrist-right) replaced Edouard Daladier (moderate socialist) as Prime Minister on 21 March 1940. Reynaud, an outspoken opponent to Hitler, was considered more dynamic. The successful German offensive started on 10 May.

On 18 May, Reynaud appointed Pétain (then 84) Vice-Prime Minister. Pétain had been Minister of War in 1934, then Ambassador in Spain in 1939. On 19 May, Reynaud appointed General Maxime Weygand as Commander-in-chief of the Allied Forces in replacement of the ineffective General Maurice Gustave Gamelin. By the end of May, both Pétain and Weygand became convinced that France had to ask for an armistice, an agreement between the German and the French governments leading to a temporary cease-fire, pending the conclusion of a peace treaty.

Reynaud's other option was to call for a cease-fire or a surrender, while the government would move to North Africa and continue the war, with its airforce, navy and its colonial Empire. However, Pétain was determined to stay in France, to share French people's suffering and misery.

Paris was occupied in mid-June. The French government had left Paris for Tours, then Bordeaux early June.

On 16 June, Churchill proposed to Reynaud a total union between France and the UK: one Parliament, one government, one country. The majority of ministers in the French government, who favoured an armistice, rejected this historical proposal.

Reynaud resigned and proposed to the President of the Republic to replace him by the personality most capable to ask Hitler his conditions for an armistice and a peace treaty. Appointed Prime Minister by Lebrun, Pétain formed his government on 17 June.

The armistice was signed on 22 June: its conditions were drastic.[3] France was divided into two zones, occupied and non-occupied. Germany would

[3] English text of the Franco-German Armistice is in 'The Avalon project at Yale Law School', http://www.yale.edu/lawweb/avalon/wwii/frgearm.htm

control northern and western France – north of a line Geneva-Tours-Bordeaux, including Paris and the entire Atlantic coast until Spain, the latter being a 'forbidden' area within the occupied zone. In the occupied zone, the German Reich could exercise all rights of an occupied power and the French government had to support all German regulations which were to be carried out with the aid of the French administration. The remaining two-fifths of the country would be administered by the French government with its capital in Vichy. The French army was reduced to 100 000 men and French prisoners of war would remain in captivity until the end of the war and a peace treaty. France had to pay the occupation costs of the German troops, war material would be secured under German control. The French fleet would be collected in designated ports and disarmed, except for those units released for the protection of French interests in its colonial empire. France would have to surrender upon demand all Germans named by the German government in France and in French colonial possessions: the asylum protection of German political and other refugees was thus suppressed. Not included in the armistice was the *de facto* annexation of Alsace-Lorraine to Germany in August 1940.

Some 90 000 French soldiers died during the brief 1939–1940 campaign, and nearly two million French troops were taken prisoner and retained in prisoners' camps in Germany until the end of the war.

On 10 July 1940, the Chamber of Deputies and the Senate of the Third Republic met in Vichy and voted a 'constitutional law' which gave 'every power to the Government of the Republic, under the authority and signature of Marshall Pétain, in order to promulgate by one or several acts a new Constitution of the French State'. The new Constitution would 'guarantee the rights of labour, family and homeland' and would be 'ratified by the Nation and applied by the assemblies which it would create'. The law was adopted by 569 for, 80 votes against and 17 abstentions (184 members were not present).

In effect, the law gave all constitutional, legislative, executive and judiciary powers to one man, Pétain, and his government, powers which he used fully.

Under the still valid constitutional law of 25 February 1875[4] relative to the organization of the public powers, a revision of the constitutional laws could be initiated only by the two Chambers, or at the request of the

[4] Texts of the 'Constitution de la Troisiéme République, 24–25 février, 16 juillet 1875', are in http://ecjs.stlouis.stemarie.chez.tiscali.fr/constitution1875.htm

President of the Republic, – both Chambers then meet as a National Assembly to agree on a revision.

The 'constitutional law' of 10 July 1940 violated these prescriptions. Also violated was Article 2 of the still valid constitutional law of 14 August 1884, which stated: 'The republican form of the government cannot be the object of a revision proposal'.

The law of 10 July may therefore be deemed illegal and invalid, but it was enforced until the Liberation of France in 1944.

The Vichy Regime

The Vichy regime first established a constitutional framework, the Constitutional Acts, as an authoritarian regime based on the name and initial prestige of one man, Pétain, which was completed and reinforced by laws, regulations and decisions. Pétain announced his decisions or assessments in widely heard radio speeches. The regime's viewpoint was expressed in a strictly controlled, censured press.

Constitutional acts

Pétain issued 12 'constitutional acts' in 1940, 1941 and 1942.[5] These set up an authoritarian political regime which replaced the structure of the Constitution of 1875 and abolished most of its provisions. The parliamentary assemblies of the Third Republic, Chamber of Deputies and Senate were not abolished but suspended: in effect, they were not called upon to play any role during Pétain's regime.[6] Albert Lebrun, The President of the Republic ceased to exert his constitutional powers: overwhelmed by the military and political events, he gave way without protest to the new Chief of the French State. The 'French Republic' was changed into a 'French State'. Its traditional motto '*Liberté, égalité, fraternité*' was changed to '*Travail, famille, patrie*', labour, family, homeland. Pétain's constitutional

[5] The Constitutional Acts are found in 'Le gouvernment de Vichy' http://mjp.univ-perp.fr/France/co1940.htm

[6] Parliament members continued to receive their salaries until 30 September 1941 when Pétain stopped payments: Pétain's Address to the French People, 12 August 1941, *New York Times*, 13 Aug. 1941. http://www.ibiblio.org/pha/timeline/410812awp.html

acts conveniently abrogated all basic elements of the 1875 Constitution incompatible with these acts.

The constitutional law of 10 July 1940 authorized Pétain to issue one or several constitutional acts as a basis for a new Constitution of the French State. The 12 constitutional acts decreed by Pétain were not a basis for a new Constitution, they set up a provisional authoritarian regime. A draft Constitution was separately elaborated by the government as from 1941 and only signed by Pétain on 30 January 1944: it was never submitted nor ratified by 'the Nation'.

The Vichy Constitutional Acts were promulgated by Pétain in the royal format of 'We, Marshall of France, Chief of the French State, in consideration of the Constitutional Law of July 10, 1940, Decree . . .'

By **Constitutional Act No. 1** (11 July 1940)**,** Pétain assumed the functions of Chief of the French State and abrogated Article 2 of the Constitutional Law of 25 February 1875, under which the President of the Republic was elected by the Senate and the Chamber of Deputies for seven years.

Constitutional Act No. 2 (11 July 1940) defined the authority of the Chief of the French State (11 July 1940). Pétain gave himself unlimited powers: the Chief of State has full governmental powers: he appoints and revokes ministers and state secretaries, who are responsible only to him. He exercises legislative power in the Council of Ministers 'until the formation of the new Assemblies': however, these Assemblies were never constituted. He promulgates laws and assures their implementation. He makes appointments to all civil and military posts, has full powers over the armed forces, has the right to grant pardon and amnesty, he negotiates and ratify treaties.

Constitutional Act No. 3 (11 July 1940) maintained the Senate and Chamber of Deputies until the Assemblies to be created by a new Constitution were set up.

Constitutional Act No. 5 (30 July 1940) established a Supreme Court of Justice, which replaced the Senate as Court of Justice in the 1875 Constitution which was to judge the President of the Republic, ministers or any person accused of attacks against the security of the State.

Constitutional Act No. 7 (27 January 1941) required the state secretaries, high dignitaries, and high officials of the State to take oath before the Chief of State: 'They shall swear allegiance to his person and engage themselves to perform their duties for the welfare of the state in accordance with rules of honour and of probity' (Art. 1).

Article 2 made these officials personally responsible to the Chief of State. This responsibility applied to their person and their property.

Article 3 of this Act enabled the Chief of State to decide and apply the following sanctions: payment of reparation and fines, loss of political rights, forced home residence under supervision, administrative internment, detention in a fortress, – to senior officials who had 'betrayed the duties of his functions', following an inquiry.

Article 4 allowed the prosecution under normal judicial procedures for crimes or offences which may have been committed by the same persons. Article 5 provided that Articles 3 and 4 would apply to former ministers, high dignitaries, and high officials officials who have exercised their duties within the past ten years: this allowed the trial at Riom of several ministers of the Third Republic (see below). This provision violated a basic principle of criminal law, that of non-retroactivity of laws.

It also violated two Articles of the Constitutional Law of 16 July 1875. Article 12, which states that: '. . . Ministers may be prosecuted by the Chamber of Deputies for crimes committed in the exercise of their functions. In this case, they are judged by the Senate . . . constituted as a Court of Justice by a decree of the President of the Republic, taken in the Council of Ministers, to judge any person accused of attack against the security of the State . . .' Article 13, which prescribed that 'No member of one or the other Chamber may be prosecuted or investigated on the occasion of opinions [expressed] or votes cast by him in the exercise of his functions'.

Constitutional Act No. 10 (4 October 1941) extended the provisions of Constitutional Act No. 7 to require all civil servants to swear allegiance to the Chief of State.

Other **Constitutional Acts** designated in turn Pierre Laval, Admiral François Darlan, then again Pierre Laval as Pétain's successors.

Constitutional Act No. 12 (17 November 1942) and **No. 12 bis** (26 November 1942) delegated legislative power to the chief of the government.

A law of 24 January 1941 created a National Council as a consultative assembly. Its members were not elected, but appointed by the government for two years among social-economic and religious circles.[7] Its main task was

[7] Members of the National Council included former politicians (three ministers of the Third Republic, a few senators and deputies), a physician, a pianist, two members of the French Academy, presidents of Chambers of Commerce, an assistant to the Paris Archbishop and Marc Boegner, president of the French Protestant Federation.

to draft the main basic provisions of the future new Constitution which was never concluded.

The nature of the regime

The regime was first a regime created under foreign occupation (of half of the country until 1942, when all of France was occupied by the German authorities and army) which pretended that it still had sovereignty and control over the country's policies, state administration and police. Such an ambition was not credible in the occupied zone, and was no longer tenable after November 1942. Vichy's insistence on maintaining some autonomy had the effect that Vichy took over unpleasant tasks which the German authorities were not able to assume as efficiently, such as new laws limiting individual freedoms, maintenance of public order, implementation of the Nazi policies of the extermination of the French and foreign Jews by internment in French camps and ensuring transport to Drancy – a transit camp near Paris – before the internees were deported to extermination camps.

At the same time, the Vichy regime was a French initiative which was inspired by French rightist and conservative concepts and views. The Germans had no role to play in the creation of the Vichy regime – the law of 10 July 1940 – nor in the initial constitutional acts. They did not compel Pétain and his advisers and assistants to create a quasi-dictatorship. They wanted financial and material resources from France, later they demanded manpower for their factories (the compulsory work service – *Service du travail obligatoire, STO*), and as of 1942, they demanded French assistance for the 'final solution'. Vichy initiated its own antisemitic laws without German pressure: they responded to one characteristic of the Vichy regime, its own antisemitism. But the regime had other targets: it was a reaction against the democratic and parliamentary regime of the Third Republic and socialism – major parliamentarians were interned and a few were prosecuted – the free-masons were excluded from public service, the communists[8] and the gaullists and other resistants were hounded, prosecuted and/or executed.

The regime was also a conservative reaction from 'excessive' freedoms towards 'real values', such as the countryside and the family, based on

[8] The French Communist Party started actively opposing the German occupation only when Germany invaded the USSR in June 1941.

Catholic and rightist beliefs. Pétain's National Revolution was to challenge France's evolution since the Revolution of 1789 towards representative democracy.

A myth was created: the defeat was caused by French decadence, a sinful, corrupt, godless and selfish France, it was caused by democracy and by pacifism. Economic liberalism, linked to *la juiverie internationale* (international jewry), was condemned as another cause of France's misfortune. Political parties and trade unions were dissolved. A corporatist system (state-controlled trade organizations) was set up on the Italian fascist model.

Another myth was that Pétain and De Gaulle had a tacit anti-German agreement: Pétain was the shield and De Gaulle the sword, Pétain was only marking time, waiting for the victory of the Allies – a myth which gave a justification to French patriots to accept the Vichy regime. This myth was shattered when Pétain met Hitler in Montoire on 24 October 1940, when the principle of a franco-german collaboration was agreed and when Laval declared: 'I wish for Germany's victory' in April 1942. In reality, Vichy wanted to become a bona fide partner for Hitler, then expected to win the war, to be in a more solid position for the future negotiations of a future peace treaty with Nazi Germany.

Vichy became more authoritarian and repressive as the 'total war' went on in the Eastern Europe and other fronts, increasing German demands on France, while the French people endured severe material hardships, shortages of food, fuel, clothing, and France became the target of Allies' bombing. The compulsory labour service (*Service du travail obligatoire, STO*)[9] imposed on young Frenchmen as from 1943, encouraged a number of them to join the resistance (*maquis*). Anti-German attacks in France triggered the cycle of terrorism/repression/terrorism.

Anti-Jewish laws

While neither the Constitutional Acts, nor Pétain's public speeches, made mention of Jews, a number of laws, decrees and decisions separated Jews from the French population and excluded them from state functions and other professions. Their possessions were confiscated, they were assigned to residence,

[9] First a voluntary programme initiated mid-1942, the *Service du Travail Obligatoire (STO)* was imposed on all young people between 20 and 22 years of age by a law of 16 February 1943.

then to internment camps. As from 1942, following German orders, the French State, the prefects (*préfets,* regional government officials), the police and the military sent the Jewish internees to Drancy, a French internment camp near Paris, before they were sent by train to extermination camps, such as Auschwitz.

76 000 French and foreign Jews were sent to those camps with Vichy's willing support and assistance: some 2600 returned after the war.

Without any pressures by the Germans, the Vichy authorities initiated their own antisemitic and xenophobic legislation, only a few days after Pétain became Chief of State.

Although not specifically addressed to Jews, two laws arbitrarily limited the rights of naturalized French citizens. *A law of 17 July 1940* restricted admission to the French civil service to those born of a French father. Two other laws of 16 August and 10 September 1940 restricted access to the medical and legal professions. These laws were applied rigorously to Jews. *On 22 July 1940*, a law set up a commission to review all the naturalizations accorded since 1927 and to strip of French nationality all 'undesirable' new citizens. Eventually, fifteen thousand lost French nationality, including about six thousands Jews.

On 27 August 1940, Vichy repealed the *loi Marchandeau* of 21 April 1939 which had outlawed any press attack 'towards a group of persons who belong by origin to a particular race or religion when it is intended to arouse hatred among citizens or residents'.[10] The rightist press had been violently antisemitic between the two World Wars in France until the Marchandeau law was passed: Vichy then allowed antisemitic and xenophobic hatred to be spread through newspapers, books, radio and exhibitions.

On 3 September 1940, a law legitimized administrative detention without judicial intervention or control. This law was modelled after *decrees of 12 November 1938 and 18 November 1939*. They permitted 'the taking from their residences of people deemed dangerous to the national defense or to national security'. Such people under appropriate circumstances could be held 'at a place designated by the Minister of Defense or of the Interior'. It thus allowed taking such 'dangerous' people – Jews were not then targets, but foreigners – to internment camps without charge nor right to defend themselves.

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[10] Michael R. Marrus and Robert O. Paxton, *Vichy France and the Jews* (Basic Books, Inc., Publishers, New York, 1981), pp. 3–4.

Germans, Spaniards and other Europeans were sent to these camps. Some camps, like Gurs, first took in Spanish Republican refugees from the Spanish war, and then, from 1940 on, mostly foreign and French Jews. As noted above, German refugees interned in those camps were later handed over to the Nazis in accordance with article 19 of the Armistice Convention.[11]

Two laws of 3 and 4 October 1940 dealt specifically with Jews: the first one created a '*Statute of Jews*', a legal innovation in French law.[12]

The law of 3 October 1940 on the Statute of Jews introduced the concept of 'race' in French law, a concept foreign to its tradition and a violation of the republican principle of equality of all French citizens, by excluding Jews from public state functions.

> Article 1. For the purposes of the present law, a Jew is one who has three grandparents of the Jewish race; or who has two grandparents of that race, if his or her spouse is Jewish.
> Article 2. The availability and exercise of the following public functions and duties are denied to the Jews:
>
> 1. Head of State, member of the government, the Council of State, . . . the Court of Cassation . . . , the courts of appeal, courts of first jurisdiction, justices of the peace, . . .
> 2. Senior officials of ministries, prefects, police agents at all levels.
> 3. Governors-General of the colonies.
> 4. Teaching staff in public education.
> 5. Officers in the army, navy and airforce.
>
> . . . .

These professions were opened to Jews only if they had been combatants in the First World War, or had had a citation during the 1939–1940 war or had the Legion of Honour on military grounds or the Military Medal. Individual exceptions to the Statute could be granted by decree approved by

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[11] 'Résistance: la double mémoire', Michel Cullin, *Libération*, 17 July 2000.

[12] References and translation of parts of the texts are in: Richard H. Weisberg, *Vichy Law and the Holocaust in France* (New York University Press, New York, 1996), pp. 39–40 and 56, to which I have added details. The laws are: *Loi du 3 octobre 1940 portant statut des juifs* (Journal Officiel du 18 Octobre 1940) – and *Loi sur les ressortissants étrangers de race juive* (Journal Officiel, 18 Octobre 1940).

the Council of State for Jews having rendered exceptional services to France in literary, scientific or artistic domains.

Article 4 limited the access and exercise of liberal professions to Jews within a fixed proportion (quotas). Article 5 forbade Jews from the exercise of professions in the media – press, radio –, films and theater.

The law applied to individuals in the Vichy non-occupied zone. Those in the occupied zone were covered by a German ordinance of 27 September 1940, which defined Jews by their religion, not by their race.

The law of 4 October 1940 on foreign nationals of the Jewish race went further: it authorized prefects to assign a forced residence to foreign Jews or to intern them in 'special camps':

1. Foreign nationals of the Jewish race may, from the promulgation date of the present law, be interned in special camps by a decision of the prefect of the department of their residence.
2. A commission charged with the organization and administration of these camps shall be constituted in the Ministry of the Interior . . .
3. Foreign nationals of the Jewish race may at any time be assigned a forced residence by the *prefect* of the department in which they reside.

In addition to the exclusion of Jews from public offices, foreign Jews could then be assigned to residence or, worse, to internment camps for indefinite periods by administrative decisions, without charge except for their race, and without court judgment nor judicial control. In 1941, there were approximately 50 000 foreign Jews in camps in the non-occupied zone.

On *7 October 1940*, the French political status granted to the Jews in Algeria by the *Décret Crémieux* was abolished by law.

A third antisemitic law of 2 June 1941, replacing the law of 3 October 1940 on the *Statute of Jews*, added to the race definition of Jews that of religion:[13]

1. A Jew is: He or she, of whatever faith, who is an issue of at least three grandparents of the Jewish race, or of simply two if his/her spouse is an issue herself/himself of two grandparents of the Jewish race.
   A grandparent having belonged to the Jewish religion is considered to be of the Jewish race;

[13] Weisberg, pp. 58–59, – *Loi du 2 juin 1941 remplaçant la loi du 3 octobre 1940 portant statut des juifs* (Journal Officiel, 14 juin 1941).

2. He or she who belongs to the Jewish religion, or who belonged to it on 25 June 1940, and who is the issue of two grandparents of the Jewish race . . .

The law confirmed the prohibitions for Jews on state and other professions of the law of 3 October 1940. It added prohibitions to work in banking and other business activities. Prefects could now intern French Jews in special camps. Jews who had violated the provisions of the law could be punished by jail sentences of six months to five years, and or financial fees.

Another law of the same date instituted a census of the Jews: it required all Jews in the non-occupied zone to register with the authorities. Individual declarations included personal and family information, religion, education, military service, professional activity, as well as details of economic activity. The Germans had required a census of the Jews in the occupied zone with the ordinance of 27 September 1940, which was carried out efficiently by the French police.[14]

The exclusion and persecution of the Jews was institutionalized by the creation of the *Commissariat Général aux Questions Juives* (General Commissariat to Jewish Questions) by a law of 29 March 1941. A law of 22 July 1941 ordered the 'aryanization' of Jewish properties, allowing their forced sale. Its purpose was to 'eliminate all Jewish influence in the national economy'. It empowered the Commissioner-General to name a provisional administrator to any Jewish business or real estate, with all powers.[15]

In the occupied zone, German ordinances forbade Jews from having a radio (13 August 1941), to be out of the domicile from 8 pm to 6 am (7 February 1942). They were ordered to wear the yellow star by an ordinance of 29 May 1942.

A Vichy law of 23 June 1941 limited the number of student Jews admitted to universities to three per cent. A law of 19 December 1941 further limited their admission. A decree of 16 July 1941 limited to two per cent the proportion of Jews as barristers (*avocats*), a decree of 11 August 1941 set the same proportion for medical doctors.

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[14] Marrus-Paxton, p. 100.

[15] Robert O. Paxton, *Vichy France, Old Guard and New Order, 1940–1944* (Columbia University Press, New York, 1972, 2001), p. 179.

Other laws organized the registration and control of French and foreign Jews. Foreign Jews could not leave their place of residence without a permit (Law of 9 November 1942), – the mention '*Juif*' had to be stamped on identity and food ration cards (Law of 11 December 1942).

A *Union Générale des Israélites de France* (General Union of Jews in France) was created under the Commissariat by a law of 29 November 1941. All Jews were compelled to belong to the Union. The Union's resources were the 'sums recuperated by the Commissariat', the assets of dissolved Jewish associations and dues paid by Jews according to their fortune. A German ordinance of 17 December 1941 imposed a fine of one billion Francs on Jews of the occupied zone, to be assessed on Jewish assets through the Union.[16]

On 30 September 1942, Pierre Laval, who held both offices of the Vichy Prime Minister and Foreign Minister, sent a secret cable to the Vichy representative in Washington, D.C., as a basis to justify Vichy's antisemite policies to the Americans.[17]

He wrote that following the defeat, a flood of Jews had invaded the non-occupied part of France from the occupied zone and from neighbouring countries: 'its Hebrew population had reached excessive proportions'. These Jews without a country constituted an element which was 'manifestly dangerous'. Not assimilated into the normal economy, they lived only through the black market.

> The only means of avoiding this peril was the return of these individuals to the lands of their origin in Eastern Europe. This movement has begun. It is taking place by families, the under-age children going with their parents, unless the parents prefer to go alone.
>
> This plan, brought about exclusively by our concern for national safety, is intended only to free our soil of the presence of immigrants . . . It has not ulterior motive and is in no respect a persecution.

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[16] See 'Mémoire juive et éducation, Autres lois antisémites', http://perso.wanadoo.fr/d-d.natanson/autres_lois_antisemites.htm. German measures concerning a curfew, changes of residence, seizure of radio sets, the yellow star, prohibition to enter public premises are also listed in this document.

[17] USA National Security Agency, Center for Cryptologic History, 'Eavesdropping on Hell: Historical Guide to Western Communications Intelligence and the Holocaust, 1939–1945', Series IV, Volume 9, 2nd Ed., 2005, pp. 151–153.

This message was sent after the major raids of foreign and French Jews had taken place in France, including the Paris raids (*Vel' d'Hiv rafle*) of July 1942. Forty-five train convoys left France in 1942 for Auschwitz and other concentration camps, through the transit camp of Drancy.

French people's attitudes on Vichy's antisemitism

The leftist parties, Socialist and Communist, were no longer in power.[18] The Communists began an active campaign against the Vichy regime and the German occupation, after the German invasion of the USSR in June 1941. However, they did not focus on the racial laws. The Socialist leaders were interned, judged and a few murdered: several of them were Jewish and they suffered from the Vichy campaign against parliamentary democracy and the Jews, without any way of fighting back. Mendès France and Léon Blum were tried and condemned, Jean Zay and Georges Mandel were murdered in 1944.

The laws of 3 October 1940 instituting a Statute of the Jews, the law of 4 October 1940 on foreign Jews and the law of 2 June 1941 replacing that of 3 October 1940 did not cause any visible emotion or trigger any public protests among the population, more concerned about daily life's problems of their own. Many were not even aware of these laws and of their effects, but the antisemitic spirit of the 1930s was common among many parts of society, now strengthened by Vichy's propaganda. Jews were blamed for many sins, and there may have been a sense that 'they deserved it' among some. Some were pleased that Jews were evicted from public service, liberal professions or business, leaving more room for them, some benefitted financially from the seizures of Jewish goods and assets.

Apart from French Jews, foreign Jews were included in a rejection of the waves of immigrants from Central Europe to France between the two World Wars, at a time of economic depression and high internal political tensions and fear of another war. It is estimated that approximately 75 000 Jews arrived in France as part of the flood of 300 000 immigrants and refugees that lasted during the period between the two World Wars.[19]

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[18] See Chapter 5, 'Public Opinion, 1940–42' in Marrus-Paxton.

[19] USA 'Eavesdropping . . .', p. 89.

The Churches

The established churches, Roman Catholic and Protestant, gave allegiance to the Vichy regime as one of their obligations due to any legitimate political power. Their authorities did not reject the Statute of the Jews but protested against alleged abuses and asked for more humane treatment. Loyalty to the head of state, a respected figure, was required and law had to be applied.

The Catholics

As noted by Marrus-Paxton,[20] there was 'almost total silence of the Catholic hierarchy in the face of anti-Jewish legislation'. Vichy's respect for religious and traditional values, its moral order, its rejection of the atheist Third Republic who had fought against Catholic secularism, could not but please the Catholic Church: it wholeheartedly supported the regime and its chief, the 'providential man'. Pétain government included several 'good' Catholic ministers: Joseph Barthélemy, Justice Minister from January 1941 to March 1943, signed the Statute of the Jews of 2 June 1941, managed the Riom trial and authorized the lawless, sinister 'special sections',[21] – Xavier Vallat, head of the General Commissariat to Jewish Affairs from March 1941 to May 1942, helped draft the 2 June 1941 revised Statute of the Jews, its companion law instituting their census-taking, the law of 22 July 1941 which 'aryanized' Jewish goods and properties. Philippe Henriot, another 'good Catholic' was Vichy's Minister for Information and an eloquent anti-Gaullist and antisemite propaganda speaker on Radio Paris.

In the summer of 1941, Pétain was advised by his ambassador to the Vatican, Léon Bérard, that the Church was fundamentally opposed to racist theories, but it was legitimate to limit the social activities of a group with ethnic particularities, restrict its influence, deny them access to public office, set fixed proportions to access to universities and the liberal professions. Bérard concluded: 'As an authorized source at the Vatican told me, they do not intend to get into a fight over the *Statut des Juifs*'.[22]

There was no fight, but there was a misunderstanding. At a lunch in July 1942 in Vichy, Pétain told the Apostolic Nuncio, Cardinal Valerio Valeri

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[20] Marrus-Paxton, p. 198.

[21] See Weisberg, Chapter 4 on 'Barthélémy: A Catholic Prewar Liberal Is Called to Vichy'.

[22] Marrus-Paxton, p. 201. Léon Bérard's detailed letter to Pétain of 2 September 1941 regarding the Vatican's position is in Weisberg, pp. 421–424.

that he was consoled by the fact that the Pope understood and approved his policy on the Jews. Valeri replied that he was mistaken: The 'Holy Father does not approve of it'. Valeri later asked for another meeting in which he delivered the Pope's plea to stop the persecutions, to no avail. These exchanges were not made public.[23]

A few Catholic dignitaries took more or less courageous positions following the massive deportation of Jews in the Summer of 1942. Jules Saliège, archbishop of Toulouse, issued a vigorous protest on 23 August 1942, to be read in all parishes: it said, in part: 'Jewish men are men, Jewish women are women . . . Everything is not allowed against them . . . They are part of the human race as are so many others. A Christian cannot forget it'. Saliége helped protecting Jews in his region, and supported charitable associations giving assistance to the detainees in internment camps at Noé and Récébédou. The Gestapo came to arrest him on 9 June 1944 but left him in view of his age and state of health. Other archbishops issued similar protests, Gerlier in Lyon, Théas in Montauban, Moussaron in Albi, Delay in Marseille, but some included in their message a homage to the Marshall and even the right of the State to defend the country against certain Jews 'who have done us so much evil'.

A number of individual priests took a more or less active role in resistance activities, against the orders or wishes of their hierarchy. Father Pierre Chaillet, a Jesuit in Lyon, created, *Témoignage Chrétien*, a clandestine periodical. 5 000 of its first copy entitled 'France, beware of losing your soul', was issued in November 1941, followed by 13 more issues. It denounced racism, Vichy's antisemite policies and the anti-Christian Nazism: Christians must know and they must give their testimony'.

Individual Catholic and Protestant churchmen and believers gave practical aid to help the Jews escape persecution, provided Jews with false identity papers, helped them to cross the French-Spanish, or the French-Swiss borders. Jewish children were hidden, entrusted to non-Jewish families.

Chaillet was actively linked with Protestants, such as Pastor Roland de Pury, who gave pro-resistance sermons in his own Lyon parish.[24]

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[23] USA 'Eavesdropping . . .', pp. 92–93.

[24] See http://www.ordredelaliberation.fr/fr_compagnon/890.html, 'Jules Saliège, – more generally, on Catholics during the resistance: Bernard Comte, *L'honneur et la conscience, Catholiques français en résistance, 1940–1944* (Les Editions de l'Atelier, Paris, 1998), see pp. 160–161.

The Protestants

The Protestant minority in France – approximately 800 000 – was by nature more sensitive to the Jewish exclusion and persecution than the Catholic majority, with still live memories of persecutions dating back to the 16th and 17th centuries. While they were divided into several confessional groups, their *Fédération Protestante de France* and its president, Pastor Marc Boegner spoke for most of these groups.

Boegner accepted a seat in Vichy's advisory National Council, in which there were three other Protestants, in order to assure a Protestant presence and to defend Protestant interests. The two nominated Catholic archbishops, Gerlier for Lyon and Suhard for Paris, did not take their seat but were only represented in the Council.

Two of Pétain's ministers were of Protestant origin: Admiral Jean-François Darlan, Minister of the Navy from June 1940 to February 1941 when he replaced Pierre Laval as vice Prime Minister and Pétain's successor. He was also minister for foreign affairs, defence and the interior. On Hitler's orders, he had to relinquish all his posts to Laval in April 1941, but remained Pétain's successor. In January 1942, he was appointed Commander-in-Chief of French Armed Forces and High Commissioner in North Africa. He was murdered in Algiers on 24 December 1942. Darlan, an anglophobe, believed that Germany would win the war and that collaboration with Hitler was not only justified, but necessary. He appointed Xavier Vallat Commissioner-General for Jewish Affairs in March 1941 and was involved in all antisemite legislation, regulations and actions during his tenure in Vichy.

Rear-Admiral Charles Platon, appointed State Secretary to the Colonies, a fierce anglophobe (as were most officers in the French navy), had no specific responsibility with the antisemitic programme of Vichy.

Another Protestant , André Philip, a Socialist member of the Chamber of Deputies, joined De Gaulle in London in July 1942. He was one of the 40 parliamentarians who voted against the law of 10 July 1940 granting all powers to Pétain.

Many Protestants in France soon rejected the principles of the National Revolution, Vichy's anti-democratic stance and its antisemitic laws for several reasons:[25]

[25] See 'Musée virtuel du Protestantisme français' http://www.museeprotestant.org/Pages/preview.php?noticeid=678 to 683.

- there was a fear of a Catholic domination and exclusivism under the National Revolution;
- they belonged to a minority who had been persecuted;
- the structure of French Protestantism in more or less autonomous communities was more favourable to contestation than the Catholic hierarchy;
- they had a tradition of exercising individual religious, moral and intellectual independence and autonomy, leading them not to accept blindly political authority;
- they had a broader exposure to the outside world, in part through the Federation's membership in the World Council of Churches in Geneva.

A Protestant review, *Foi et vie* (Faith and Life), published in January 1941, in spite of censorship, the 'Letter to the Protestants of France' by Karl Barth (of October 1940) advocating resistance to Hitlerism.

On 26 March 1941, Boegner wrote a letter of solidarity to Isaïe Schwartz, Grand Rabbi of France: it was published by the collaborationist antisemite periodical in Paris *Au pilori* under the heading: 'An inadmissible letter of the head of France's Protestants', giving it more exposure. On the same day, Boegner sent an official letter to Darlan in the name of the French Reformed Church, expressing his deep emotion about the law of 3 October 1940 'which introduced the racist principle in French legislation, whose rigorous implementation caused French Jews cruel hardships and harrowing injustices'. He asked for a reform of the statute imposed on French Jews.[26] In the latter letter, Boegner also referred to the 'problem faced by the state by the recent and massive immigration of a great number of foreigners, including many Jews, and by hasty and unjustified naturalizations', reflecting the current political and historical vision created by Vichy. During a meeting in May 1941, Darlan told Boegner that another more severe law [the law of 3 June 1941] was about to be promulgated. He said that his sole concern was to save the Jews established in France for several generations. As for the others, he only wanted them to leave.

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[26] The text of the letters of 26 March 1941 are in *Les Eglises protestantes pendant la Guerre et l'Occupation, Actes de l'Assemblée Générale du protestantisme français, Nimes, 22–26 Octobre 1946* , 'Rapport du Pasteur Boegner (Messageries Evangéliques, Paris, 1946), pp. 24–26. See also *Carnets du Pasteur Boegner, 1940–1945* (Fayard, Paris, 1992).

On 27 June 1942, Boegner handed over to Pétain a letter protesting against the German ordinance of 29 May imposing the yellow star to French Jews in the occupied zone. He wrote that this measure could do nothing towards the 'solution of the Jewish problem, which none of us disregarded'. Pétain then expressed his "real suffering" concerning the harmful effects of the racist laws, but said that he was powerless to prevent these injustices or to mend them.

The July raids of Jews in June/July 1942, their internment at the *Vel d'Hiv* stadium in Paris followed by their deportation to extermination camps, raised fear and anger among the population and the Churches. On 18 August, Boegner and Cardinal Gerlier agreed that the Catholic Church and the Protestant Churches should at least synchronize their interventions. They both wrote to Pétain: Boegner's letter, dated 20 August, protested against the measures taken by the French government against foreign Jews (converted or not to Christianism) and the way they were carried out. The deportation of these foreigners to Germany was done in many places in 'revolting conditions of inhumanity': several of them 'know in advance the terrible fate awaiting them'.

> The 'handing over' of these unfortunate foreigners happens in many places under inhumane conditions which have aroused the most hardened consciences and brought tears to the eyes of witnesses. Crammed into freight cars without any concern for hygiene, the foreigners designated for departure were treated like cattle.

As Vice-President of the World Council of Churches, Boegner conveyed 'the deep emotion of Churches of Switzerland, Sweden, the United States at the news, known in the whole world, of what is being accomplished in France'. He begged the Marshall 'to impose indispensible measures so that France did not inflict upon itself a moral defeat whose weight would be incalculable'.

Boegner met with Pierre Laval on 9 September 1942. Laval said that he could not do otherwise, faced with more and more pressing German demands. In order to save the French Jews, the foreign Jews had to be handed over. Boegner asked if the children could be saved, French families would adopt them. Laval replied that the children must stay with their parents: "Not one must stay in France".

On 22 September 1942, a statement by Boegner was circulated and read a few days later in most Protestant Churches in France. It said, in part:

> . . . The Reformed Church of France cannot remain silent in the face of the suffering of thousands of human beings who have found asylum on our soil . . .

> Divine law cannot accept that families willed by God can be broken, children be separated from their mothers, the right of exile and compassion be unrecognized, respect for the human person be violated, and helpless individuals be surrendered to a tragic fate . . .[27]

These verbal and written protests, and meetings with high Vichy officials did not change the course of events. However, they recalled, under tragic and dangerous circumstances, and in a hostile and dramatic environment, such essential principles as the value of human life, the right of all human beings to life and dignity, and clearly rejected racism as incompatible with Christian faith.

Protestants who had been members of pre-war youth movements took the lead in providing assistance first to refugees, Spanish internees, then to the Jews. Relief was provided in internment camps by the CIMADE (*Commission Inter-Mouvements auprès des Evacués*). In heavily Protestant areas, Jews found shelters with the support of pastors and the local population, at their own risk.

Vichy Justice

Vichy judges, who had pledged loyalty to the head of State, Marshall Pétain, followed Pétain's legislation without questions as to its legitimacy, but questions only on the interpretation of texts. They participated in ad hoc 'special' tribunals, political trials and generally followed orders or suggestions made by the government.[28]

Generally speaking, the judges 'worked within the system'. Their traditional education and training led them to submit to the laws of the country as a professional obligation. They implemented racist laws, which limited severely French Jews' rights and freedoms, without concern for the rule of law and human rights proclaimed by the French Revolution and enforced during the Third Republic.

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[27] Text in 'French Protestant Churches and the Persecution of the Jews in France', Michael R. Marrus, Shoah Resource Center, The International School for Holocaust Studies: source, Carol Rittner, Stephen D. Smith & Irena Steinfeldt, *The Holocaust and the Christian World*, Yad-Vashem 2000, pp. 88–91.

[28] See a summary of *La justice des années sombres, 1940–1944* (La Documentation française, Paris, 2001) in http://www.fondationresistance.org/actualites/nousavonslu34.htm, accessed on 18 June 2005.

During its first year, Vichy used both civil courts, for instance against clandestine propaganda, and ad hoc tribunals to judge resistants, 'terrorists'. As from the Summer of 1941, these ad hoc tribunals became generally used, in order to show an active judiciary collaboration with the Germans, first against Communist attacks against German troops, then against other armed resistance groups. Military tribunals were used in the non-occupied zone until November 1942, and 'special sections' were created in August 1941. Summary judgments were also issued by non-judiciary, administrative martial courts. Death sentences issued by these tribunals (6 by ad hoc tribunals, 45 by special sections, of which 33 *in absentia*, 200 by martial courts) were still a relatively small number in comparison with the many executions of civilian hostages, resistants and Communists by the Germans.

Vichy laws permitted extra-judiciary measures which affected thousands of persons:

According to Rousso:[29]

> The Vichy regime and the collaborationists were directly responsible for the imprisonment of 135 000 people, the internment of 70 000 suspects (including numerous political refugees from central Europe) and the dismissal of 35 000 civil servants. As victims of exclusionary laws, 60 000 freemasons were investigated, 6 000 harassed, and 549 (of 989) died in the camps. The French governmental apparatus, together with parties in the pay of the Germans, abetted the deportation of 76 000 French and foreign Jews, fewer than 3 per cent of whom survived.

The following section refers to two political trials, aimed at discrediting the political leaders of the Third Republic, and to the creation of the 'special sections'.

The trial of Pierre Mendès France

On 9 May 1941, Pierre Mendès France, a French airforce lieutenant, former under-secretary of the Treasury in the socialist-communist government of Léon Blum's 'Front Populaire' of 1936, a 'radical' (moderate socialist) elected member of the Chamber of Deputies since 1932, was condemned by

[29] Henry Rousso, translated by Arthur Goldhammer, *The Vichy Syndrome, History and Memory of France since 1944* (Harvard University Press, Cambridge, Mass. – London, UK, 1991), p. 7.

a military tribunal to a six year jail sentence, the loss of his military rank and the withdrawal of his civil rights for ten years for military desertion.[30]

The trial was flawed in law and in facts, and Mendès France was innocent of any charge of desertion. He was condemned by a court who had prejudged him guilty of desertion as a parliamentary member of the Third Republic and as a Jew.

Mendès France had undertaken his compulsory military service in 1929 as a corporal in the air force. When war started, as lieutenant in the reserves, he chose to serve with the air force in Syria where he arrived in September 1939. Following a course of training, he obtained a diploma as observer. In April, his commanding officer granted him a period of leave of 50 days, which included a twenty day period for fulfilling his functions as parliamentarian. He returned to France on 27 April and on 9 May asked to be assigned to a fighting unit. He visited the Air Ministry in Paris several times per week in order to receive a mission order. On 10 June, Colonel Lucien, director of the military personnel in the Ministry finally gave him a handwritten order (faced with the successful German offensive, the Ministry was about to leave Paris for Bordeaux) to go to the airforce school of observers near Bordeaux in order to improve his training. He arrived in Bordeaux on 16 June, but the school had been transferred to Meknès in French Morocco.

The President of the Republic, the presidents of the Chamber of Deputies and of the Senate and the French government had left Paris for Bordeaux. A decreasing number of government ministers were in favour of transferring all government authorities to North Africa and continue the fight against Germany. Pétain, Weygand and Laval were opposed to this solution: they won.

However, in the confused situation of the time, measures were taken to transport the parliamentarians and their families from France (Le Verdon, 100 km from Bordeaux) to North Africa by a luxury cruise ship (changed into a military troop carrier), the *Massilia*, scheduled to leave on 20 June. Mendès France obtained a written authorization to leave France in order to join his Unit in Morocco and boarded the ship with his wife and two children. Out of 506 passengers, there were 115 civilians including 27 parliamentarians: among them Edouard Daladier, former Prime Minister, Georges Mandel, former Minister of the Interior, Jean Zay, Former Minister of Education. However, the President of the Republic and the

[30] This section is based on *Un tribunal au garde-à-vous, le procès de Pierre Mendès France* by Jean-Denis Bredin (Fayard, Paris, 2002), which has an extensive bibliography.

Presidents of the Senate and Chamber of Deputies were not on board: government officials had told them that the government would stay in France.[31] On 21 June, the ship was still authorized to leave for Casablanca.

On 22 June, the Armistice was signed with the Germans and the Pétain government finally decided that all government authorities should remain in France.

The *Massilia* arrived in Casablanca on 24 June, but the atmosphere had changed: upon instructions from the government, General Charles Noguès, Resident general in Morocco and Commander-in-chief of the operations in North Africa, ordered the parliamentarians to remain aboard.[32] They were not to return to France to possibly oppose the 10 July vote which gave all powers to Pétain. Georges Mandel, opposed to the armistice and determined that the war should continue in North Africa, was arrested and interned in France. He was murdered on 7 July 1944 by French *miliciens*, members of the Vichy paramilitary police, in a forest near Paris.

On government orders, a violent press campaign started against the 'ship of the cowards', against the protests of Herriot and Jeanneney who recalled that the *Massilia* voyage had been organized and authorized by the government. Paris antisemitic periodicals attacked the 'fugitives' as politicians, instruments of the Popular Front, grave-diggers of France, cowards, deserters, and for some, Jews and free-masons. The media campaign lasted months.

On 27 June, Mendès France managed to go to Rabat and was authorized to work as staff officer with General François d'Astier de La Vigerie, air commander in Morocco. After checking Mendès France's military papers, d'Astier had received clearance from his military headquarters in Algiers to employ Mendès France temporarily in Morocco, until he could be demobilized in France.

During the 10 July vote of the two Assemblies, President Herriot made a public protest against the unfair and odious campaign against the parliamentarians who left on the *Massilia*. He said, in part:

> I attest, on my honour, and I am prepared to prove by the most precise papers, by incontestable documents that our colleagues have left on regular instructions of the government.[33]

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[31] Among the better known, Edouard Daladier, Georges Mandel, Jean Zay, André Le Troquer.

[32] Noguès had first favoured continued fighting against the Germans from North Africa, but then accepted Pétain's orders.

[33] Bredin, p. 74.

On 24 and 25 July 1940, the state radio (there were no private radio stations) announced that most passengers of the *Massilia* would be prosecuted, or punished. Civil servants passengers were dismissed, including those who embarked on instructions from their ministers. The radio said that, among the passengers there were four parliamentarians, including three former government ministers, who left Bordeaux while they were still in the army. They would be judged by military tribunals for abandonment of post (desertion).

On 16 August, Jean Zay, parliamentarian and former minister of Education, was arrested in Rabat and interned in France. On 20 August, he was condemned by a military tribunal in Clermont-Ferrand to life deportation. On 20 June 1944, he was murdered by French *miliciens*.

On 31 August 1940, Mendès France was arrested and detained at the military jail of Casablanca, on charges of 'internal desertion in wartime', for having left without authorization his corps before 20 June and having been illegally absent until 25 June 1940. He was transferred to a high security jail in Clermont-Ferrand on 12 October to be judged by a military tribunal. After two refusals, two competent lawyers accepted to represent him. In December 1940, his high security detention was changed to standard conditions.

The biased investigative judge, Colonel Leprêtre, built up the charges against Mendès France, discrediting the witnesses favourable to the suspect, and dismissing the facts which would exonerate him. On 14 February 1941, Mendès France's lawyer, Fonlupt-Esperaber wrote to the judge recalling that the object of the investigation (*instruction*) is not to confirm the justification for an indictment and the judge's mission is to establish the facts and to assess them on an equitable and juridical basis, not to investigate for or against the accused. His request that the charges be abandoned was rejected.

Colonel Leprêtre then transmitted the file to Colonel Degache, the trial prosecutor, known to be violently antisemitic.

The trial was held on 9 May 1941. Its President, Colonel Perré, was a fanatical supporter of the extreme right, a faithful servant of the new regime. He was one of the judges of the tribunal which condemned De Gaulle to death on 2 August 1940, *in absentia*. He was assisted by six military judges who remained silent. Perré kept interrupting Mendès France during his initial statement, as well as several witnesses whose testimonies supported the accused's statement of facts. Perré was constantly hostile, despising, giving his own biased interpretation of details of the case.

By a majority of six to one, Mendès France was judged guilty of desertion in wartime. Extenuating circumstances were granted by a majority of the judges. He was condemned to six years' imprisonment, the loss of his military rank and the suspension of his civil rights for ten years.

Mendès France then told the guards in the court: 'An innocent has just been condemned by political hatred. This is not France's justice, it is Hitler's. Do not despair of France!'. On 21 June 1941, Mendès France escaped from jail and went into hiding in France, then in Switzerland. Taking the identity of a Polish refugee, he crossed France by train, reached Barcelona, Madrid, and finally Lisbon, where he was contacted by the British Intelligence Service who arranged for his air travel to London on 20 February 1942. Mendès France joined De Gaulle's Free French in London and flew a number of bombing missions over France and Germany in the French-run Lorraine airgroup. In November 1943, he was appointed by De Gaulle commissioner for Finance in the French Committee of National Liberation in Algiers and, after the Liberation of France, participated as Prime Minister and Minister in several governments.

In September 1941, Mendès France was one of the privileged targets of the exhibition organized in Paris, 'The Jew and France' (*Le Juif et la France*), intended to demonstrate that the Jew is the eternal enemy of France. On 25 October 1941, Mendès France had been disbarred as a lawyer, following his condemnation for desertion. This decision was annulled on 28 December 1944. On 30 April 1954, the Criminal Court of the Court of Cassation annulled the judgment of the military tribunal of 9 May 1941, thus finally withdrawing any charge of offence or crime against him.

The Riom trial

The trial of Third Republic politicians in Riom – a small town in the center of France – and one general was another parody of justice, but this one ended in a fiasco. On 15 September 1940, shortly after France's defeat and Pétain's assumption of power, Léon Blum, Prime Minister during the 1936 Popular Front and Socialist leader, and other prominent pre-war leaders were arrested without charge by the Vichy law of 3 September 1940 authorizing administrative detention: Edouard Daladier, former minister of war since 1936 and several times Prime Minister, Guy La Chambre, former minister of air, a general, Maurice Gamelin, former Commander-in-Chief, and Robert Jacomet, Controller-General of the Administration of the Armies, Paul Reynaud, former Prime Minister and Georges Mandel, former Minister. The latter two were not among those tried at Riom. On 30 July 1940, Vichy had created a new high-level court, the Supreme Court (*Cour suprême*), by its fifth Constitutional Act. In a radio address to the French people on 12 August 1941, Pétain spoke about 'an ill wind rising in many

regions of France', and of an atmosphere of false rumours and intrigues. He acknowledged that 'our parliamentary democracy is dead'. He said, in part, that he had decided to use the powers given to him by Constitutional Act No. 7 to judge 'those responsible for our disaster'. He created a Council of Political Justice (*Conseil de Justice Politique*), which would report to him on 15 October 1941, in parallel to the Supreme Court.

On 9 October, the Supreme Court indicted Blum and the other defendants – Daladier, La Chambre, Gamelin and Jacomet – for treason against the duties of their functions in actions that led from a state of peace to a state of war before 4 September 1939, and damage to the security of the state. Blum was charged with demoralization of the population and unpreparedness for war, when as Prime Minister he nationalized the war industry and failed to suppress strikes. Blum and the other defendants maintained that all the constitutional acts under the legislation of 10 July 1940, which created the Vichy regime and the Supreme Court, were invalid. The acts they were accused of were political ones for which the newly created Court had no validity.

While the Court was carrying its preliminary examinations and questioning of the defendants, Pétain announced on 16 October 1941, before the trial had even started, that he had condemned Blum, Daladier and Gamelin to life imprisonment in a fortress, on the advice of the Council of Political Justice, in accordance with Constitutional Act No.7 dated 27 January 1941. The sentence was the most severe under Art. 3 of the Act. In violation of the principle of non-retroactivity, the Act was declared applicable to former ministers, high dignitaries and civil servants in service within the last ten years. This unfounded and illegal condemnation was taken without any element of due process (no notification of the charges, no consideration of any rebuttal by the accused, no assistance by lawyers, no hearing by a legitimate court of justice), even though the same persons had been indicted by the Supreme Court and were to be judged later. The Court's proceedings in Riom were being made into an unpleasant farce, and its judges discredited by the Chief of State himself. Pétain's odd initiative was due to German pressures and a blackmail: if the Riom accused were severely punished, the Germans would show some clemency with the hostages they held in Paris.[34]

[34] On the Riom trial, see Joel Colton, *Léon Blum* (Fayard, Paris, 1966), Chapter 15, – and Jean Lacouture, *Léon Blum* (Seuil, Paris, 1977), pp. 464–506., – see also Weisberg, Chapter 1.

The formal charges were published on 28 October 1941. The defendants were given five days to respond. The question of the responsibility for the war was abandoned, the Court would judge their responsibility for the defeat. Blum suggested to the Court to look for the causes of the defeat where they were, that is in the errors of the High Military Command: Pétain himself was Minister of War in 1934.

The first of the 24 sessions of the Court took place on 19 February 1942, in front of their ten judges, including an admiral, a general and a law professor. In an initial statement, the Court's President said that the judgments rendered on three of the defendants were of no value before the Court, thus nullifying Pétain's 'condemnation' . . .

On the first day, General Gamelin said that he would not participate actively in the trial's debates. Blum remarked that, if the only military defendant withdrew, the trial would deal only with the political responsibilities of the defeat, not with the military ones. On 9 April, Blum received a telegram from the USA signed by 200 famous persons including Eleanor Roosevelt, expressing their friendly wishes and admiration for having courageously chosen justice and democracy.[35] During the debates, Blum made a vigorous defence in front of the ten judges, 230 journalists, a few diplomats and officers, attacking the legitimacy of the Court, the violations of the rights of the defendants, and the trial itself, the trial of France and of the Republic. To the charge of having betrayed the duties of his function, he asked what were these duties and which had he betrayed. On 15 March 1942, Hitler expressed his fury against the trial, 'where charges are directed, not against those who, by their mad decision, have caused this war, but against the negligence of those who have neglected to prepare it . . .'.[36] On 14 April, Pétain decided to suspend the trial while maintaining the previous life detention decision: the Riom Court never rendered a verdict. On 31 March 1943, still in detention in France, Blum, Daladier and Gamelin were 'kidnapped' by the Germans, taken to Germany and detained in a barrack close to the Officers' quarters near but not in the Buchenwald camp. They were released in April 1945 by German officers and finally reached Paris on 14 May 1945.[37]

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[35] Colton, p. 432.

[36] Lacouture, p. 481.

[37] See Lacouture, p. 506, see also Weisberg, pp. 6–36.

Special sections

Another example of Vichy's disregard for elementary legal guarantees was the creation of the Special Sections (*Sections spéciales*) by a law of 14 August 1941.

These, as part of military or navy tribunals, were to judge perpetrators of 'all penal infractions, whatever they may be, committed with the intent of communist or anarchist activity'. Judgments were not appealable and had to be carried out immediately. Penalties included life imprisonment with or without a fine, hard labour for a term or for life, or death. All existing bodies of inquiry or judgment were stripped of jurisdiction in favour of the special section.

The German authorities had threatened to kill 100 hostages as reprisals for the killing, on 21 August 1941, of a Wehrmacht officer in the Paris subway. Vichy officials rushed to defuse the threat and accommodate the Germans by setting up these courts and, promptly, judge four individuals who had no connection with the subway killing: three were condemned to death and executed, one was sentenced to life imprisonment. One magistrate refused to serve on such a court.[38] The argument used by Vichy officials was that they had avoided greater slaughter. They also satisfied a basic Vichy ambition: that of maintaining a semblance of political, administrative and judiciary sovereignty over the French territory and people, even though France was occupied and many decisions were taken by the occupier.

Special sections were responsible for a number of summary executions and long sentences rendered outside of any due process requirements.

Conclusion

The Vichy regime and the years of occupation are one of the darkest parts of France's history, from which the country is still trying to extricate itself.

Following the First World War and its tremendous human and economic losses, the French went through a period of political instability, with an ineffective political center torn between a violent fascism and a communism feared by the Army, the bourgeoisie and business interests. The

[38] Weisberg, pp. 376–380. The English text of the law of 14 August 1941 is on p. 376. A detailed report on the hostage crisis by a high Vichy official is in Jacques Benoist-Méchin, *A l'épreuve du temps, Tome 2, 1940–1947* (Julliard, Paris, 1989), Chap. XI 'Cent pour un', pp. 227–243.

economic crisis of the 1930s and its resulting unemployment increased the French feelings of insecurity, their longing for authority and a strong leader, their xenophobia and rejection of all these 'un-French' immigrants from Central Europe. Antisemitism retained its minority status among the population, but was present in all its social strata.

The unexpected military defeat of 1940 shocked all the French: leaving aside the obvious deficiencies of the senior military commanders (including Pétain, Weygand and Gamelin), the authoritarian Vichy regime gave them simple targets to blame: the parliamentarians, democracy, the freemasons, the Jews, and France's own moral 'decadence'. The regime brought to trial, unsuccessfully, a few Third Republic leaders, political parties were forbidden. The regime initiated its own antisemitic policies of exclusion, internment which led and facilitated the later deportation and extermination. The regime tried to replace the traditional enemy, the German (*le Boche*) by the British, the 'perfidious Albion'.

Pétain and his government had all powers without limits (except those set by the Germans) nor control: constitutional, legislative, executive, and judiciary. There were no political, representative counter powers, except for changes in public opinion as relayed by the prefects, and the only other remaining moral authorities, the Churches.

For most French people, the four-year period of occupation was a period of hardships: shortages of food, clothing, soap and other products of basic necessity, handed out by a faulty system of coupons. Winters were cold, heating was scarce. Cars could not be run without coupons of gazoline reserved for the authorities. Two million prisoners of war languished in German camps, missed by their families and in the farms. Censorship was exercised over the media and on private mail.

It was a period when, for the first time, the equality of all French under the law was broken: a new racist policy was introduced in the French legislation which excluded Jews from higher education, employment in the civil service and other state enterprises, the liberal professions. They were forced to register, their property was 'legally' seized. Jews in the occupied zone had to wear the yellow star.

It was a period where citizens could be judged and condemned by special courts without due process. They could be sent to internment camps by decision of the prefects, and not by a decision of justice, because of their opinions or their race. The internees had no legal recourse nor any legal assistance. Any protests, resistance to the laws or to the regime, assistance to Jews, participation in or assistance to the resistance or the Communist

Party, were punished severely by long sentences or the death penalty, either by the Vichy authorities or by the Germans. Those captured were often tortured by the Gestapo or the French police, hundreds of resistants, Communists, hostages or others were either summarily executed, or sent to German concentration camps.

It was a period when Vichy's administrative authorities and the French police carried out the 'dirty work' of the Nazi , out of a conscious decision by Vichy that French sovereignty required that French *fonctionnaires*, and not the German occupiers, interned French and foreign Jews, arranged for their transport to Drancy and onwards to extermination camps. Even if the Vichy leaders had no firm knowledge of the 'Final Solution', their participation and assistance to the Germans made them willing accomplices to the planned Nazi extermination of the Jews. In so doing, Vichy destroyed France's former reputation as the fatherland of human rights and a land of asylum. The dark period of occupation brought out the worst among some in a climate of persecution: there were many anonymous individual denunciations of Jews and alleged resistants to the French police or to the Gestapo. Usurpation of Jewish properties took place with or without authorization. For those who could afford it, the shortages were allievated by a broad black market, creating more feelings of injustice and anger. The military defeat facilitated the rise of a quasi-fascist regime under the debonair authority of a revered Marshal. Initially, there was general acceptance of the new regime which had stopped the military operations and promised relief and renovation. This support declined over the years for several reasons:

- the realization that the Germans might not win the war lifted any justification for Vichy's policy of collaboration with Hitler: the conquest of French North Africa by the Allies in November 1942 gave hope that they would eventually land in continental Europe and 'liberate' France;
- the realization that Pétain and his ministers were more and more under the domination of the Germans and that their political autonomy was limited;
- the drafting of young Frenchmen to work in Germany as from 1943 was opposed by many who chose to join resistance camps (*maquis*), resistance which was thus strengthened;
- the suffering of the Jews through exclusion, internment and deportation began to be better known also as from 1942. State antisemitism had first been met with indifference, or had been ignored,

> or had been hailed by some for dogmatic, professional or personal interest reasons. Even though there was no knowledge among the population that there was a 'final solution' which would lead to the mass extermination of the Jews, feelings of compassion, moral or practical support to the Jews, and a progressive rejection and condemnation of Vichy's measures became more apparent.

This was a period where religious and moral standards clashed with the citizen's obligation of loyalty and obedience to the established authorities. Even religious dignitaries, when protesting against antisemitic measures, assured Marshall Pétain of their allegiance to the Chief of State, and, in one letter, to the 'generous heart of the great soldier'.[39]

Those who continued the fight against the Germans after the defeat were few. They either joined De Gaulle in London, or set up or participated in resistance activities in France itself at great personal risk for themselves and their families.

Those who rejected Vichy's antisemitic policies and practices were also few. Individual 'Righteous' (*les Justes*), Churches or youth organizations tried to save Jews, or at least to give them some temporary support. Their courageous, at times heroic, action has repaired in a limited but significant measure the stained honour of France.

This Chapter has set the stage for the succeeding periods: the post-Liberation period, with its climate of revenge against the collaborationists and their leaders, when trials showed little interest or focus on their responsibility for antisemitism and its crimes. A number of high level officials who collaborated with the Germans during the occupation of France were judged for 'treason', not for crimes against humanity (Chapter 7).

The next period, starting in the 1970s, shows a slow recognition that Vichy was indeed part of France's history, that antisemitic laws were initiated by the regime without any direct pressure by the Germans, that the French authorities are accountable to French justice for their action in implementing these laws. Only a few senior Vichy officials were judged, belatedly, for crimes against humanity, as accomplices to the Nazi extermination of the Jews (Chapter 8).

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[39] Boegner's letter of 27 June 1942.

Chapter 7

Post-Liberation Myth, Purge and Trials

On 6 June 1944, the Allied forces crossed the Channel and landed in Normandy, on the Northern coast of France. Paris was liberated on 24 August. On the 25th, General De Gaulle was acclaimed by the Parisians when he walked down the Champs-Elysées and entered Notre Dame Cathedral. He installed in Paris the Provisional Government of the French Republic, which had replaced the French Committee of National Liberation on 2 June. The Provisional Government re-established France's democratic order and assumed authority, progressively, over the liberated parts of France. The Gaullist ordinance of 9 August 1944 regarding 'the re-establishment of the republican legality' affirmed that France's government was and remained the Republic, and that, in law, it had not ceased to exist. It also noted the nullity of all acts contrary to democratic principles prescribed by Marshall Pétain and made all acts prescribed by De Gaulle enforceable in France. General elections were held on 21 October 1945 to set up an Assembly charged with the drafting of a new Constitution.

The newly-installed authorities were faced with daunting difficulties. War was not finished in the European theater until the German surrender of 8 May 1945, when the last part of France on the Atlantic coast (in Royan) was finally liberated. There were revolutionary movements in a few regions,

where Communist resistance groups took power and exercised summary justice. Armed groups had to be ordered to surrender their weapons, some were incorporated in the French armed forces which had landed on the Southern coast of France in August 1944.

There were political tensions between De Gaulle who wanted to institute a new Constitution with a strong executive and a weak Parliament to remedy the past ineffectiveness of the parliamentary system of the Third Republic. The socialists and the Christian Democrats wanted a return to the parliamentary regime. The Communists, first hoping for a Soviet-type revolution, realized its impossibility in a country with a large Allied military presence and without popular support.

The Vichy myth was replaced by a Gaullist myth: that the Vichy regime was illegitimate, the French Republic did not have to be refounded, it had not been abolished. The 'dark years' were not part of the 'real France'.

However, the 'real France' was there, in conflict with itself: some historians described the pre-Liberation and post-Liberation periods as a civil war, or a virtual civil war. The French were torn between their respect for and faith in Marshal Pétain who had stopped the war in June 1940 and given some hope to the people, at least until November 1942, when the Allies invaded North Africa – and the new Gaullist authorities – yet un-elected – who had the prestige of the long-awaited Liberation, the military successes of the Allies, with the support of a revived French army, and of the Resistance movements within France. There was an urge for revenge: first against those who had openly and willingly collaborated with the Germans, against the Vichy leaders, against those who had carried out arrests, torture or executions of resistants. Then, in some areas, there was a social revenge against the elite, and private vendettas and denunciations unrelated to any political grounds. Illegal purges and abuses took place in many regions which the new authorities tried to channel through legal means: new legislation, new courts and mostly political trials.

This Chapter first refers to the Gaullist myths, then describes the new legislation and court system designed to try those who collaborated with the Germans. It reviews the illegal, non-judiciary and violent purges carried out in various parts of France before and after the Liberation, and the judiciary and administrative purges organized by the government. A few exemplary trials will be summarized: those of Pierre Pucheu, Marshal Philippe Pétain and Pierre Laval.

The Gaullist Myth

The myths of the Vichy regime were shattered: the defeat of France in June 1940 was not due to some sort of moral decay, nor to democracy, but rather to the lack of military preparation, a defensive stance and the neglect of the combined tanks and airforce strategy which had been promoted by De Gaulle between the two World Wars and successfully adopted by the Germans.

De Gaulle was a democrat but felt that too much parliamentarism had handicapped the governments of the Third Republic. The suggestion that Pétain and De Gaulle, acting as 'the shield and the sword', had played a secret but useful complementary role was strongly rejected by De Gaulle: Pétain had committed treason by signing the armistice and collaborating with the German enemy.

According to Rousso,[1] the Gaullist myth created the theory of 'resistancialism', meaning:

> . . . [f]irst, a process that sought to minimize the importance of the Vichy regime and its impact on French society, including its most negative aspects; second, the construction of an object of memory, the 'Resistance', whose significance transcended by far the sum of its active parts (the small groups of guerrilla partisans who did the actual fighting) and whose existence was embodied chiefly in certain sites and groups, such as the Gaullists and Communists, associated with fully elaborated ideologies; and, third, the identification of this 'Resistance' with the nation as a whole, a characteristic feature of the Gaullist version of the myth.

The myth was initiated and forcefully expressed by De Gaulle when he came to Paris on 25 August 1944, when the city was not even fully liberated:

> Paris! Paris humiliated! Paris broken! Paris martyrized! But Paris liberated! Liberated by itself, by its own people with the help of the armies of France, with the support and aid of France as a whole, of fighting France, of the only France, of the true France, of eternal France.[2]

De Gaulle added that 'we have chased [the Germans] out [of France] with the assistance of our dear and admirable Allies'.

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[1] Henry Rousso, Translated by Arthur Goldhammer, *The Vichy Syndrome, History and Memory in France since 1944* (Harvard University Press, Cambridge, Mass.,/London, England, 1991), p. 10.

[2] Rousso, p. 16.

The main tenets of the myth can be summarized as follows:

- the armistice was an act of treason, as was Pétain's collaboration with Hitler;
- there was minimal collaboration of the people with the Germans;
- national unity: the French were essentially united against collaboration with the Germans, they were patriotic;
- French interests were protected by the Gaullists and an elite of heroic Resistance fighters, supported by the people;
- France liberated itself by its own efforts.

The myth aimed at reinforcing De Gaulle's political legitimacy by delegitimizing the Vichy regime, at establishing order and stability, at artificially re-creating national unity and at erasing or decreasing the responsibility of Vichy in its authoritarian and racist policies and actions. At the international level, De Gaulle needed to show France's unity and support for his own policies in order to assert France's 'greatness' and France's restoration to the status of a big power. With British support, France became one of the five permanent members of the UN Security Council.[3]

The myth was a deliberate construction unrelated to historical, political, military and economic facts: France was not liberated by itself but by the military forces of the Allies, with a small contribution of the Allied' supported French forces and of the internal Resistance. The French population had supported the Pétain regime at least until 1942. They knew that France was no longer a 'great power' on political, military and economic grounds but thought that their colonial Empire might support this claim. After the Liberation, the French economy was in shatters, the French still had coupons for most necessities (food, clothing, gasoline) until 1949.

Most of the French accepted De Gaulle's dream of *grandeur*, to help them recover from years of humiliation, suffering, deprivation, sacrifice and terror, to regain their pride in their country.

Post-Liberation Laws and Courts

On 15 March 1944, in Algiers, the National Council of the Resistance adopted its Programme, called the Charter.[4] Among the measures to be

[3] See 'The "Vichy Syndrome" by Tony McNeill, The University of Sunderland, 9 Dec. 1999 in http://www.sunderland.ac.uk/~ôs0tmc/occupied/syndrom.htm

[4] The National Council of the Resistance (CNR) comprised 14 Resistance groups, including trade union and political movements, Communist, Socialist, Christian-Democrats,

adopted after the Liberation, it proclaimed the unity of its fourteen Resistance groups with the goal to establish the Provisional Government of the Republic formed by De Gaulle. The 'punishment of traitors and the eviction from the administration and professional life of all those who have dealt with the enemy or have actively associated themselves with the policy of the governments of collaboration' was to be assured. The property of traitors and black marketeers and all enemy property would be confiscated. Other measures included the 'establishment of the broadest possible democracy' through the re-establishment of universal suffrage and of all fundamental freedoms. It also proposed important social and economic reforms.

New legislation was needed to deal with the unprecedented situation of a *de facto* government, the Pétain regime, considered illegitimate by the resistants, being an accomplice of the enemy occupying power. Two concerns had to be reconciled: respect for legal forms and the traditional guarantees of republican justice and, on the other hand, the need to judge quickly.

The *ordinance of 26 June 1944* set the principle of the illegitimacy of the Vichy regime. As a consequence, its servants could not enjoy the immunity traditionally offered to those carrying out orders by superiors, except as detailed hereunder:[5]

> Neither a crime nor a misdemeanour shall be charged against the authors or accomplices of the acts in question when the acts have been performed in the strict execution of orders or instructions, entirely without personal initiative, and without exceeding those orders or instructions, or when the act consist simply of the fulfillment of professional obligations without wilful participation in anti-national activities.
>
> Nevertheless, no laws, decree, rules, orders or authorizations of the *de facto* authority called 'Government of the French State' shall constitute justification within the meaning of Article 327 of the Penal Code, nor authorization or approval as provided in the definition of certain infractions, when the accused was personally able to evade their execution, and when his responsibility or moral authority was such that his refusal would have served the nation.

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and other political movements. See Novick, Appendix B, pp. 198–201. Chapter 8 'Nullum crimen sine lege' deals with post-liberation legislation

[5] This ordinance was revised by ordinances of 14 September and 28 November 1944, giving interpretation as to who could be held accountable. Translation of the quoted article in the latter ordinance is in Novick, p. 144. Details on the ordinance are in Philippe Bourdrel, *L'épuration sauvage, 1944–1945* (Perrin, Paris, 2002), p. 43.

The ordinance referred to Articles 75 to 83 of the Penal Code, which had been adopted by decrees of the Daladier government in July 1939. Article 75 is the key article which was used for the trials of collaborationists:

> Shall be guilty of treason and punished by death:
>
> 4. Every French citizen who, in wartime, will entice military personnel or sailors, to enter the service of a foreign power [. . .]
> 5. Every French citizen who, in wartime, will entertain intelligence with a foreign power or with its agents, with a view to facilitate the enterprises of this power against France.

Article 79 aimed at those who 'will enroll soldiers for the benefit of a foreign power', which applied to those responsible for those members of the Legion of French Volunteers against Bolshevism, who joined the German army.

Three types of official courts were instituted: the courts of justice, in each French department; the civic courts charged with less important cases, also in each department; and, at the national level, the High Court of Justice which judged the members of the Vichy governments and senior officials, admirals, colonial governors-general, and diplomats. These jurisdictions started functioning in the second half of October 1944, with the aim of replacing progressively the various extra-legal bodies which carried out 'people's justice' in the aftermath of the Liberation.

An *ordinance of 27 June 1944* authorized the trial and punishment of all civil servants for acts of collaboration with the enemy and for having undermined the [democratic] institutions and public liberties.

An *ordinance of 26 August 1944 instituting national indignity* targetted 'every French citizen recognized as guilty of having, after 16 June 1940, either given direct help voluntarily in France or abroad to Germany or to its Allies, or having voluntarily undermined the unity of the nation or the freedom and equality of the French'.[6]

Members of governments or 'pseudo-governments' having exercised their authority in France between 16 June 1940 and the establishment of the Provisional Government of the French Republic were liable to be charged with this crime. The ordinance also applied to those having had a directing function in national, regional or departmental services of the propaganda of these governments and of the Commissariat on Jewish affairs. It listed a number of bodies of collaboration, including the *Service d'ordre légionnaire,*

[6] See text in Bourdrel (2002), pp. 551–555.

la milice, la milice antibolchévique and others, participation in which would be treated as a crime. Publishing articles or books, or giving lectures favouring the enemy, promoting collaboration with the enemy, racism or totalitarian doctrines would be considered criminal (Art. 1).

The ordinance established 'special sections' – an unfortunate term in view of the infamous *sections spéciales* created by Vichy (see Chapter 6), but with none of the latter's wide powers of punishment. These special sections were attached to the departmental courts of justice. Each section had five members, four jurors and a magistrate as President. There was no right of appeal on substance, but only a recourse to the Court of Cassation on procedural grounds (Art. 2, 3 and 7).

Judgments of *indignité nationale* could order the withdrawal of all civic and political rights, ineligibility to representative functions, destitution and exclusion of public functions, legal and teaching positions, associations and trade unions, leading positions in the media, managing directors and members of governing boards of industrial and business firms. The duration of these punishments would not be less than five years (Art. 9 and 10).

Some of these punishments recalled the anti-Jewish exclusion laws of Vichy. The difference was that the Vichy laws applied to Jews because they were Jews, not charged with any offence, without judicial decision nor appeal, and without limitation of time. The post-Liberation ordinance prescribed punishments on an individual basis, based on a judgment, for a set period of time. Indicted persons had legal assistance.

The introduction to the ordinance drew attention to the possible charge of discrimination, but replied that the principle of equality before the law is not opposed to a separation between good and bad citizens in order to distance from positions of command and influence those among the French who disregarded France's ideal and interest during the most painful period of its history. On the charge that the ordinance had retroactive effect, a violation of the Penal Code, the introduction replied that the system of national indignity was not part of the criminal order, but was based on the terrain of political justice, and its judgments could not be pronounced beyond six months after the total liberation of France.

The Purges (*l'Épuration*)

Extra-legal purge

In August 1943, De Gaulle stressed the need to ensure that, after the Liberation, the purge of those who collaborated with the Germans did not

degenerate into 'the unleashing of local personal battles'.[7] In a document of 15 October 1943, the Central Committee of the United Movements of Resistance (*Mouvements unis de résistance, MUR*) addressed instructions to its local leaders, which took 'account of the legitimate need for revenge of the oppressed French, and the need to prevent disturbances likely to cause bloodshed'. In each French department, they should prepare a list of the most notorious traitors, whose 'summary execution would be considered by the whole population as an act of justice. On D-day, the suspects would be immediately arrested and executed, but posters will announce their execution based on a condemnation by the local Committee of Liberation'.[8]

Neither De Gaulle's warnings nor the instructions of the Resistance movements had any orderly or calming effect on local circumstances and actors. Purges started even before the Liberation. The occupation had given rise to hatreds and resentments which, in different places and circumstances, erupted into violence.

Early estimates of non-judiciary, summary executions were high. Anti-Resistance circles and Vichy apologists gave a figure of more than 100 000 which was later dismissed as without sound basis. Robert Aron[9] revised this figure downwards to between 30 000 and 40 000 summary executions.

The French government offered figures on summary executions based on inquiries conducted among the prefects in 1952:

A.	Executions of persons suspected of collaboration with or without a 'de facto' trial:		
	1. Pre-Liberation	5 143	
	2. Post-Liberation	3 724	
			8 867
B.	Victims of murders or executions in which the motive is not established:		
	1. Pre-Liberation	1 532	
	2. Post-Liberation (to 1 January 1945)	423	
			1 955
			10 822

[7] Quoted by Peter Novick, *The Resistance versus Vichy, The Purge of collaborators in Liberated France* (Chatto & Windus, London, 1968), p. 61.

[8] 'L'injustifiable "justice" du peuple', Philippe Bourdrel, in *Historia*, September 2004, p. 55.

[9] Robert Aron, *Histoire de Vichy* (Fayard, Paris, 1954).

Novick generally agrees with these figures.[10] Bourdrel however raises them to between 10 000 and 15 000.[11]

Summary executions carried out before the Liberation were generally linked to war conditions, mainly on orders by Resistance groups. Their priority targets were the German enemy and those considered as closely associated with the Germans: French collaboration activists, Vichy's para-military forces (in particular, the *Milice*), informers, those who had business relations with the Germans, and black market traffickers. Philippe Henriot, Minister of Information of the Vichy government and eloquent radio propagandist for Vichy, was condemned to death by the National Council of the Resistance and executed at his domicile in German occupied Paris on 28 June 1944. During the post-liberation period when the German troops had left and when the Vichy authorities had not yet been replaced by an effective administrative and police structure, there was less or no control over Resistance groups' initiatives in different regions. It took time, negotiations and persuasion for De Gaulle-appointed prefects to assume effective power in their regions. Most summary executions took place in areas where armed Resistance had been active, in such areas as Brittany, Dordogne, Limousin, and Savoy.[12] They left long-lasting memories of fear and resentment among the local people in towns and villages, still divided between Vichy and De Gaulle supporters more than half a century after the Liberation.

Many *justiciers* (righters of wrongs, or vigilantes) had become last-minute resistants who took the law in their own hands, and communist groups who used the purge as part of an insurrection aimed at challenging the political, economic and social regime. 'Justice' without judiciary guarantees of due process, was carried out by popular tribunals created by self-appointed Department Committees of Liberation, and by martial courts of Resistance groups. They condemned suspects to death, some *justiciers* tortured them. Denunciations of alleged collaborationists and traitors poured in to the police stations: during the Occupation, many resistants and Jews had been denounced anonymously to the Gestapo or Vichy police.

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[10] Novick, Appendix C, pp. 202–208.

[11] Bourdrel (2002), p. 539.

[12] The French departments with the highest numbers of summary executions were Finistère, Côte du Nord, Haute-Vienne, Lot-et-Garonne, Ardèche, Yonne, Côte d'Or, Saône-et-Loire, Rhône, Ain, Haute-Savoie, Ardèche, Drôme, Bouches-du-Rhône: Bourdrel (2004), p. 60.

The motives of the self-appointed *justiciers* were varied: patriotism, the 'right' to condemn and punish 'traitors', social or personal revenge. Some became impatient with legal justice and its condemnations, considered too lenient, or with commutation of death sentences to life or time-limited sentences.

More frequent than executions were the shameful shearings administered to women suspected of 'horizontal collaboration' with the Germans, but also targetted were those who only worked for the Germans. Over 20 000 women are estimated to have had their hair shorn and been publicly humiliated.[13]

Judiciary purge

The new judiciary process, aimed at containing the excesses of 'people's justice' by channelling the wish for revenge towards a legitimate judiciary system, became effective at the beginning of 1945, six months after the Liberation.

According to Venner,[14] the number of cases judged by the Courts of Justice, which ceased functioning in 1951, was 57 954, and those judged by the Civic Chambers, 69 797. The judgments rendered were:

– Death sentences in presence of accused	2 853
– Death sentences *in absentia*	3 910
– Death sentence executed	767
– Forced labour for life	2 777
– Forced labour for set periods	10 434
– Imprisonment	26 289
– National indignity	49 723
	96 753

The outstanding cases were presumably acquittals or cases dismissed.

The High Court of Justice judged a Head of state, Marshall Pétain and a Prime Minister, Pierre Laval (see below), 106 ministers, secretaries of state

[13] *Historia*, September 2004, pp. 64–65.

[14] Dominique Venner, 'Les tabous de l'Epuration', *La Nouvelle Revue d'Histoire*, No. 13, July–August 2004, pp. 42–44.

and high-level civil servants, between March 1945 and January 1949. The Court rendered the following sentences:

- 8 death sentences, of which 3 were executed (Laval, Darnand, De Brinon);
- national indignity (*dégradation nationale*): 14, of which seven were suspended for acts of resistance;
- forced labour: 8 of various duration (one for life);
- acquittals: 3
- cases discharged: 42

8 accused died before their judgment.

No data have been released concerning the activities of the military tribunals, which functioned in liberated France from 1944 until the 1950s.

Purge of the French civil service

French civil servants had loyally served the Vichy authorities, and many had collaborated with the Germans under Vichy's orders, as they felt was their duty. The difficulty was to separate the good from the bad, those who had publicly gone beyond their official duty to please Vichy and the Germans.

Three ordinances issued in Algiers gave a legal basis for the purge of civil servants under certain conditions.

An *ordinance of 10 September 1943* established a Commission for the purge of the French administration in liberated North Africa. The Commission was charged with suggesting measures to be taken in the case of

> all officials and civil servants who, since 16 June 1940, have by their acts, their writings, or their personal attitude, either encouraged enemy undertakings, or prejudiced the action of the United Nations [the Allies] and of Frenchmen who are resisting; or have interfered with constitutional institutions or basic public liberties; or knowingly derived or attempted to derive any direct material gain from the application of regulations enforced by the *de facto* authority contrary to the laws in force on 16 June 1940.

The Commission was to distinguish between those who merely obeyed orders without having the authority necessary to challenge them, and those who, 'going beyond their strictly professional obligations, knowingly associated themselves with an anti-national policy'. The Commission could, after inquiry, recommend to the Ministries concerned that 'guilty' officials and civil servants be transferred, demoted or dismissed. When judicial

action was called for, it would refer the cases to the regular justice system.[15] An *ordinance of 7 January 1944* authorized the forced retirement of civil servants, in specific cases. The *ordinance of 27 June 1944* instituted the purge of the civil service in France itself, with conditions similar to those of the September 1943 ordinance. The scope of the ordinance applied not only to the administrative services, but it included the armed forces, the police, the 'irremovable' judiciary and employees of semi-public, state-subsidized entities. It authorized the immediate suspension of all suspect civil servants at half pay while awaiting a final decision and gave procedural guarantees for the accused. The actual purge was left to each Ministry. Administrative sanctions ranged from official reprimand to dismissal without pension. Ministries could refer cases to the State Prosecutor.[16]

In liberated France, the *ordinance of 10 January 1944* created 17 posts of Commissioners of the Republic: appointed by De Gaulle by decree, they replaced the Vichy prefects in liberated parts of France. They had wide powers, including a role in the purges. They could suspend all legislative and regulatory texts, and were to take all measures and decisions to maintain order and the functioning of public administrations and private enterprises. They were authorized to suspend from their functions all elected officials and civil servants, and to suspend the implementation of tribunals' judgments.

The Departmental Committees of Liberation (*Comités départementaux de libération*), created by Circular of 23 March 1944 of the French Committee of National Liberation, had a decisive action with regard to both legal and non-legal purges. These political bodies were composed of representatives of the various Resistance movements, including political and labour union representatives and local personalities. After the Liberation, they were to assist the new authorities and temporarily represent the population of the department. Among other functions, 'they prepare immediate measures for the replacement of the unworthy (*indignes*) civil servants', and, although they had no judicial power, they were entrusted 'with the arrest of traitors and suspects'.[17]

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[15] Translation from the French text in Novick, p. 50. The Purge Commission was composed of a President and four members appointed on the recommendation of the Commissioner of Justice and the Commissioner of the Interior, 'ministers' of the French Committee of French Liberation in Algiers. The Commission could subpoena witnesses and documents: Novick, pp. 50–51.

[16] See Novick, pp. 80–81.

[17] See Bourdrel (2002), pp. 46–47.

The purge of the Vichy magistrates raised a particular problem. They had enforced the Vichy legislation, without raising questions as to its legitimacy. As other civil servants, they dutifully carried out their professional duties. A few eminent jurists and magistrates drafted anti-semitic laws and initiated their implementation. A few magistrates accepted to sit in such an obviously political trial as the Riom trial, and in such other 'exception' tribunals as the infamous 'special sections' (see Chapter 6). All judges, except one, took the special oath of allegiance to Marshall Pétain, as required by the Ministry of Justice.

On 7 September 1944, the Central Commission of purge of the magistrature was created. Composed of magistrates and of resistants, it advised the Minister of Justice on measures to be taken against individual judges. The proportion of those who suffered some type of punishment is estimated at 8.8 per cent of a total of 2 200.[18]

According to statistics given by the Minister of Justice published at the end of 1950, 11 343 Vichy civil servants were subject to legal purge measures, out of 50 000 cases reviewed; 2 706 members of the Police *préfecture* in Paris were called to the Purge Commission which pronounced 1 732 disciplinary measures including 631 dismissals without pension.[19] For all the police corps, one of out of five were subject to disciplinary measures, 37 per cent of the senior police officials were dismissed. Altogether, between 22 000 and 28 000 civil servants were the object of disciplinary measures: in the Ministry of Interior, 9 508; in the Ministry of National Education, approximately 4 000. By 1947, 2 300 military officers were dismissed.[20]

Other purges

Purges were also applied in economic, intellectual, artistic and media circles, either through judicial prosecutions, or through internal purge committees in each trade sector. Louis Renault, founder of the Renault car and truck factories, had helped the Allies' victory in 1918. During the Occupation, part of his truck production was delivered to the Germans, while the tank

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[18] See 'France, 1944, rétablissement de la légalité républicaine', http://www.denistouret.net/conshistoire/1941.html, accessed on 30 June 2005.

[19] Bourdrel (2002), p. 558.

[20] Venner, p. 44, – see also Olivier Wieviorka, 'Epuration, la guerre civile n'aura pas lieu', – 'Les drames de l'été 1945, les procès, le deuil et l'espoir', *Les collections de l'Histoire* (Ed. Complexe, Paris, No. 28), pp. 11–19.

repair shops in his factory had been requisitioned by the Germans. Following a violent press campaign initiated mainly by the Communists, Louis Renault was labelled as a symbol of the hated capitalism, the class enemy and defamed by other unfounded accusations. When, on 23 September 1944, he freely came to a judge to exonerate himself, he was jailed with other detainees and submitted to a regime of terror. Wounded by a warden, he died in a hospital, left without care, on 23 October. In January 1945, his factory was nationalized.[21] Marius Berliet, maker of trucks in Lyon, had a relatively better fate. Jailed in a military prison on 4 September 1944, his trial took place in October 1946, he was condemned to two years' imprisonment, his property and that of his sons were confiscated. He was pardoned in 1948 and, after his death, his enterprise returned to his sons.

The rightist journalist Robert Brasillach was accused of 'treason' for having written articles supporting France's collaboration with Germany and having accepted paid trips to that country. In spite of a plea in his favour by writer François Mauriac, Brasillach was condemned to death and shot on 6 February 1945. The brilliant playwright Sacha Guitry, whose plays were performed in Paris during the Occupation, was jailed for two months, then his case was dismissed.

Selected Trials

The trial of a Vichy minister: Pierre Pucheu

Pierre Pucheu, a former industrialist who joined the pro-fascist political party of Jacques Doriot in the 1930s, was 45 in 1944.[22] He joined the Vichy government led by Admiral Darlan in February 1941, after the removal of Pierre Laval, as Secretary of State for Industrial Production. Appointed to the post of Secretary of State for the Interior on 18 July, he became Minister for the Interior on 11 August. The political and security situations, as well as the relationships with the Germans, were tense. Pucheu took up his position when the French Communist party, following Hitler's aggression against the USSR on 22 June 1941, initiated assassination attempts against

[21] Alain Frerejean, 'Un écrivain et deux industriels dans le collimateur', *Historia*, September 2004, pp. 62–63.

[22] Bourdrel (2002), pp. 11–12, 38–42, – Novick, pp. 56–59.

the German military (tactics opposed by De Gaulle from London). These were followed by the taking of hostages by the Germans and summary executions. After the assassination of two senior German officers in Nantes and Bordeaux in October 1941, the Germans gave a list of 100 hostages to Pucheu to select half who would be executed, an impossible dilemma. Pucheu tried to save first former World War I combatants, leaving on the list mostly jailed Communists: 33 Communists were executed in Nantes and Chateaubriant, out of a total of 48 executions.

Pucheu left the government on 18 April 1942 when Pierre Laval came back to power upon German pressure: he had refused the post of Minister for the Colonies. Following the Allies' landing in North Africa in November 1942, Pucheu left France for Spain on 12th November. Pucheu wrote to General Henri Giraud, then in Algeria after his escape from a prison camp in Germany, to ask whether he could join the French army in Algeria. On 15 February 1943, Giraud sent him a letter starting with 'My dear friend' and ending with 'Hoping to see you soon'. Giraud stressed that there were certain difficulties due to Pucheu's tenure as a minister in the Vichy government which had created hostility on the part of most French opinion.[23] However, Giraud was ready to welcome him and to give him a post in a combat unit, provided that he would not engage in politics, and that he would adopt a pseudonym. Taking this as an assurance of protection, Pucheu arrived in Morocco in May 1943 and was placed under house arrest by the authorities in Algiers. On 14 August 1943, he was jailed in a high security jail in Meknès. His lawyer, Paul Buttin, protested in vain against his detention.

He was arraigned before a military tribunal, created by an *Algiers decree of 23 July 1943* and an *ordinance of 2 and 21 October 1943.* Its jurisdiction included crimes and offences against the security of the state committed by members or former members of the '*de facto* organism self-proclaimed government of France', colonial general governors, senior civil servants, generals and members of antinational groups.

On 25 October 1943, Pucheu was transferred from Meknès to Algiers.

Another *ordinance of 8 January 1944* stated in its first Article that the investigating judge of a military tribunal could suspend his investigation

[23] General Henri Giraud shared the co-presidence of the French Committee of National Liberation in Algiers with General De Gaulle from June to November 1943, when De Gaulle became the only President. On the Pucheu trial see Paul Buttin, *Le procès Pucheu* (Amiot-Dumont, Paris, 1947). Giraud's letter of 15 February 1943 is on pp. 116–117.

until the Liberation of France, if the judge considers that proofs referred to by the accused or the prosecution and only available in France are indispensable for the demonstration of truth. On 17 February, one of Pucheu's three lawyers wrote to the investigating judge to ask that the trial be suspended until the Liberation of France, as the indictment files contained only newspaper cuttings, propaganda leaflets, anonymous letters and testimonies based not on facts but on hearsays. All relevant documentation was only available in government offices in France, all witnesses were in France. He had also asked that the investigating judge be replaced as the judge also had important political functions and had publicly called for condemning Pucheu to death in a newspaper. Both claims were rejected. Pucheu had to be judged without any delay in Algeria.

The trial started on 4 March 1944 in Algiers. Judges were two civilian magistrates and three generals. Order was maintained in the court-room, French and foreign journalists had been invited to attend.

Pucheu was first charged with plotting and carrying out the overthrow or the illegal change of the legal Republican government, a charge which could not be sustained, as Pucheu joined the Vichy government well after July 1940, when Pétain was given all powers. The last two charges – that he personally directed arrests and violence – were found not sufficiently supported by evidence. There was however ample evidence for the charges of collaborating with the Germans and conspiring with the enemy. The judges found evidence that he set up special tribunals to apply summary justice to people suspected of disturbing public order and that he was involved in organizing three special police units – the Police for Jewish Affairs, the Anti-Communist Police, and the Police for Secret Societies. He was involved as one of the signatories of the law of 14 August 1941 which instituted the Special Sections, and the laws of 7 and 14 September 1941. In his final speech, the prosecutor said that Pucheu deserved death.

In their defence, Pucheu's lawyers first condemned the atmosphere of popular indignation created, mostly at the instigation of the Communist party, against an 'imaginary' and bloody personage. They affirmed that the Vichy government was the legally appointed government of France until it became illegitimate with the return of Laval in 1942, when Pucheu left the government. If anyone was responsible for the alleged coup d'Etat of July 1940, it was Pétain, Laval and the 569 parliamentaries who voted for the delegation of powers to Pétain. Furthermore, the Penal Code does not punish conspiracy against the security of the state by death but by life imprisonment. One lawyer paid homage to the impartiality of the debates: witnesses both

for the prosecution and for the defence were free to give their testimonies, – the prosecution and the defence gave their arguments freely. However, he strongly criticized the investigating judge for his conflict of interest, for refusing to hear four witnesses residing abroad, and for refusing to suspend the trial. The rights of the defence had thus been violated, in view of the absence of witnesses and the lack of documents. The lawyer finally rejected the major charges, concerning the recruitment for the Legion of French Volunteers against Bolshevism, and he explained the reasons for the insistence of the Communists for the trial. He said that the laws of August and September 1941 were signed by Marshall Pétain and other ministers: Pétain was responsible, not one minister. Finally, exceptional circumstances deserved exceptional measures.

On 11 March, Pucheu was sentenced to death for having provided military forces to a foreign power, Germany, for collaboration with Germany and intelligence with the enemy, and in particular, for his participation in the running of the special sections and of other crimes, including:

7. . . . [while] secretary of state for Industrial Production and then Minister of the Interior . . . promulgating or contributing to the promulgation of laws claiming to be those of the French State, favourable to the policies of Germany, in time of war . . . [and]
9. . . . placing at the service of the German occupying forces all or part of the organs of public power in time of war . . .

He was declared not guilty of measures aimed at destroying or changing the government, nor of causing the arrest of French persons, ordered or carried out any arbitrary act or violations of individual liberties of citizens. His personal properties were to be confiscated.

On 16 March, a Communist newpaper in Algiers published violent articles hailing the death sentence given to Pucheu, the 'traitor', and compared his senior lawyer, Paul Buttin, to Goebbels, as the Hitlerian advocate of 'anti-France'.[24]

On 19 March, two of his lawyers formally asked General De Gaulle to pardon Pucheu. Several personalities, including the President of the Tribunal, had informally asked De Gaulle to save his life. De Gaulle admitted to the lawyers that the trial was political and that there was almost nothing in the indictment file. He told them that 'we live in a horrid drama'

[24] Buttin, pp. 221–228.

and referred to the 'horrid policy of collaboration and its present consequences'. He retained his 'esteem' for Pucheu and was convinced that his intentions were good, that he was sincere. However, De Gaulle added that 'only the "reason of state" must guide my decision'. He assured the lawyers that he would ensure the education of his children.[25]

De Gaulle rejected the request for a pardon and Pucheu was executed on 20 March 1944 by a military firing squad.

According to a press release of 20 October 1944, the Minister of Justice produced, in a press conference of 19 October, a French document allegedly proving that Pucheu had designated personally French hostages who were to be shot by the Germans on 22 October 1941, which was thus justifying his earlier condemnation. Pucheu's senior lawyer (Paul Buttin) wrote to the Minister to protest against the production of a new document as a charge which could not be an evidence, as it was not submitted during the trial, and the defendant was not allowed to rebut it.

Pucheu's condemnation and execution was to set an example and show that the French Committee of National Liberation would severely punish the main Vichy collaborators, as demanded by the Resistance in France, and particularly by the Communists. In effect, it created an additional division between those who wanted justice to condemn quickly the main Vichy leaders, while others deplored the travesty of justice and the pre-set death sentence.

For De Gaulle and the new leaders, Pucheu's trial was a test: how could those leaders be judged? on what charges? by what court? could the requirements of due process be respected?

However, the Pucheu trial showed its limits: while the trial itself was conducted with dignity, the pre-trial investigation process was hurried and inadequate, the indictments were ill-founded, there was no reliable evidence, the defence's arguments were not seriously taken into account. The atmosphere around the trial was pernicious, the verdict was made in aggressively hostile newspapers.

The Trial of Marshall Pétain

This was the major post-liberation trial, where the head of state of Vichy, a Marshall of France, a former acclaimed and revered military commander of

[25] The French text is in Buttin, pp. 231–233.

the First World War and the 'saviour' of defeated France, was tried for his political role and decisions during these dark years.

Was it possible to hold such a trial in the turbulent post-Liberation period, when passions were high and the taste for revenge difficult to control?

The trial met several major legal obstacles which the defence raised before and during the trial. Procedural questions: could the judges, who had sworn allegiance to Marshall Pétain, now judge fairly the accused? Was the composition of the jury fair? What law was applicable?

In substance, was this a political trial judging political actions and judgments, or a judiciary trial in which guilt would only be assessed on legal grounds?

Before the trial

On 3 September 1943, the French Committee of National Liberation had declared that Philippe Pétain and his Ministers were guilty of treason, punishable by articles 75 and following of the Penal Code for having signed, on 22 June 1940 an armistice 'contrary to the will of the people', an obvious untruth. As Germany remained however the enemy until the signature of the peace treaty, collaboration with Germany constituted another aspect of treason.

This text, signed by both Generals De Gaulle and Henri Giraud as co-Presidents of the French Committee of National Liberation in Algiers, declared that no competent jurisdiction could judge these crimes before the liberation of France.

The *ordinance of 9 August 1944*, issued in Algiers had determined that the nature of the French government was and remained the Republic and declared null all constitutional, legislative acts and decrees promulgated in France after 16 June 1940 and until the re-establishment of the Provisional Government of the French Republic.

The order to start investigating the alleged crimes of Pétain and those of other leaders was issued on 13 September 1944.[26]

Besides Pierre Pucheu, judged and condemned in Algiers, a few high dignitaries were judged in Paris after the Liberation of France by the High Court of Justice, instituted by the *ordinances of 18 November 1944 and 18 January 1945*, before the trial of Pétain. On 15 March 1945, Admiral

[26] See Marc Ferro, *Pétain* (Fayard, Paris, 1990), pp. 614–654. and Jean-MarcVaraut, *Le procès Pétain* (Perrin, Paris, 1995), Chapter I.

Esteva, Resident-General in Tunisia until 1943, was condemned by the High Court to life detention, loss of military rank, national indignity and confiscation of his assets. On 21 April 1945, General Dentz was condemned to death, but the sentence was commuted to life imprisonment.

On 19 August 1944, on Hitler's orders, Pétain, still France's head of state, was forcefully abducted by an SS commando from Vichy and sent to Sigmaringen, in Germany, where the principal chiefs and journalists of the Paris Collaboration were kept under German guard. In a letter of solemn protest to Hitler, Pétain declared that he then ceased to exercise his functions as chief of the French State. Pétain considered himself a prisoner, refused all contact with the Germans and his co-prisoners, and maintained a voluntary silence. Knowing that his trial was to come, he started preparing his defence with his secretary.

On 5 April 1945, Pétain wrote again to Hitler asking him to let him return to France to be judged and 'defend his honour'. His trial was to start on 24 April and he was to be judged *in absentia*, De Gaulle's preference. Against his superiors' orders, Ribbentrop's personal representative transported Pétain and his wife to Switzerland on 24 April, date of his 90th birthday. Against the wishes of De Gaulle, the Swiss authorities accepted Pétain's request: he and his wife were returned to France on 26 April and jailed in the Montrouge fort, near Paris, where they stayed until the trial.

The indictment

Pétain's indictment, dated 23 April 1945, was delivered to him on the 27th.[27] A long document relating political-historical events interpreted as a basis for legal charges, had been prepared by a magistrate who had earlier sworn allegiance to the Marshall. The prosecutor, Mornet, had not, as he was already retired during the Vichy period. A complement to the indictment was submitted on 22 July.

The indictment started with the resignation of Prime Minister Paul Reynaud on 16 June 1940 and the signing of the armistice on 22 June 1940. The main argument was that the first three Constitutional Acts creating a 'French State' headed by Pétain giving him all powers – executive, legislative

[27] The French text of the indictment and of its complenent is is 'Anovi, La seconde guerre mondiale, les documents, France 1945, L'Acte d'accusation du maréchal Pétain' http://www.guerre-mondiale.org/Documents/accusation.htm

and judiciary – was the outcome of a long-fomented plot against the Republic, an unlikely scenario. Thanks to France's defeat, the plot had succeeded, but its definitive success was only assured under the condition that this defeat was not challenged. Pétain's role in this plot was mainly his name and authority and the expectation that he would assume power. According to the indictment, various elements proved that Pétain was guilty of internal conspiracy against the security of the state and of the crime of conspiring with Hitler during the period preceding the war.

France could hold against Pétain that he based his policies on the definitive acceptance of the defeat. Another reproach was the Montoire agreement with Germany of the vanquished with the victor,[28] which sanctioned a humiliating collaboration but also

> the enslavement of France by Germany, which in the legislative area, the Vichy government lent itself to by modelling its legislation on that of the Reich, not limiting itself to that, in placing outside the common law entire categories of the French people and in organizing their persecution similarly to what happened in the Hitler regime, then in delivering to the executioners the victims demanded by the Reich as if to mark even better its humiliation.
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> . . .
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> How to justify the promulgation of these abominable racial laws, instead of entrenching behind the impossibility to go against all French legislation, and all French tradition, while it would have been better, a hundred times, to leave the responsibility to apply the principles of these laws to the occupying powers? How to justify the monstrous creation of the special sections of appeals courts, with injunctions to magistrates, by order of the German authorities, to murder by authority of justice the unfortunate persons referred to them?

In conclusion, the indictment charged Pétain of having committed the crime of conspiracy against the internal security of the state and to have conspired with the enemy in order to promote its enterprises in relation with his own, crimes defined and punished by article 87 and 75 of the Penal Code.

A few more documents supporting the charges were cited in the Complement to the indictment of 23 April 1945.

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[28] On 24 October 1940, Pétain met Hitler in Montoire (France) and shook hands with him. In a radio message on 30 October, Pétain said that he was now entering in the way of the collaboration with Germany, a collaboration which 'must be sincere'.

The trial

Pétain was defended by three competent and dedicated lawyers. The senior one wanted to plead the age factor and blame Laval for all crimes. The other two did not agree with this position and convinced Pétain that he had to defend his position and decisions.[29] The lawyers' request for the hearing of 14 defence witnesses, including the former Swiss Ambassador, the former American Ambassador and the former Papal nuncio accredited to Vichy, received no reply.

The Court was composed of three professional magistrates, twelve parliamentary jurors who had not voted the 10 July 1940 law giving Pétain all powers, and twelve jurors from Resistance organizations, a total of 24 jurors. Its President was the first President of the Court of Cassation.

The prosecutor had served Vichy as the vice-president of a Commission charged with the retroactive revision of naturalizations.

The Court was totally biased against Pétain: the trial was a political trial, in a general atmosphere in France of revenge stirred up by the Communists.

The trial started on 23 July 1945 in the Court of Appeal of Paris. Pétain's senior lawyer submitted that the Court was illegal, its jurors chosen on a list of the accused's adversaries, and magistrates who had sworn allegiance to Pétain and had applied the laws promulgated by the accused. The case should have been submitted to the Senate, competent to judge cases of high treason upon indictment by the Chamber of Deputies, in accordance with the Constitution of 1875. These arguments were rejected by the Court. In a preliminary statement, Pétain declared that the powers granted to him were legitimate and recognized by all the world's countries, from the Vatican to the USSR. He used these powers to act as a shield in order to protect the French people. The Court did not represent the French people. He would not make any other statement, nor answer any questions, although he did intervene briefly on a few occasions.

The first witnesses for the prosecution, all the major political leaders of 1940 and a general,[30] tried, unsuccessfully, to prove that the armistice was an act of treason on the part of Pétain. General Maxime Weygand countered that the armistice was the only acceptable solution at the time, a military

[29] Varaut, p. 91.

[30] Among others, former Prime Ministers Edouard Daladier and Léon Blum, former President of the Republic Albert Lebrun, former President of the Senate Jules Jeanneney, former President of the Chamber of Deputies Edouard Herriot.

necessity, and that the politicians, such as Paul Reynaud, were relieved to let Pétain take over the country's direction and assume responsibility for such a difficult decision. The prosecution then withdrew part of the indictment: the trial was not the trial of the 'criminal' armistice or of the 10 July vote: it was the trial of the treason starting on 11 July 1940.

Pierre Laval, jailed in France since 1 August 1945, was called to the trial as a witness on the 3rd of the month. Laval re-affirmed that the interest of France, in October 1940, when Germany's victory over Britain was assured, was to find a formula to avoid the consequences of defeat: it was the only possible policy. He said that Pétain accepted without difficulty Hitler's invitation to meet with him in Montoire, and accepted the principle of a collaboration with Germany.

Concerning the 'Jewish question', the Court's President recalled that in June and July 1942, racial persecutions worsened and asked what was then the attitude of Pétain. Laval replied: 'The attitude of the Marshall, Mr President, was that of an honest man. He was indignant like myself. He protested. We have protested uselessly and vainly'. The President replied: 'Protested and gave in!'

No questions were asked about Laval's (and Pétain's) antisemitic policy and laws, nor about the raids and deportation of foreign and then French Jews. Laval only referred to the resistance of Pétain and himself to the German plan to have all Jews naturalized since 1927 lose their French citizenship: about three per cent of the 900 000 naturalized foreigners lost French nationality.[31]

Two resistants who had been sent to German concentration camps testified for the prosecution. They said that French Jews and resistants had been arrested and sent to these camps by the Vichy police, following orders from the Vichy government. A Communist witness said, in part, that the deportation, torture and gas chambers did not directly concern the trial, as the trial was, in his view, about treason and collaboration with the Germans, not about the deportations.[32]

A letter to Pétain from Admiral Leahy dated 22 June 1945 recalled that he held in very high esteem Pétain's personal friendship and his devotion to the welfare and protection of the French people. However, Leahy repeated the opinion he had expressed during his tenure as US Ambassador to Vichy

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[31] Varaut, pp. 236–238, 259–262.

[32] Varaut, p. 282–283.

France, that a positive refusal to grant the least concession to the Axis' demands, which could bring about more pain to the French people, would, in the long term, be of advantage to France.[33]

A number of Generals, two admirals and other personalities were called as witnesses for the defence. The witnesses supported Pétain's position when he asked for an armistice, said that he had avoided a worse fate for the French by staying in his post, and that he had preserved France's authority in North Africa, to the benefit of the Allies. General Juin, who had served first Pétain, then De Gaulle, was prevented by De Gaulle from testifying in person at the trial.

Cardinal Liénart, archbishop of Lyon, wrote to the Court 'to try to render justice to a man whose long career of honour and glory is threatened to end in the most cruel misfortune'. His conviction was that Marshall Pétain, far from having betrayed his homeland, only wanted to serve it.[34]

Pastor Marc Boegner, President of the French Protestant Federation was the only religious leader to testify in person at the trial. He said that he had told Pétain several times of the growing emotion and indignation of the French Protestant churches, emotion and indignation shared by Cardinal Gerlier. After the events of June 1942 and the round-ups of Jews in the Vel' d'Hiv in July, events which Boegner was the only one to refer to during the trial, he said: '. . . once more, I noted a deep emotion [on the part of Pétain], but, once again, I had the impression of a powerlessness to prevent great evils which, in his inner self, he called by their name and condemned them without limit'.[35]

On 11 August 1945, in his closing speech, the prosecutor maintained the terms of the indictment, that is the charge of treason but replaced the charge of a plot against the Republic by crimes against the regime. On Vichy's anti-semitism, he denounced 'this monstrous law instituting the Jewish statute' of October 1940, inspired by the prejudices and hates of the occupying power. He did not mention the round-ups of Jews in 1942 with the support of the French police. He asked for the death sentence.

The three defence lawyers followed with their pleas. They stressed that Pétain was defending his honour, not his life. They set apart Pétain's policy

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[33] Varaut, pp. 284–286.

[34] Varaut, pp. 340–341.

[35] Varaut, p. 340 – and *Les Eglises protestantes pendant la Guerre et l'Occupation, Actes de l'Assemblée Générale du protestantisme français, Nimes, 22–26 Octobre 1946*, pp. 46–47.

of playing for time with that of Laval, Pétain's 'evil genius', of intimate union with Germany. They noted that the prosecution had abandoned the charge of a plot to overthrow the Republic. One lawyer set out the tragic dilemma faced by the government concerning the hostages and the death condemnations of the special sections: let the French condemn fewer men in order to prevent the Germans from condemning more. He recognized that Pétain had promulgated the laws of exclusion of the Jews from many activities, but he had imposed exceptions for former World War I combatants and their families. Pétain rejected the German demand that Jews wear the yellow star in the non-occupied zone. He had rejected the law which would have taken away the French nationality of all Jews naturalized since 1927. Pétain could not be made responsible for the atrocities committed by the Germans. The lawyer was convinced that Pétain and the Resistance had fought the same combat. In a final statement, Pétain repeated that his only thought had been to remain with the French people in France, as he had promised, to try to protect them and lessen their sufferings. He had no other ambition but to serve France.

On 15 August 1945, the High Court condemned Pétain to death, to national indignity and to the confiscation of his personal property, for having conspired with Germany, power in war with France, with a view to favouring its enterprises, crimes defined and punished by Articles 75 and 87 of the Penal Code.

In view of the age of the accused, the Court expressed the wish that the condemnation to death not be carried out.[36]

On 17 August 1945, De Gaulle commuted the death sentence into life detention. Pétain was first detained at a fortress in the Pyrénées, where Edouard Daladier, Léon Blum and Maurice Gamelin had been jailed in October 1941 on Pétain's orders. On 15 November 1945, Pétain was transferred to l'Ile Yeu (an island off the coast from Bordeaux), where he died on 23 July 1951.

Eight requests in revision of the trial were submitted by Pétain's lawyers since 1950, without success. The formal reply by Ministers of Justice was that there would be no revision other than that of history.[37]

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[36] The full French text of the judgment of the High Court is in 'Anovi, La seconde guerre mondiale, les documents, La condamnation du maréchal Pétain' http://www.guerre-mondiale.org/Documents/condamnation.htm, accessed on 30 June 2005.

[37] Varaut, p. 415.

The 'Jewish question'

The trial did not examine in depth the responsibility of Pétain in the antisemitic legislation adopted as early as October 1940, the several laws of 1941, the dutiful implementation of these policies and laws by the state administrators (the *préfets*), the judges at all levels and the police, and their dramatic consequences on the lives and properties of thousands of foreign and French Jews. Pétain's condemnation was formally justified by a charge of treason, collaboration with the Germans in the interests of the enemy, and not because he had promulgated these laws, which were deemed to have been only initiated and implemented because of German pressures and demands.

There was no appreciation in 1945 that the October 1940 laws were purely a French initiative, not a copy of German legislation, and even went further than the Germans laws in defining who was a Jew. This fact was only revealed in the 1970s when American historian Robert O. Paxton published his book on 'Vichy France: Old Guard and New Order', a thesis later confirmed by French and other historians.

As seen above, there was a reference to the exclusion of 'whole categories of French people' in the Indictment, but only as a copy of German legislation, and a reference to delivering victims to the executioners. A few references were made during the sessions to the racial persecutions of 1942 and to the deportations, but the latter included workers sent to Germany as forced labour, resistants sent to Buchenwald, and Jews sent to Auschwitz. Pétain's defence was to show that he had resisted some measures and had tried to protect French (not foreign) Jews. During the investigation preceding his trial, Pétain said: 'I have always and in the most vehement fashion defended the Jews . . . These persecutions were made outside of me . . .'

In fact, Pétain never mentioned as such the 'Jewish question' in his speeches, nor did he publicly take position in favour of the victims.[38] Pétain's condemnation only had a short reference to the 'monstrous character of the deportation': he was blamed for not making any public protest against the deportation measures, not for promulgating anti-semitic legislation.

The trial of Pierre Laval

Pierre Laval did not have the prestige of Marshall Pétain, a revered victor of World War I and a grand-fatherly figure for many French people during the

[38] Ferro, p. 631 and 246.

Occupation. Laval was despised or hated by many, he was believed to be the evil influence over Pétain. As a lawyer, a Socialist then independent parliamentarian, he was five times government Minister during the Third Republic, and twice Prime Minister. A pacifist and anti-Communist, he was for France's rapprochement with Mussolini's Italy in the 1930s. In June/July 1940, he was largely responsible for persuading the government to remain in France, to persuade the Parliament to give all powers to Pétain and to accept an armistice. He was convinced that Germany would win the war, and wanted France to collaborate with the Germans in order to improve its position for future peace negotiations. In a radio broadcast of 22 June 1942, he said: '. . . I wish a German victory, because, without it, bolshevism to-morrow would settle everywhere'. This 'wish' shocked France, where most still believed that Pétain was playing a waiting 'double game', and were silently hoping for the victory of the Allies and France's liberation from German occupation. Laval became even more unpopular when he announced, under German pressure, the programme of sending French workers to work in German factories, first on a voluntary basis, on the pretence of having one French prisoner of war liberated for three workers sent to Germany, then on a compulsory basis. In June 1942, also under strong German pressures, Laval agreed to an arrangement according to which French Jews would not be arrested but all foreign Jews would be arrested and delivered to the Germans. He announced in mid- September as a 'concession' that the Jewish children would be deported together with their parents instead of being separated: this was not a German demand. He added: 'No one and nothing can deter us from carrying out the policy of purging France of undesirable elements without nationality'.[39]

Laval's appointments in the Vichy government

In June 1940, Laval was appointed by Pétain as Minister of State, Vice President of the Council of Ministers. He accompanied Pétain when the latter met Hitler in Montoire on 24 October 1940, and the principle of a collaboration with Germany was announced. Constitutional Act No. 4 of 12 July 1940 designated Laval as Pétain's successor if Pétain was unable to exercise his functions. Laval countersigned the law instituting the Statute of

[39] Quoted by Michael R. Marrus and Robert O. Paxton, *Vichy France and the Jews* (Basic Books, Inc. Publishers, New York, 1981), p. 269.

the Jews on 3 October 1940 and he was appointed as Minister for Foreign Affairs at the end of October.

Laval was dismissed from the government by Pétain on 13 December 1940. On the same day, Constitutional Act No. 4 ter annulled Act No. 4 and declared that a successor to the head of state would be designated by the Council of Ministers by majority vote. Pétain wanted to pursue both France's collaboration with Germany and to maintain relations with Britain and the USA, while Laval, an anglophobe, had chosen only a closer collaboration with the Germans.

After Laval's dismissal, Pétain appointed a triumvirate composed of Admiral François Darlan, General C.-L. Huntziger and P.E. Flandin, a former parliamentarian. On 10 February 1941, Constitutional Act No. 4 quater announced that Admiral Darlan was the new successor of the Marshall and the new Vice-President of the Council. Pétain called Laval back on 18 April 1942, to the French people's dismay. Laval was now head of the government (Constitutional Act No. 11). On 17 November 1942, he was given legislative power (Constitutional Act No. 12), and again, became Pétain's successor (Constitutional Act No. 4 quinquies). In January 1943, Laval created the French *Milice*, a political-military police which was active in hounding, torturing and executing resistants, Communists and Jews.

Following the Allies' landing in Normandy on 6 June 1944 and the progressive liberation of France, on 17 August, the transfer of the Vichy government to Belfort was imposed by the German authorities in spite of Laval's protests. Laval then ceased to exercise his functions of head of government. On 7 September, he and his wife, his Ministers and other collaborators were taken to the Sigmaringen castle, where Pétain and his wife and collaborators were also detained. On 22 April 1945, Laval left Germany for Switzerland, then on 2 May, Barcelona in Franco's Spain, where his hope to find refuge was denied. On 31 July, he was sent to the US zone in occupied Germany, handed over to the French military, sent to Paris, where he was jailed in the Fresnes prison on 1 August 1945.

The trial

Pétain's trial was political but it retained an appearance of legality and due process. Laval's trial had no such appearance: it was blatantly biased, hurried over, and had an unseemly and gory ending.

The High Court had the same composition as for the Pétain trial, except that the jurors were 36. Laval also had three lawyers, bright but inexperienced.

Laval, a lawyer himself, overpowered them with a somewhat erratic defence. The jurors were outspoken in condemning Laval to death before the end of the trial.[40]

Laval was indicted for conspiracy against the security of the state and conspiracy with the enemy in order to favour its enterprises together with his own. The prosecutor's plan was to stress the charge of treason. The preliminary judicial investigation (*instruction*) was cut short: it started on 17 September and ended on 22 September, against the protests of the lawyers. Most basic questions about Laval's role in the 10 July 1940 vote, the meeting with Hitler in Montoire, Laval's dismissal and his return in 1942, the relationships with Germany, the forced labour decisions, were not asked.

The trial started on 3 October. His lawyers resigned, citing their incapacity to assist their client. Laval appeared before the Court alone. He told the judges and the prosecutor that, during Vichy, they were all under orders from the government and he denounced the arbitrary procedure now imposed upon him. When he told the Court 'Condemn me straight away, it will be clearer', after three warnings, the President expelled him. On 5 October, the lawyers came back, after being re-appointed by the Court. On 5 and 6 October, Laval replied to the charge of conspiracy against the security of the state. He gave his version of the events of 8–10 July 1940 and affirmed that one reason for staying in power was to try to protect France against German demands. He did not reply to the charge of conspiracy with the enemy. Following another argument with the President – Laval refused to answer his questions, saying that the President answered his questions himself – and insults uttered by a few jurors, Laval decided not to attend further sessions. On 8 October, the Minister for Justice asked Laval's lawyers to return, with Laval, to the Court. Laval accepted on the condition that the jurors who had threatened him be excluded.

The closing speech of the prosecutor and the condemnation to death were pronounced on 9 October, in the presence of all the jurors, but in the absence of the accused. The condemnation was based on Articles 87 and 75 of the Penal Code. Laval was also condemned to national indignity and to the confiscation of his properties.

On 12 October, De Gaulle met with Laval's lawyers. Laval had not asked for a pardon which had been sought by many foreign governments. The final decision was to allow the judgment to be carried out.

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[40] On the Laval trial, see Jean-Paul Cointet, *Pierre Laval* (Fayard, Paris, 1993), pp. 509–537, – Varaut, pp. 265–280.

On 15 October, on the day of the planned execution, Laval was found almost dead in his cell: he had poisoned himself. On instructions by the prosecutor, he was revived by the prison's doctors, and shot by a firing squad. He shouted 'Vive la France' before dying.

Conclusion

During the tumultuous period after the Liberation of France, De Gaulle, with the prestige of the head of a victorious France, and thanks to his skilled and energetic political management and his rhetoric, saved France from a civil war, feared by many in view of the long and bloody Spanish civil war precedent in the 1930s. He was faced with considerable challenges: while struggling to maintain or restore order, he had to annul Vichy's laws, replace and punish the collaborationists guilty of crimes, restore democratic institutions, re-build the army and the police, and renovate France's judicial and administrative structures.

In the judiciary area, De Gaulle faced contradictory claims: a popular and/or political demand for prompt punishment if not revenge over the collaborationists at all levels, the need to stop and pre-empt extra-legal trials and executions, and the need to restore law and justice in judging the accused.

The extra-legal purge which erupted more or less spontaneously after the departure of the German troops in various regions took a heavy toll: probably between 10 000 and 15 000 executions, when resistance groups or individuals took justice into their own hands. The number of judiciary condemnations, including imprisonment and death sentences, was close to an impressive 100 000.

The purge of the civil service was particularly difficult as all civil servants had served Vichy during the four years of occupation. It was therefore necessary to identify those who had positions of responsibility, those who showed an excessive zeal in tracking resistants and Jews and in helping the Germans. Individual cases went through a process of review by administrative committees and decisions by ministers.

Judging the major figures of French collaboration with Germany was one of the main challenges faced by justice, amidst a public climate of turmoil, revenge and hate, encouraged by the press and the Communists, where death sentences were expected ahead of the trials.

The three cases briefly described above, those of Pucheu, Pétain and Laval have some similar characteristics. The preliminary investigations and

collection of documentation (*l'instruction*) were hurried and incomplete, the lawyers had limited or no access to all the documents and were unable to call on all the defence witnesses useful or even necessary to their causes. Death sentences were the only sentence to be applied.

Some of the accusations were ill-founded in fact or in law and some were withdrawn during the trials. The charge that Pucheu had been a party to the July 1940 transfer of power from the Parliament to Pétain had no basis as he joined the Vichy government only in February 1941. Charges that Pétain and Laval had been responsible for a conspiracy against the security of the state was hardly tenable as Pétain had received all powers from a legitimate parliamentary assembly. For all three at different levels of responsibility, the charge of conspiracy with the enemy, that is state collaboration with Germany, was valid, as well as the initiation, promulgation and implementation of legislation which violated the republican principles of equality of all citizens, the setting up of special courts and measures limiting the freedom of individuals and confiscation of their properties.

The composition of the courts was unfair to the accused: judges showed their hostility towards the accused during the debates, juries were stacked with resistants who had no reason to be objective towards those whom they considered responsible for such abuses as torture and executions. In short, these trials and many others conducted in the aftermath of France's liberation were neither fair nor equitable.

The sentences condemning Pucheu, Pétain, and Laval were referred to De Gaulle, head of state, with the traditional right of pardon of monarchs and Presidents of the Republic. However, as he himself revealed, his decisions were heavily influenced by non-judicial 'reasons of state', in the sense that, in his view, the maintenance of public order and, no doubt, his own legitimacy, required a response to the public and political calls for revenge and punishment. As is often the case in emergency situations, reasons of state prevailed over the requirements of justice. The judiciary was firmly kept under government control, as it had been during the Vichy regime. The tense, unstable political climate, after the Liberation in France, the pressures of a strident press, the political difficulties of holding together rival political and social factions with different objectives, the military requirements and the international situation gave little room for De Gaulle to manoeuvre.

In judging history, past political decisions, people, leaders and institutions, situations and constraints of the time should be taken into account. The charges against Pétain and Laval concerned, retroactively, their decisions

taken during the German occupation, in a position of subordination to the victors, where negotiations could only be finessed and when the French leaders were convinced that Germany had already won the war.

Our present view of the racial policies of Vichy is influenced by the knowledge that the Jews deported to Drancy, then to Auschwitz, were to be exterminated, while knowledge of the 'final solution' was then a well kept secret. However, strong suspicions of the fate of the Jews sent to Auschwitz became known as early as 1942.

The Vichy leaders cannot escape responsibility and accountability for changing the French democratic 'République' into an authoritarian state, in promulgating anti-semitic laws, in ensuring that French administrators and judges implement them, and in insisting that the French administration and police take action in rounding up foreign, then French, Jews in French concentration camps, in helping the Germans deport them, only to assert a fictitious French sovereignty over actions which should have been left to the Germans. Neither Pucheu, Pétain nor Laval were judged primarily for their anti-semitic laws and action against the Jews, they were judged and condemned for changing the regime and for collaborating with the Germans, an act retroactively charged as treason. They were not judged for crimes against humanity, a legal concept only 'invented' by the Nuremberg Charter in 1948 as one of the charges against the major war criminals of the Nazi regime judged by the International Military Tribunal in Nuremberg.

The first indictments and trials of Vichy leaders for crimes against humanity were only and belatedly initiated in the 1990s, as recorded in Chapter 8.

Chapter 8

From Barbie to Papon

After the Liberation of France and the surrender of Germany, the Nuremberg trial (November 1945–October 1946) gave retribution to the senior, surviving and detained, Nazi leaders who were found guilty of crimes against peace, war crimes and crime against humanity (see Chapter 9). The German leaders were the guilty ones, and there was not much introspection or discussion in France about the crimes against humanity committed by Vichy, either on its own or in association with the Germans.

As discussed in the previous Chapter, Vichy leaders were judged for illegal regime change and 'treason', not for crimes against humanity or complicity with such crimes. The French people had other compelling concerns: France was a devastated and ruined country which had to be reconstructed. The French people wanted first to see an end to all the war restrictions hampering their daily life. It took time, but France's economic recovery was impressive, thanks to effective economic leadership and hard work, to the US- financed Marshall Plan, and to the creation of the Common Market: between 1946 and 1974, called the 'Glorious Thirties [thirty years]', France's gross national product increased by four times. The development of the European Economic Community, then the European Union, gave peace to Western Europe. France had lost its perennial enemy, Germany, but had to deal with colonial wars until 1962 (see Part I).

The Gaullist myth of a resistant France covered up the warts, vices and crimes of Vichy. Reconciliation between the two Frances, that of Vichy and that of De Gaulle, was attempted through amnesties of those punished by the purges. A general amnesia of that black period blanketed out possible feelings of guilt.

Then, in the 1970s, amnesia began to dissipate. Public events and trials of suspects charged, for the first time in France, with crimes against humanity, shattered the Gaullist myth and confronted the French people with the dark past of the Occupation: Vichy's willing collaboration with Nazi Germany could no longer be hidden. The Vichy years were becoming, at last, part of France's history.

Amnesties and Amnesia

The amnesties

On 5 January 1951, the first amnesty law was adopted. Its proponents had cited five major arguments: clemency, reparation for the injustices of the purge, national reconciliation, the political nature of certain offences committed during the Occupation, and the example of Germany and Italy, which had started their own national reconciliation. The Communists, however, opposed any kind of amnesty, as promoting the 're-birth of fascism'.[1]

The law granted amnesty to all those who had committed acts for which the punishment involved loss of civil rights and a prison sentence of less than fifteen years. The law provided for individual remedies for those who had been forcibly conscripted, minors below the age of twenty-one, and those who had already served most of their time. The law did not apply to grave crimes nor to judgments of the High Court. Courts of justice had been abolished in 1950 and replaced by military tribunals. The High Court of Justice ceased functioning also in 1950, but was reconvened in 1954 and in 1960 to try escaped suspects who had returned to France.

The second amnesty law was adopted on 24 July 1953, whose first Article affirmed in part, in a self-justification statement: 'Amnesty is neither

[1] Henry Rousso, Translated by Arthur Goldhammer, *The Vichy Syndrome, History and Memory in France since 1944* (Harvard University Press, Cambridge, Mass.,/London, England, 1991), pp. 51–54.

rehabilitation nor revenge, nor is it a criticism of those, who, in the name of the nation, bore the heavy burden of judgment and punishment'.

All remaining prisoners of the purge, except those guilty of the most serious crimes, were then released, marking the end of France's post-Liberation purges (*épuration*). Of the 40 000 individuals sent to prison in 1945 for acts of collaboration, only 4 000 remained in jail in 1951 and none by 1964.

A long amnesia

Based on the Gaullist myth, a collective amnesia covered up the political/military shame of the 1940 defeat by the Germans: France had resisted and fought, she was now in the camp of the victors. The amnesia also limited the extent of Vichy's collaboration with Germany: only a small part of the population had followed the treacherous leaders. All the blame for the exclusion of the Jews, then for their deportation and ultimate extermination, was placed only on the German occupier. Whatever Vichy did was under pressure by the Germans. There was no French responsibility for the Holocaust.

Approximately 76 000 Jews were deported from France, some 2600 returned at the end of the war. As from 1945, the French discovered the Nazi camps, but without making a clear distinction between internment, transit, concentration and extermination camps. French workers sent to Germany on forced labour, political deportees including Gaullist or Communist resistants, Free-Masons and Jews were all included under the name of deportees. The French Communists, then a strong political party, laid stress on their own 'martyrs', widely inflated their numbers and favoured those sent to concentration camps because they fought against the Germans over those who were 'only' deported, 'those' meaning Jews. The few Jewish survivors of the concentration camps wanted to re-join the French community from which they had been excluded: they did not claim their difference nor did they expose publicly their tragedy, they called themselves 'French deportees'.

Externally, the Cold War gave strength to an anti-Bolshevism which Vichy had used to defend its policy of collaboration with Germany. West German scientists, intelligence and military specialists were promptly considered by the U.S.A. as useful resources, without need to investigate their Nazi past. After the first Nuremberg trials, punishments of Nazi leaders became less severe.

However, the Eichmann trial gave new international prominence to Nazi atrocities. Adolf Eichmann had organized deportations of Jews from

Germany and other European countries to extermination camps. After World War II, Eichmann fled from Austria and settled in Argentina under the name Ricardo Klement. In May 1960, Israeli Security Service agents daringly (and illegally) seized Eichmann in Argentina and took him to Jerusalem for trial in an Israeli court. He was found guilty and sentenced to death. He was executed by hanging on 1 June 1962.[2]

The return of Vichy's memories

In the 1970s, a series of events made the French take a new look at the Vichy years. A documentary film, 'The Sorrow and the Pity' (*Le chagrin et la pitié*) shocked government and the public, now confronted with a realistic picture of the French people's behaviour during the Occupation, far from Gaullist idealistic images.[3] The film, directed by Marcel Ophuls[4] and produced by André Harris and Alain de Sédouy in 1967–1968, was the first film made in France about the memory, not the history, of the Occupation. Set in Clermont-Ferrand, composed in part of archival footage, it was dominated by eyewitnesses' accounts from those who had lived through the period: collaborators and resistants, prominent political figures and unknown 'locals', Pétainists, Communists and Gaullists, French, English and German witnesses. It showed neglected aspects of collaboration: the pro-Nazi commitment of some collaborators. It also revealed examples of anti-semitism among the French, unrelated to Nazi ideology and practices: large segments of French people were antisemitic during the period between the two World Wars, and many were xenophobic, partly in reaction against the considerable immigration of foreigners, including foreign Jews, during the economic crisis of the 1930s and a period of high unemployment.

The government refused to allow the film, ready for distribution in 1969, to be shown on the French television channels, still entirely under government control. One argument for this rejection was that the film 'destroys myths that the people of France still need'.[5]

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[2] U.S. Holocaust Memorial Museum, Washington, D.C., http://www1.ushmm.org/wlc/article.php?lang=en&ModuleIf=100. . . accessed on 14 September 2005.

[3] Rousso, pp. 100–114, – and, Joan B. Wolf, *Harnessing the Holocaust, The Politics of Memory in France* (Stanford University Press, Stanford, California, 2004), pp. 62–64.

[4] Marcel Ophuls is the son of Max Ophuls, a renowned film director who had fled Nazi Germany.

[5] Rousso, p. 110.

In April 1971, the film was shown in a small cinema in Paris, and seen by about 600 000 people. In 1979, the American miniseries *Holocaust* was shown on French television, with wide success. The Sorrow and the Pity film was finally shown on 29 and 30 October 1981 on one television channel, and seen by an audience of about fifteen million. It broke with the Gaullist conventional wisdom and opened French opinion to a new and disturbing view of France's Vichy past.

News that President Georges Pompidou had quietly granted a pardon in November 1971 to Paul Touvier, a former member of the Vichy *milice*, gave rise to a heated controversy (see below the Touvier trial). The publication of American historian Robert O. Paxton's *La France de Vichy, 1940–1944* in 1973[6] created more controversies, particularly among French historians who resented the intrusion of an American into the writing of French history, although Paxton's research was based on reliable German archives and French archives had been closed to him. Paxton described Vichy as a willing associate of the Nazis, a government run by wilful collaborators who met German demands and, at times, surpassed them. It destroyed the widely accepted dogma that Pétain had been a shield and De Gaulle the sword, the myth that Pétain had protected the French from the Nazi's worst demands.

In October 1978, the news magazine *L'Express* published an interview with Louis Darquier de Pellepoix, former Vichy minister for Jewish affairs.[7] Darquier had overseen the major deportations of Jews from France of 1942. Sentenced to death at the Liberation, Darquier had taken refuge in Spain. A blatant denier of the Holocaust, Darquier claimed that the disappearance of six million Jews was 'an invention, pure and simple. A Jewish invention, of course'. He dismissed the gassing of Jews at Auschwitz as a lie. The scandal was, again, to show that there was a French-born anti-semitism, as well as French support, albeit limited, for Nazi policies.

In the 1990s, several trials brought to light the participation of Vichy collaborators in the persecution of Jews, and their eventual deportation and extermination. However, the first judgment by a French court on the charge of crimes against humanity was that of Klaus Barbie, a former Gestapo head.

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[6] Robert O. Paxton, *La France de Vichy, 1940–1944* (Editions du Seuil, Paris, 1973) is a translation of Paxton's *Vichy France, Old Guard and New Order, 1940–1944* (Colombia University Press, New York, 1972, 2001).

[7] Wolf, pp. 66–71.

The Trials

The trial of Klaus Barbie

Barbie became a member of the Nazi Party in 1937 and joined the SD (Security Service), a branch of the SS in 1935.[8] After German forces overran Western Europe, Barbie served in the Netherlands, and, in 1942, was made chief of the Gestapo Department IV in Lyon – which was then a stronghold and hiding place of the French resistance. In this position, he was active in chasing French resistants, promoting the torture and execution of thousands of prisoners. He personally tortured prisoners whom he interrogated. He was personally responsible for the arrest, torture and death of Jean Moulin, a senior leader of the French resistance. He was responsible for the capture on 6 April 1944 of 44 Jewish children and seven Jewish educators, sheltered in Izieu, a village near Lyon, and their deportation to Drancy, the transit camp before Auschwitz. On that date, he sent the following telegram to the Gestapo in Paris:

> Forty four children, ages three to thirteen years have been captured in Izieu. In addition, the entire Jewish personnel there were arrested. The transport to *Drancy* will take place the 7th of April on my orders. – signed Barbie.

This evidence, produced during the trial and confirmed by experts attested to Barbie's personal responsibility in the Izieu arrest.

Just before Lyon was liberated, Barbie fled to Germany where he was employed and protected by the US Army's Counterintelligence Corps (CIC) from 1946 to 1951, because of his police skills and anti-Communist zeal. Under CIC protection, Barbie with his wife and children escaped to South America, and eventually took up residence in Bolivia where he obtained citizenship in 1957. Under the alias Klaus Altmann, he gave help to the dictatorships in Peru and in Bolivia. Sought by the French police since 1945, Barbie had been found guilty of war crimes *in absentia* in 1952 and in 1954.

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[8] Rousso, pp. 199–216, Wolf, pp. 106–107, – see also: 'The Trial of Klaus Barbie, Klaus Barbie Biography', http://members.aol.com/voyl/barbie/kbbio.htm, accessed on 12 September 2004, – *Les enfants d'Izieu, 6 avril 1944, Un crime contre l'humanité* (Les patrimoines, Editions ledauphiné, Veurey, 2003), 'The trial of Klaus Barbie', Joseph November, 2000, http://members.aol.com/voyl/barbie/0mainb.htm, http://members.aol.com/voyl/barbie/6vhapter.htm

In 1971, Barbie was positively identified by Serge and Beate Klarsfeld, hunters of Nazi war criminals.[9] In 1972, France asked for Barbie's extradition for the first time but to no avail. In 1974, the Bolivian Supreme Court refused to deport Barbie because Bolivia and France had no extradition treaty. The Bolivian dictators protected Barbie until October 1982, until replaced by a democratically-elected government. In 1983, Socialist President François Mitterand, in power since 1981, was persuaded by his Government's ministers and Klarsfeld to actively seek Barbie's return to France. The father of Robert Badinter, the minister for justice, had died in Auschwitz after being deported from Lyon. Badinter had attended the Eichmann trial in 1961. Mitterand also wanted to give more prominence to the memory of the Resistance.

Barbie, a man of seventy, was extradited and arrived in France on 5 February 1983. The investigating magistrate notified him of his indictment for crimes against humanity, issued a year before, and Barbie was jailed in Lyon. On 23 February 1983, the prosecutor issued publicly the text of the indictment. The eight charges included the massacre of 22 hostages in the Gestapo building in 1943, the arrest and torture of 19 persons in 1943, the round-up of 86 persons from the Jewish Center in 1943, the shooting of 42 persons (including 40 Jews) as reprisal killings in 1943 and 1944, the round-up, torture and deportation of national railway workers in August 1944, the deportation to Auschwitz of 650 persons (half were Jews), the shooting of jailed prisoners in August 1944, and the arrest and deportation of the Jewish children and adults at Izieu.

Crimes against resistants, who had considered themselves as combatants, were war crimes, for which the twenty-year statute of limitations had

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[9] Beate and Serge Klarsfeld work in a team, internationally known for their anti-Nazi and pro-Israel activities. Serge, a French Jew, and his family went into hiding from the Gestapo in Nice in 1943, when Serge's father was arrested and sent to Auschwitz. After the war, they conducted campaigns and demonstrations, pressing for the arrest and prosecution of former Nazi and wartime collaborators. They were influential in bringing Barbie, Touvier, Bousquet and Papon to trial. Serge is also a lawyer, an historian and an archivist. His documents on the deportation of Jews from France were published in his book *Vichy/Auschwitz* in 1983. He published in 1994 *Le Mémorial des enfants juifs déportés de France*, and he established the full list of the 75 721 Jews deported from France, train by train. See: L'Express Livres, La mémoire à vif, 'Le travail de Serge Klarsfeld, magistral archiviste du génocide en France, est irremplaçable', Eric Conan http://livres.lexpress.fr/critique.asp?idC=3027&idR=12&idTC=3&idG=8, accessed on 9 September 2005.

expired. Thus, the murder of Jean Moulin was not part of the charges. The indictment was limited to offences committed against the civilian populations, and crimes against Jews. Barbie could thus not be punishable for the war crimes for which he had twice been condemned to death.

Applicable law

The law of 26 December 1964 introduced the legal concept of 'crimes against humanity' in the French Penal Code, for the first time. The law defined these crimes by reference to Article 6 of the Charter of the International Military Tribunal [Nuremberg Tribunal] of 8 August 1945:

> (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.

This reference was to limit the application of the law to crimes committed during the Second World War or connected with it – and to prevent its applicability to crimes committed during the Algerian War. The law also referred to UN Resolution 3 (I) of 13 February 1946 on the Extradition and Punishment of War Criminals and affirmed that these crimes were not subject to statutory limitations.

A judgment of the Court of Cassation of 20 December 1985 in the Barbie case defined crimes against humanity as 'inhuman acts and persecutions which were committed systematically in the name of a state which practices a policy of ideological hegemony … not only against persons because of their membership in a racial or religious group, but also against opponents of such a policy, whatever form their opposition might take'. The Court declared that 'neither the motives of (certain) victims nor their possible status as combatants can preclude the existence of an intentional element on the part of the accused in the offences being prosecuted'. What was decisive in the determination of crimes against humanity was not the identity of the victim but the fact that the offences committed 'were presented as politically justified in National Socialist ideology by those in whose name they were perpetrated. This allowed the prosecution to include crimes against Jews among the charges.

The trial

A forty-lawyer team, including Serge Klarsfeld, representing different groups of Barbie's victims led the prosecution. Two camps emerged: those who wanted Barbie tried for the murders and torture committed against the Resistance, those who wanted Barbie punished for his action against the Jews.

Barbie was defended by five lawyers but mainly by Jacques Vergès, who gave priority to an aggressive tactic of 'attacking the prosecution' over the traditional defense of rebutting or denying charges.[10] In short, Vergès argued that France had no legal right to prosecute Barbie for crimes against humanity as 'imperialist' France had committed so many human rights violations in her colonies, in Africa, Indochina and during the Algerian War. Vergès, in a intentional diversion, also denounced Israel's responsibility for the massacre in Sabra and Chatila, and America's aggression and crimes in Vietnam. He also attacked the probity of the Resistance. Barbie had not committed crimes against humanity, but political acts.

The Court was composed of three judges. The fourteen jurors, all but one born after 1940, were endorsed by both the victims' and the defendant's representatives.

While originally set for 1984, the trial only started on 11 May 1987, after years of legal problems. Following the recitation of the list of charges, on the second day of the trial, Vergès demanded that his client be set free immediately. He claimed that Barbie had been kidnapped illegally by France and was being tried twice for the same crimes. On the third day, Barbie read the following statement prepared by Vergès:

> Mr Prosecutor, I would like to say that I am a Bolivian citizen and that if I am present here it is because I have been deported illegally . . . I place it fully in the hands of my lawyer to defend my honour in front of justice, despite the climate of vengeance [and] the lynching campaign set forth by the French media.

His request to be excused from the courtroom was approved by the judge. Fifty-eight witnesses for the prosecution were heard, giving evidence of Barbie's crimes. On the final day of the trial, Vergès gave the floor to an

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[10] Vergès is a French lawyer who specializes in defending political radicals and terrorists, including 'Carlos the Jackal'. He also defended revisionist 'historian' Roger Garaudy, who denied that the Holocaust had taken place. He gained fame during the Algerian war in defending Algerian independentists and their French supporters.

Algerian attorney and a Congolese attorney, to attack French colonialism and racism.

On 4 July 1987, the jurors declared Barbie guilty of crimes against humanity. He received a life sentence.

The trial against Barbie and against Nazi crimes was diverted by Vergès into a trial against France as a 'bourgeois state', against French colonialism, the USA, the Zionists. He used it as a tool for attacking the Gaullist myth of France's unity behind an effective and 'clean' Resistance.

For the prosecution and for history, victims were given a voice, and for the first time in France, a Nazi official was punished for crimes against humanity. At the same time, the French were faced with an ambiguous image of the Vichy period, and with the dark side of their colonial past.

Technically, the trial served to separate crimes against humanity from war and other 'ordinary' crimes. It affirmed the role of the courts in French society in revealing previously ignored or hidden facts, for the objective presentation of historical facts and events, and, more importantly, as a long-needed forum for the expression of victims' memories and suffering.

The Barbie trial led to the first trial of a French collaborationist for crimes against humanity, the trial of Touvier.

The trial of Paul Touvier

On 19 April 1994, Paul Touvier was sentenced to life imprisonment for complicity with crimes against humanity, the first French citizen to be condemned on such charges. The judgment was based on a charge of the murder of seven Jews in Rillieux-la-Pape, in 1944.

Touvier was a *Milice* section head, the para-military force of volunteers against resistants and Jews.[11]

After the Barbie trial, the Touvier trial was another dramatic event in France, which, again, challenged Gaullist interpretation and official memories of the Vichy years. But Touvier was not a high-level Vichy leader or

[11] The *Milice* was created in January 1943 by Joseph Darnand, secretary-general for the maintenance of order. It recruited about 45 000 toughs and fascist fanatics, who acted in collaboration with the Germans, or independently. On Touvier, see: François Bédarida (Ed.), *Touvier, Le dossier de l'accusation* (Seuil, Paris, 1996), – Jean-Paul Jean – Denis Salas, *Barbie, Touvier, Papon, Des procès pour la mémoire* (Editions Autrement, Paris, 2002), – diplomatie judiciaire, *Paul Touvier, Milicien*, http://www.diplomatiejudiciaire.com/Nuremberg/Touvier.htm, 12 February 2002.

minister: most of these had been judged immediately after the Liberation. He was not responsible for Vichy's antisemitic laws, but he applied them enthusiastically. He was 'only' a mid-level 'manager', an executioner of resistants and Jews.

Why the impact and resonance of the Touvier affair? He was the first French collaborator to be judged and condemned for crimes against humanity, and not for treason or intelligence with the enemy. The trial showed that the French had a willing and active role in the persecution of the Jews. The long lapse of time between the crimes committed in 1944 and the trial (fifty years!) revealed the long reluctance of French political leaders, the administration and judges to open the 'wounds of the past', in the words of President Georges Pompidou, or their determination to hide an unpleasant past, in which many sectors of society were involved. It also revealed the ambiguous role of the French Catholic Church, during the Vichy years and since: Catholic dignitaries, priests and other believers helped Touvier escape from justice until 1981.

Before the 1994 trial

Touvier joined the *Milice* in January 1943. In September, he was appointed chief of the second departmental Service of the *Milice* in Lyon, and then chief of the regional service in January 1944 also in Lyon. This Service was in charge of collecting information, and had the authority to carry out arrests, house searches, questioning, punitive expeditions. The *Milice* was to fight against the 'inside enemy', the Bolshevik, the Jew, the Free-Mason, the 'terrorist', that is the resistant. On 29 June 1944, Touvier ordered the murder of seven Jewish hostages in Rillieux-la-Pape, near Lyon, as a reprisal for the murder, the day before, of Philippe Henriot, Vichy Secretary of State for Information and Propaganda.

When Lyon was liberated, on 3 September 1944, Touvier started a life of hiding in different places in France, with the systematic and continuous hidden support from the Catholic Church.[12] He found refuge in a number of monasteries and was assisted by many priests, who gave him financial assistance.

On 10 September 1946, Touvier was condemned to death *in absentia* for treason by the Court of Justice of Lyon. On 4 March 1947, the same

[12] Rousso, pp. 114–126.

sentence was given by the Court of Justice in Chambéry for conspiring with the enemy, also *in absentia*.

On 20 June and 3 November 1949, the Civil Court of Lyon condemned Touvier, still a fugitive, to two sentences of five-year imprisonment and a prohibition from entering the region for ten years for armed aggressions against a local shopkeeper in Lyon, committed in June 1944 and June 1946.

After making Touvier's acquaintance in 1957, Canon Charles Duquaire, private secretary to the archbishop of Lyon, kept in contact with him and coordinated at all levels the steps leading to a pardon. In 1963, with Duquaire's support, Touvier introduced a formal request for pardon and amnesty to General De Gaulle, then President of the Republic. It was rejected as Touvier was still at large and as the death sentence was unlikely to be executed.

The twenty-year statute of limitations lifted Touvier's two death sentences in September 1966 and March 1967. Touvier came into the open, and again with Canon Charles Duquaire's support, Touvier asked for his pardon on 16 July 1969. This was to apply, not to the lifted death sentences, but to the subsidiary condemnation of life prohibition of entering French territory and the confiscation of his properties.

On 23 November 1971, the President of the Republic, Georges Pompidou, acceded to this request, a decision which was to be kept quiet. When known, the decision raised a heated controversy. On 5 June 1972, an article in the newsmagazine *L'Express* revealed the hidden location of Touvier. In a press conference held on 21 September 1972, Pompidou said that his action was 'purely and simply an act of clemency'. He asked:

> Hasn't the time come to draw a veil over the past, to forget a time when Frenchmen disliked one another, attacked one another, and even killed one another?

The time had not yet come, and the past was still re-appearing.

Judgments and counter-judgments

On 25 April, 11 May and 27 June 1973, a number of deportees and resistants and fifteen associations introduced complaints against Touvier in Chambéry and in Lyon. On 3 July 1973, Georges Glaeser submitted a complaint in Lyon against Touvier for crimes against humanity. He accused Touvier of the murder by the *Milice* of seven Jewish hostages, including his father, on 29 June 1944 in Rillieux-la-Pape.

Then followed a lengthy series of judgments and counter-judgments. On 13 February 1974, the investigating judge of Lyon declared that he had no competence, as the facts were charges of conspiracy with the enemy, subject to the jurisdiction of the Court of Security of the State. An appeal was rejected, and the judge's decision was confirmed by the Criminal Chamber of the Court of Cassation, which returned the case to the Prosecution Chamber of Paris. On 27 October 1975, this Chamber annulled the judge's decision but confirmed that the statute of limitations applied to the crimes, and returned the case to the investigating judge of Paris. On 30 June 1976, the Criminal Chamber of the Court of Cassation annulled the latter decision and sent the case to the Prosecution Chamber of Paris. On 27 July 1979, this Chamber ordered that the file be sent to the investigating judge of the Tribunal of Instance of Paris.

An arrest warrant was issued against Touvier on 27 November 1981. Following more judiciary interventions and complaints against him, he was arrested on 24 May 1989 in the priory Saint-Joseph, near Nice. The investigating judge indicted him for crimes against humanity and placed him in jail. In 1989 and 1990, more complaints were submitted to tribunals in Paris and in Lyon, and more judiciary decisions were rendered at all levels, including the Court of Cassation, between 1989 and 1993.

Touvier was released from jail under judiciary control on 11 July 1991 on a bail of 60 000 francs, by decision of the Chamber of Prosecution of Paris.

On 13 April 1992, the Court of Criminal Appeals in Paris dismissed the case (a *non-lieu*), a ruling that there were 'no grounds' for prosecution, in the case against Touvier. According to the 1985 ruling of the Court of Cassation, only offences committed in the service of a government practising a policy of 'ideological hegemony' could be tried under the 1964 law declaring such crimes not subject to statutory limitations. Vichy, according to the judges, was no such regime, and, in the killing of seven Jews in Rillieux, Touvier could not be considered as the executor of a decision taken by the Germans. This killing was a tragic event, but not part of a systematic plan of extermination, and thus it was not a crime against humanity.

This judgment was annulled in part by the Criminal Chamber of the Court of Cassation on 29 November 1992, and sent to the Prosecution Chamber of the Appeals Court of Versailles.

On 2 June 1993, the Court of Versailles found that Touvier had knowingly become an accomplice of a crime against humanity in connection with voluntary homicides with premeditation on the seven Jews in Rillieux, homicides which were part of a concerted plan on behalf of a state practicing

a policy of ideological hegemony against persons chosen for their belonging to a racial or religious collectivity. Prosecution was authorized by reference to Article 6 (c) of the Nuremberg Charter.

The trial

Touvier's trial was held at the Court of Versailles from 17 March to 20 April 1994. Its president was assisted by two judges, The jury was composed of nine persons, between 30 and 50 years of age, who did not express any feelings during the trial. Touvier was represented by one lawyer. Thirty lawyers represented deportees and resistants, and Jewish deportees and internees or their relatives, as well as the League of Human Rights and the International League against Racism and for Friendship of Peoples.

Touvier, then aged seventy-nine, showed a sharp memory regarding his youth and the post-war years, but his memories of his actions in the *Milice* were blurred. He was unrepentant, and denied that he was responsible for the killing of the seven Jews, nor of acts of torture or other murders, nor of any association with the Gestapo. He agreed that he was anti-Communist and Petainist, but denied that he was anti-semitic: he did not know about the Statute of the Jews of 3 October 1940.

Witnesses gave evidence of torture, round-ups of workers and Jews, the persecution and extortion of Jews, his close relations with the Gestapo. His service was a specialized service for Jewish questions. When asked about his decision to have seven Jews executed, he replied, on 28 March, that there was no other solution and that 'he saved 23', as 30 were to be executed in reprisal for the murder of Philippe Henriot. On 30 March, the President referred to a 96 page notebook containing newspaper clippings from 1985 onwards, annotated by Touvier: every page had anti-semitic or pro-Nazi comments. On the same day, an aged former member of the *Milice*, a typist-stenographer in Touvier's service, acknowledged that she typed index cards on resistants and Jews, and that torture by electricity had been practised.

On 6 April, another witness, Louis Goudard, gave his testimony: he had been jailed in the same cell as the seven Jews who were executed. On 29 June 1944, the seven and Goudard were called and held against a wall: he saw Touvier, and he was returned to his cell. When the seven Jews did not return, he realized that he was not executed because he was not a Jew.

In his final accusation statement on 18 April 1994, the Prosecutor said that the Rillieux killing fitted into the Nazis' antisemitic plan: 'The plan was Nazi, the complicity was French'. He also dismissed Touvier's assertion that

he saved 23 people as a lie. Touvier had expressed neither repentance nor remorse.

The Prosecutor requested life imprisonment, as the death penalty had been abolished on 9 October 1981.

In his final plea, on 19 April, Touvier's lawyer pleaded for his acquittal for three reasons: Touvier was not an accomplice of the Rillieux crime, this crime was not a crime against humanity: humanity, wisdom and equity precluded the condemnation of his client. He said: 'We are in war, and in war, everything is atrocious'. 'Rillieux is a horrible fact, but a minor fact'. He pleaded that Rillieux was at most a war crime, which had been voided as a result of the twenty-year statute of limitations.

On 20 April, the jurors found Touvier guilty of complicity with a crime against humanity on all seven counts of the indictment. The sentence was life imprisonment, by a majority of eight votes.

On the same day, Touvier filed an appeal against this judgment with the Court of Cassation. His appeal was rejected on 1 June 1995.

Touvier's three requests for release from jail were rejected by the Prosecution Chamber of the Appeals Court of Versailles on 24 May and 21 July 1994, and 4 April 1995. Although Touvier was 'only' a middle-level henchman, he was emblematic of the true nature of Vichy and of its own role in persecuting the Jews.

Touvier died at the jail's hospital on 17 July 1996.

The aborted trial of René Bousquet

Bousquet was Secretary-General for Police in Vichy's Ministry of the Interior, in 1942–1943.

In this capacity, he was directly involved in the implementation of the anti-Jewish policies of Vichy, in active collaboration with the Nazis.[13]

After a first trial in 1949, ending with a mild condemnation for 'national indignity', he was indicted in 1991 for crimes against humanity. His murder, on 8 June 1993, annulled the judiciary proceedings.

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[13] On Bousquet, see Pascale Froment, *René Bousquet, Préface de Pierre Laborie* (Fayard, Paris, 2001), Jean-Salas, pp. 111–120, – 'René Bousquet: itinéraire d'un préfet de Vichy dans la Marne et en Champagne', in Jean-Pierre Husson, *La Marne et les Marnais à l'épreuve de la Seconde Guerre mondiale* (Presses universitaires de Reims, 2e éd., Reims, 1998), http://crdp.ac-reims.fr/memoire/enseigner/rene_bousquet/menu.htm, 2000.

A brilliant civil servant

With a law degree, Bousquet, at the age of 20, was already *chef de cabinet* of the prefect of the Tarn-et-Garonne, a territorial department of the South-Western part of France, thanks to his family and political links with the *radical-socialists* (the moderate left) predominant in the region and often heads or ministers in coalition national governments, and connections with the Free-Masonry. During the floods which ravaged the area in March 1930, he became a national hero by courageously saving dozens of persons from drowning. He was awarded several medals for his bravery by the President of the Republic. At 22, he joined the secretariat of the Minister of the Interior who was a radical-socialist himself and a close friend of Laval. In 1938, he was appointed assistant prefect (*sous-préfet*) in the Marne department, in the Champagne region, where he showed his competence and effectiveness.

On 17 September 1940, Pétain appointed Bousquet prefect of the same department, now in the German-occupied zone of France. At 31, he was the youngest prefect of France, when the average age of entry into the office was 45. In August 1941, he was promoted to regional prefect, responsible for three departments. As a department and regional prefect, he showed great zeal in hunting Communists and Gaullists, but he applied the racial laws against the Jews with the 'maximum of humanity', according to one of his assistants. He tried to protect Free-Masons with limited success. From 1940 to 1942, Bousquet implemented Vichy's official policy of collaboration with the Germans which implied accepting the defeat of May-June 1940, and the assured victory of Germany. He saw his role as collaborating loyally with the Germans, while maintaining the sovereignty of the French state.

Espousing the objectives of Pétain's National Revolution, he had skillfully advanced his career as a high-level functionary, with an easy transition from the Third Republic to the Vichy regime.

In April 1942, he accepted Laval's offer to join him in Vichy as Secretary-General for Police, equivalent to a ministerial post. Laval was then the head of the government, the Minister of Foreign Affairs and Minister for the Interior.

Also in 1942, the SS, under the direction of Karl Oberg, had taken over the responsibility for the maintenance of order in the occupied zone of France from the German army. On 6 May 1942, Reinhard Heydrich, Chief of the Security and Secret Police (SIPO and SD), shook hands with Bousquet in Paris, recorded by filmed news. Heydrich informed Bousquet of Hitler's order that the French police in the occupied zone was to take orders from the SS chief. Heydrich also informed Bousquet of the forthcoming deportation

of stateless Jews in the occupied zone. Bousquet asked him if he could not also deport the stateless Jews interned in camps in the non-occupied zone of France. This was left open, depending on railway traffic conditions.

On 16 June, in a meeting between Oberg, Knochen and Bousquet, a possible agreement between the German and French police forces was discussed, as well as the 'Jewish question'. Bousquet is reported to have promised 10 000 Jews as a target for deportation.[14]

On 1 July, Adolf Eichmann, during a brief visit to Paris with Oberg's assistant, Helmut Knochen, envisaged the deportation of all French Jews. In a meeting on 2 July, Bousquet said that he was ready to arrest, in the two zones, the number of foreign Jews requested by the Germans: 20 000 in the occupied zone and 10 000 in the non-occupied zone, as Pétain refused the arrest of French Jews.

On 4 July, Bousquet conveyed the Vichy government's decision to the Germans in Paris: 'Bousquet declared that, at the recent cabinet meeting, Marshall Pétain, the head of state, together with Pierre Laval, agreed to the deportation, as a first step, of all stateless Jews from the occupied and non-occupied zones'.[15]

Even before the German-French police agreements were finalized, in a joint meeting on 7 July, the Germans told the French officials of their plans: in two days, they wanted 28 000 Jews arrested in the Paris region, 22 000 would be deported. Bousquet agreed but arranged to have responsibility laid on the Commissariat for Jewish Affairs, headed by Darquier de Pellepoix.

On 16 and 17 July, 9 000 French police carried out the raids of the *Vel' d'Hiv'*, a winter velodrome in Paris where Jews of all ages were kept for a few days under shameful conditions – without food, water nor sanitary arrangements – before their transport to Drancy, and onwards to Nazi concentration camps. In all, 12 884 arrests were made, including 5 802 women and 4 051 children.

On 8 August 1942, the formal Oberg-Bousquet agreements recognized the independence of the French police and gendarmerie, who would no longer be required to provide hostages to the Germans, nor persons arrested by the French (except for those responsible for attacks against the Germans). Bousquet was granted a large measure of autonomy on the condition that French police and the administration would support the SS and

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[14] According to German documents submitted by Serge Klarsfeld: see Froment, p. 259.

[15] Michael R. Marrus and Robert O. Paxton, *Vichy France and the Jews* (Basic Books, Inc., Publishers, New York, 1981), pp. 233–234.

German police services in their mission, – security of the troops of Occupation, prevention of attacks against the Reich in its present fight for the liberation of Europe – in the fight against communists, terrorists and saboteurs. On 13 August, Bousquet informed the prefects in the occupied zone of the Oberg accords, which were giving to the French police moral support and material means of action which it did not have before. The French police services would need to give proof of a real effectiveness: they should be given a vigorous impulsion.[16] On 22 August, Bousquet wrote again to the prefects to tell them to break all resistance in the population, to make extremely severe controls and identity checks in order to free their region of all foreign Jews. Functionaries whose indiscretions, passivity or ill-will who had made the operations more difficult should be reported.[17]

The Germans demanded that 32 000 Jews be deported by the end of the Summer of 1942. The main operations in the non-occupied zone took place during the nights of 26–28 August. Once arrested, Jews were taken to assembly points, then to internment camps such as Gurs or Noé and Récédébou near Toulouse, then on to Drancy. Bousquet had decided that 'it is preferable to arrest all the Jews in a single roundup rather than to go ahead with several roundups that will enable the Jews to hide or to flee toward neigbouring neutral countries'.[18]

Early in September 1942, Marc Boegner, President of the Protestant Federation of France saw Laval, and on the 10th, Bousquet. Boegner said that, in methods of arrests, 'abominable actions had taken place'. Bousquet replied that this was unavoidable and that hidden Jews would be hunted, there would be no exception: reasons of state prevailed. He said that whatever the outcome of the war, the Jewish problem will have to be solved.[19]

The total number of Jews deported from France in 1942 was 42 000, and 17 000 in 1943.[20]

In April 1943, Heinrich Himmler, head of the SS, during a long, secret visit with Bousquet in Paris, had been impressed by Bousquet's personality, sharing Oberg's view that he was an invaluable operator within the Collaboration context, and would be a dangerous adversary if pushed in the other camp.

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[16] Jean-Salas, p. 113.

[17] Froment, p. 271.

[18] Marrus-Paxton, p. 258.

[19] Philippe Boegner (présentés et annotés par), *Carnets du Pasteur Boegner, 1940–1945* (Fayard, Paris, 1992).

[20] Froment, p. 256 n.2.

However, as from May 1943, the Germans started having doubts about Bousquet, concerning his ability to prevent the expansion of the *maquis*, the hidden camps of the resistance groups. In December, they forced his replacement by Joseph Darnand – Bousquet was placed on leave with pay by the Vichy government.

On 9 June 1944, Bousquet was arrested by the Gestapo in Paris, then transferred to Bavaria under comfortable conditions, and assigned to residence, when his family joined him.

On 6 December 1944, Bousquet was dismissed from the administration by Dr Gaulle's Provisional Government, without pension, on the recommendation of the Purge Commission of the Ministry of the Interior. On 22 January 1945, the prosecutor issued a request for investigation against him. By an ordinance of 6 March 1945, the President of the Tribunal of the Seine ordered all his properties sequestrated.

After his liberation by the American forces and his return to France, Bousquet was arrested and jailed in Fresnes on 18 May 1945. He was provisionally released on 1 July 1948 and immediately found paid employment in the private sector, through a major French bank's support.

The Trial of 1949

In accordance with the ordinance of 18 November 1944, Bousquet was tried by the High Court of Justice, as a senior civil servant who had served the Vichy regime. The law of 19 April 1948 had revised the statute of the Court. The Court's composition was reduced from 27 to 15 members. Its president and two vice-presidents were elected by the National Assembly by an absolute majority in a secret vote. The lists of jurors and the juries themselves were proportional to the number of parliamentarians of each political group at the Assembly. For each case, the President drew lots of twelve jurors and twelve alternates.

These new, fairer procedures and the time elapsed since the stormy Liberation period allowed the Bousquet trial, one of the last trials of Vichy officials of the last session of the High Court, to proceed in a more peaceful climate than those held in 1944 and 1945: Bousquet benefitted from these circumstances, as well as from the esteem and solidarity of many of his former colleagues in the 'high' administration and judicial corps. His role in the persecution of the Jews was dismissed or ignored in view of his interventions in their favour.

The General Prosecutor submitted his indictment on 8 February 1949. The charge of crimes of conspiracy with the enemy and conspiracy against

the security of the state had not been retained. The statement started with a laudatory description of Bousquet's action, since 1938, in the Marne region as *sous-préfet*, then prefect, as an excellent administrator who negotiated with the occupying powers to the best of French interests. 'He intervened in favour of the Jews, Free-Masons, union members, Communists, avoided sanctions to the population and managed, through false statistics, to limit the demands of the occupying power'. This set Bousquet in a favourable light but was irrelevant to the accusation, which concerned his role in the Vichy government. His trial file contained 70 testimonials of local personalities, including resistance leaders, who gave testimonies in support of Bousquet's action in the region. The President of the Jewish Cultual Association (*Association cultuelle israélite*) of Châlons-sur-Marne, who had spent the war in Annecy (France) and then in Switzerland, called as a witness at Bousquet's request during the investigating process, stated the following on 3 August 1945:

> It is impossible for me to say what had been the actions and the attitude of M. Bousquet in Châlons-sur-Marne during the period of the German occupation. Since my return, I have not heard anything particular about him in the Jewish quarters of Châlons-sur-Marne.
>
> *Besides, almost all those who stayed were deported to Germany where only one returned as of today's date* (emphasis added).

The file of the preliminary investigation contained numerous elements concerning the arrests and deportation of Jews. The conclusion of a report of 13 February 1948 submitted to the Commission of Investigation (*commission d'instruction*) stated:

> . . . Bousquet has demanded from the German services that all the operations concerning arrests and delivery of foreign Jews be carried out by the French police and it does appear that the various services of French police were given this task.

The indictment reduced these facts to the following:[21]

> [. . .] Bousquet, it is true, intervened often in favour of the Jews, gave them facilities to go abroad and protected about one hundred at the general secretariat; he opposed the extension of the yellow star in the non-occupied zone, obtained

[21] Jean-Salas, pp. 113–114.

> the release in 1943 of Jews arrested by the Germans, intervened with Knochen in favour of the internees in Drancy and refused to give access to the Germans of lists of Jews kept in the *préfectures.*
>
> . . . It follows from the above review of the role of Bousquet regarding the Jews that if in numerous cases he attempted to avoid the worst, he has however agreed, on a general plan, to serve, through his authority as a high functionary, the policy of racial persecution to which Vichy is associated and that the Germans on their own could have pursued only with more difficulty . . .

The end of the indictment did not address Bousquet's role in implementing Vichy's anti-semitic policies in collaboration with the Germans:

> As a consequence, the afore-named is accused of having, in France, in 1942–1943, in a period not subject to the statute of limitations:
>
> 1. In his capacity of secretary-general of the Police of the *de facto* government, after 18 June 1940, knowingly given direct or indirect assistance to Germany and its allies, and thus had undermined the unity of the Nation, the liberty of the French, and their equality.
> 2. Knowingly performed, in wartime, acts liable to undermine national defence. Violations within the scope of and punished by Articles 1st *et seq*. of the Ordinance of 26 December 1944, paragraph 4 of the Penal Code.

The trial started on 21 June 1949 and lasted three days. The prosecutor read the indictment and concluded that the various elements of favourable evidence, together with the arrest of Bousquet by the enemy and his deportation to Germany, led to the consideration that, in spite of the faults committed by the defendant, he was entitled to broad extenuating circumstances.

Bousquet had four lawyers but defended himself. He first denied that he was the chief of the whole French police, but later recognized it. He did not know why Laval had called him, but joined him only out of friendship. He did not support the racial policy of Vichy, except as a 'lightning rod'.

In his final statement, the prosecutor requested the condemnation of Bousquet to a limited and reduced jail sentence and to 'national degradation'. His senior lawyer asked for his acquittal.

On 23 June, the President gave the verdict of the jury: although Bousquet's behaviour in several moments of his activity as Secretary-General to the Police was 'most regrettable', it did not appear that he had knowingly committed acts liable to undermine national defence and he was acquitted from this charge. He was found guilty of the crime of national indignity and condemned to a five year sentence of national degradation,

which was immediately removed, for having participated actively and in a sustained manner to the resistance against the enemy.

Bousquet was free and started another brilliant career, no longer in the public service, but at the *Banque d'Indochine* (now Indosuez), then in the UTA, a French private air-company, and as a member of a number of managing boards of business and industrial companies, and of a regional newspaper, *La Dépêche du Midi*. The Council of State returned his Legion of Honour in 1957 and he was amnestied on 17 January 1958.

Another prosecution

In the late 1970s, a team of researchers, headed by Serge Klarsfeld, produced incriminating documents from the German archives and legal complaints were filed against Touvier in 1973. In 1978, public allegations about Bousquet's role in the July 1942 round-up of Jews in the *Vel' d'Hiv'* came to light. Bousquet resigned from the Banque d'Indochine but kept most of his other functions.

On 15 September 1978, Serge Klarsfeld filed a complaint against Jean Leguay alleging crimes against humanity, charges which led to Leguay's indictment on 12 March 1979. For the first time, the suspension of the statute of limitations for crimes against humanity was applied to a French citizen. From May 1942 to the end of 1943, Leguay had been Bousquet's representative in the occupied zone. Under the Oberg-Bousquet agreement, Leguay was thus responsible for the deportation of large numbers of Jews from both the occupied and non-occupied zones. On 25 May 1945, the purge commission of the Interior Ministry dismissed Leguay from his post of prefect, an administrative, not criminal, sanction. In December 1955, the Council of State reversed this decision on the ground of 'acts of resistance'.

The judiciary investigation on Leguay took eleven years: the prosecutor's final report was submitted to a Paris court on 26 July 1989. Leguay had died on 3 July 1989, but the statement announcing the closure of the case mentioned Leguay's guilt, in an unusual breach of legal practice: 'The investigation established that Leguay, Jean, did participate in crimes against humanity committed in July, August and September 1942'.[22]

Barbie's condemnation for crimes against humanity was given in 1987.

In September 1989, the association *Les fils et filles des déportés juifs de France* (The sons and daughters of Jewish deportees of France), the National

[22] Rousso, p. 151.

Federation of deportees and internees, resistants and patriots and the League of Human Rights introduced a complaint against Bousquet for crimes against humanity, and on 1 March 1991, he was indicted for these crimes. He was again indicted on 19 and 22 June 1992 with Maurice Papon in connection with the latter's case.

On 8 June 1993, Bousquet was murdered in his appartment by Christian Didier, an unbalanced, frustrated writer seeking publicity,and not a political avenger. Thus, the Bousquet case was closed.

The trial of Maurice Papon

Maurice Papon, a former senior civil servant during Vichy, former prefect of police in Paris and former Budget Minister, was sentenced in 1998 to ten-year imprisonment for complicity with crimes against humanity for his anti-Jewish action between 1942 and 1944. The time lag between the crimes and their condemnation was due in part, to the accused's own cover-up of his Vichy activities, his access to skilled lawyers, support from his political and administrative former colleagues, and in part, to the long and intricate judiciary proceedings, due to the obstruction from the authorities and the procrastination of the judges, which were overcome only by the persistence and obstinacy of victims' associations and their lawyers, with the support of media.[23]

Summary of events

Papon started his administrative career in 1935 in the Ministry of the Interior. After the defeat of 1940, he remained in the Vichy administration and was appointed Director of Cabinet of the Secretary-General for Administration in the same ministry, Maurice Sabatier. Papon followed Sabatier when the latter was appointed regional prefect in Bordeaux by Laval. On 1 June 1942, Papon was appointed secretary-general of the *préfecture* of the Gironde department. Under the direction of Sabatier, Papon had authority over the Section of Jewish questions. Until May 1944, his services kept a census of the Jews, prepared lists of Jews to be deported, organized, as requested by the German authorities and in close cooperation with the German Police Security Service (*Sipo-SD*), the arrest and deportation of Jews from the Bordeaux region to Drancy. Between 18 July 1942 and

[23] On Papon, see: Richard J. Golsan (Ed.), *The Papon Affair, Memory and Justice on Trial* (Routledge, New York/London, 2000, – and Jean-Salas).

21 June 1944, twelve train convoys transported 1 776 Jews, including 226 minors from Bordeaux to Drancy.[24]

At the Liberation, Papon produced a certificate of resistance, dated 25 October 1944, showing that he had belonged to a resistance network since 1 January 1943. However, the certificate's authenticity was later challenged. Based on this certificate, Papon was confirmed in his functions by General De Gaulle: he was not questioned by the Purge Commission of the Ministry of the Interior. He was prefect of Corsica in 1947, then prefect of Constantine in French Algeria in 1949. He received the knighthood of the Legion of Honour in 1948. In 1958, Papon was appointed prefect of police of Paris. On 17 October 1961, the police forces under his command brutally repressed an unauthorized peace march organized by the Algerian independence party, the *FLN* (National Liberation Front), in which the number of Algerian victims is now estimated at 200 deaths.

Elected member of parliament since 1968, he was minister for the budget in the government headed by Raymond Barre, from 1978 to 1981.

On 6 May 1981, the satirical weekly newspaper *Le Canard enchaîné* published two documents, one of February 1943, and one of March 1944, both signed by Papon, showing his responsibility in the deportation of Jews. Two researchers found in February 1981 documents in the archives of the Bordeaux *préfecture* dating from the Vichy period, including its Jewish section, which showed the contribution of the *préfecture* to the deportation of 1660 Jews from 1942 to 1944.

On 8 December 1981, Gérard Boulanger, as lawyer for two families concerning four deported individuals, submitted the first judiciary complaint against Papon for crimes against humanity. Ten other complaints were introduced in May 1982 by Serge Klarsfeld. Papon was first indicted on 19 January 1983. In return, he then sued victims' representatives for defamation.

On 5 January 1983, the prosecutor had included in Papon's file a finding of 15 December 1981 by a 'Jury of Honour' which recognized that he had been a resistant since 1 January 1943, but underlined that his responsibility, although not the major one, had concerned acts apparently contrary to the Jury's conception of 'honour', but had to be set in the context of the period. The Jury felt that Papon should have resigned from his functions in July

[24] According to an account by Michel Slitinsky, one of the plaintiffs in the Papon trial. Michel escaped, when seventeen, from a round-up during which his father, Abraham, and his father's sister were arrested. Abraham died in Auschwitz: *Le Monde*, 6 March 1996. Slitinsky gave *Le Canard enchaîné* the documents published on 6 May 1981.

1942, but excluded a charge of crime against humanity.[25] Sabatier, Papon's chief, had claimed responsibility for the anti-Jewish repression before the Jury. Indicted on 20 October 1988, Sabatier died on 19 April 1989.

In 1987, Papon's investigation was annulled for a flaw of procedure. New complaints were submitted in 1990 for complicity in crimes against humanity. Papon was again indicted on 8 July 1988 and 19 April 1992, and the case entrusted to the Court of Assize of Bordeaux. In an interview published by the Paris daily newspaper *Libération* on 6 March 1996, Papon described himself as a 'scapegoat' to expiate French complicity in the Holocaust.

On 18 September 1996, the Indicting Chamber of the Bordeaux Court of Appeal charged Papon with crimes against humanity, consisting in complicity with illegal arrests and sequestrations, deportations and murders, including those of minors. Its judgment recognized Vichy's collaborationist role as an 'indispensable cog' in the Nazi final solution. The Court affirmed:

> Thus Maurice Papon ... had, even prior to taking office, a clear, reasoned, detailed, and continuous knowledge of the Nazis' plans to murder these people, constituting premeditation, even if he may have been ignorant of the exact conditions of their last sufferings and the technical means whereby they were killed.
>
> ...
>
> Very many elements of the file show that Maurice Papon, as from the first operations carried out against the Jews, became convinced that their arrest, their internment and their deportation towards the East led them ineluctably to death.
>
> ...
>
> It appears that in the domain of anti-Jewish persecutions, Maurice Papon acted as a technician, trying in all circumstances to demonstrate his incontestable competence and efficiency.

The Court rejected the defence's reliance on claims of superior orders and subordinate responsibility, as the orders given were manifestly illegal. The appropriate response of Papon to Nazi or Vichy pressure was to resign. The Court also noted that the investigation did not establish with any certainty Papon's participation in Resistance.[26]

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[25] *Le Monde*, 14 December 2004.

[26] See *Historique de l'Affaire Papon par Gérard Boulanger*, http://www.matisson-consultants.com/affaire-papon/procedure/hist, 28 August 2003. See also 'The legal legacy of Maurice Papon', Leila Nadya Sadat, in Golsan, pp. 131–160. Extracts from the judgment of the Indictment Chamber of Bordeaux are in *Le Monde*, 20 September 1996.

The Court of Cassation confirmed this judgment on 23 January 1997.

In a televised interview at the end of January of that year, Papon denied any guilt and blamed 'foreign forces in New York' for orchestrating a campaign against France and himself. He said that any 'objective' trial of the collaborationist Vichy government would show that Jews 'took part – under threat, of course – in these operations'.[27]

The trial

The trial started on 8 October 1997 and the verdict was rendered more than six months later, on 2 April 1998. On the first day, the Court agreed to the defence's request that Papon should be released from jail, in view of his great age and the serious deterioration of his health.

The Court was presided over by Jean-Louis Castagnède, a competent judge with a detailed knowledge of the case. He conducted the trial with authority, reading each relevant document and allowing both the lawyers of the victims' associations and the defence to ask or reply to questions. The President had two assessor judges, and the jury had nine members. The prosecution was conducted by two prosecutors. Thirteen lawyers represented victims' associations, including the often provocative Arno Klarsfeld (son of Serge Klarsfeld), who represented the Association of Sons and Daughters of Deported Jews and adopted his own system of attack against Papon. Survivors and victims' relatives were heard, photographs of small children who were later sent to Auschwitz, were shown.

Papon, a lively, alert and articulate man of 87, still a man of 'power', took an active role in explaining his functions, with the assistance of three lawyers. Often arrogant and assertive, at times scornful, he showed neither remorse nor regret: he said, 'if it was to be done again, I would do it'. He denied having any power over the police, affirmed that only the prefect had authority, and that all decisions were taken by the Germans. The period was a period of war, and there are no laws during a war. When asked why he did not resign, he replied that his duty was to remain in his position. He said that he had spent all his efforts to save from deportation the maximum number of members of the Jewish community. He said that he had saved 139 Jews by deleting their names from the Jewish list, at the peril of his life: the latter claim was found without foundation, as these had been non-Jews

[27] *International Herald Tribune*, 31 January 1997.

listed by error. He said that he had been a resistant. Gaullist witnesses, called by Papon's defence, maintained the Gaullist myth that Vichy did not represent France. They kept to the same script: the French should stop hating each other and start forgiving, – there was no knowledge of the 'final solution' at the time, – they objected to the trial, which should not become the trial of Gaullism, of Resistance and of France, – Papon should not be in the dock.

French historians, and Robert O. Paxton, the pioneering US historian, gave their views and assessments of the Vichy period to the Court. Samuel Pisar, the writer and international lawyer, a Polish survivor of Auschwitz as a child, testified of his experience.

In his final speech, the prosecutor requested a sentence of twenty years' imprisonment. The lawyers representing the victims had asked for a life sentence. Klarsfeld said that giving a life sentence would not be equitable, but Papon's condemnation was indispensable. Klarsfeld left it to the jurors to decide on an equitable sentence, which would then become exemplary.[28]

Seven hundred and sixty-four questions were put to the jury. On 2 April 1998, after nineteen hours of deliberation, the jury rendered its verdict: ten years' imprisonment. He was found guilty of complicity in the 'illegal arrest' of thirty-seven persons and the 'arbitrary detainment' of fifty-three others in the course of the roundup and deportation of Jews by train from Bordeaux on four separate occasions dating from July 1942 to January 1944. These could be considered as 'crimes against humanity' because they were carried out as an integral part of a Nazi plan, of which he had knowledge.

Papon was found not guilty, however, of 'complicity in the murder' of the deportees: his knowledge of the fate that awaited the deportees did not rise to the level of premeditation. The judgment received mixed reviews. The legal advance was to hold responsible a senior Vichy administrator and collaborationist for his actions, closing a gap between policy-makers (the Nuremberg Nazi leaders) and those who carried out the atrocities (Barbie, Touvier). Critics felt that Papon was guilty on all counts, and deserved the maximum sentence, life imprisonment.

As noted by Golson,[29] 'The trial in Bordeaux was not simply that of a Vichy bureaucrat docilely following orders from a collaborationist regime bent on pleasing the German occupant'. As widely reported by the

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[28] See Arno Klarsfeld, *La Cour, les Nains et le Bouffon'* (Robert Laffont, Paris, 1998), p. 233.

[29] Golson, pp. 2–3.

media – newspapers, radio and television reports in France and abroad – Papon's trial was the symbolic trial of the Vichy past itself.

The Bordeaux Court revealed more than the responsibility of a senior functionary in that region. It brought to a cruel light the willing participation of the French administration and police in the deportation of foreign Jews, in negotiation with the Germans. It recalled the exclusion of the Jews, their plundering, their suffering, in the face of a cold bureaucracy intent on following orders, among the indifference of many.

It also showed the long resistance of the French political authorities to having such a dignitary tried, and the long submission of the judiciary to these political demands.

After the trial

The sentence was appealed by Papon's lawyers on the same day, 2 April 1998. On 11 October 1999, while his appeal was still pending, Papon fled France for Switzerland. In a letter published in *Sud-Ouest*, a leading regional newspaper, Papon wrote that 'he had not fought against Nazi violence to beg for liberty from the judiciary' and claimed that it was impossible for justice to be served in a country where 'the Klarsfelds speak in the name of the President of the Republic'. This undignified episode ended when Papon was arrested in Bern, Switzerland on 21 October and sent back to France.[30]

On 24 February 2001, from his French jail where he had been held since October 1999, Papon wrote to the French Minister of Justice, saying, in part: 'How could I express regrets and remorse for a crime which I have not committed and for which I am in no way an accomplice?' He, again, challenged the Bordeaux judgment (and his country' justice) as 'deprived of any authority of a judged cause, after a prefabricated trial'.

Papon was released from jail on 18 September 2002 by decision of the Appeals Court of Paris on medical grounds. His state of health was judged incompatible with detention, and, in accordance with the Penal Code, the suspension of a sentence may be granted to condemned persons 'for whom it is established that they are affected by a pathology involving their vital prognosis, or that their state of health is durably incompatible with continued detention'. Papon walked out of the prison and, in later years, was seen at times in restaurants and other public places, without apparent health

[30] Quoted by Wolf, p. 187–188.

incapacity. A recent model for a release on medical grounds was that of Agosto Pinochet from the UK in March 2000.[31]

On 11 June 2004, the Court of Cassation rejected Papon's request for annulation of his ten year sentence.

Other prefects

Not all prefects were retained by the Vichy regime when it came to power in July 1940: more than half – 35 prefects and *sous-préfets* – were removed from their posts and placed on leave under a decree of 17 July 1940. One year later, there had been 94 dismissals, 104 forced retirements and 79 transfers of these functionaries. Many became resistants. They were replaced by 'young hopefuls' like Papon, and others appointed from the military, the Navy and other administrative corps. Thirty-six prefects and *sous-préfets* who remained in their positions died in deportation or in Resistance combats.[32]

The responsibility of the French railways

In 1991, Kurt Werner Schaechter, an Austrian-born French Jew, sued the French railways national company, called *SNCF*, for a symbolic €1, for deporting his parents who died in German extermination camps, for complicity in crimes against humanity for deporting Jews to the Nazi camps. His lawyer argued that the company went beyond orders issued by either the Vichy government or German occupying forces. The case was a civil, not a criminal, case because the 1994 revision of the Penal Code allowing criminal charges to be brought against companies or institutions did not apply retroactively. On 14 May 2003, a Paris court rejected the lawsuit charging the SNCF with complicity with crimes against humanity. The Court ruled that a 10-year statute of limitations applied in this case for crimes committed between 1942 and 1944.[33]

Conclusion

The trials of Barbie, Touvier and Papon, and the indictment of Bousquet, have opened the memory of the French to historical facts, until then hidden

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[31] The amendment to the Penal Code was approved on 4 March 2002. *Le Monde*, 2 March 2001, 20 September 2002, – *L'Express*, 18 September 2002. On Pinochet's release, see Yves Beigbeder (2002), Chapter 5.

[32] *L'Express*, 'Ceux qui ont rompu avec l'Etat pétainiste', 14 December 1995.

[33] *International Herald Tribune*, 15 May 2003.

or at variance with reality. These trials were made possible only through the activism of such anti-Nazi hunters as Serge Klarsfeld, the initiatives and insistence of survivors, victims' families and their lawyers, with evidence based on historical research and new findings. Their fight was against the power of the state, that is the determination of heads of state or of governments that 'old wounds should not be re-opened', or that 'the French people is not ready for these truths', or, more fundamentally, because the newly revealed, unpleasant, facts upset the vision of history of the Gaullists, of the Communists, and retroactively tarnished the prestige of the high administration and judiciary corps, most of whose members had followed Vichy orders and applied Vichy laws with diligence if not zeal, and had an interest in protecting their own colleagues. The emerging facts were, essentially:

- Vichy is part of French history,
- Pétain was welcome to the great majority of the French people from 1940 until at least 1942,
- Only a minority of the French were active resistants,
- there was a climate of xenophobia and anti-semitism between the two World Wars, which was encouraged by the Vichy regime when it took power,
- the 1940–1941 anti-semitic laws of total exclusion of the Jews from civil, administrative, commercial, intellectual and artistic life, were initiated by Vichy and not by the Germans, – there were few protests against these laws,
- Vichy was a willing accomplice of the Nazis by rounding up Jews, arresting and detaining them in internment camps in the non-occupied zone of France under degrading conditions, and finally transporting them to Drancy, – in the vain cause of protecting French Jews, and of bolstering an illusory French sovereignty over French administration and police.

On the other hand, critics of the judiciary treatment of Bousquet and Papon had their own arguments:

- these trials were an affront to France's prestige and honour,
- Vichy and these defendants were not aware of the Nazi 'final solution', they wanted to 'solve the Jewish problem' by exclusion, not by extermination,
- they acted under immediate and dangerous pressure from the German occupiers: they tried to negotiate with them, in order to gain time and avoid the worst,

- these trials were anachronistic: you cannot judge events and decisions taken in the 1940s with the knowledge gained over the following 50 years and the new climate of human rights of the 1990s,
- criminal justice should not apply retroactively the concept of 'crimes against humanity' of the Nuremberg Charter of 1945, and the French law of 26 December 1964.

Paul Thibaud, a French philosopher, argued (in 1997) that a trial like Papon's ultimately gave a greater sense of false satisfaction to members of subsequent generations than it gave real satisfaction to Papon's actual victims. It allowed the former to indulge in a facile morality in judging a past in which they themselves had not been actors, in which they had no vested interest, and in which they themselves could not be compromised. With the collapse of communism as an ideology, the trial at least provided a moral anchor at which to grasp.[34]

In a minority and extreme view, French revisionists claim that not so many Jews were exterminated, Holocausts deniers assert and proclaim that gas chambers never existed, that Hitler never ordered to kill anyone on racist or religious grounds, that there was no Nazi policy of physical extermination of the Jews. For them, the trials were a farce. Their small groups came from both the French extreme left and the extreme right, and maintained their arguments in spite of overwhelming evidence against their theses.[35]

Recognition, repentance and restitution

The first, clear, official recognition of France's responsibility in assisting in the Holocaust was given by President Jacques Chirac on 16 July 1995, at the former *Vélodrome d'hive* (*the Vel' d'Hiv*), at the fifty-third anniversary anniversary of the roundup of Jews in Paris:

> These black hours sully forever our history and are a terrible insult to our past and our traditions. Yes, the criminal folly of the occupant was supported, everyone knows it, by French people, supported by the French State. France, land of the Enlightement, homeland of Human Rights, land of hospitality and asylum, France, on that day, committed the irreparable. It failed to keep its

[34] As summarized by Golson, pp. 20–21. The full text is in Paul Thibaud, 'Un temps de mémoire', *Le Débat* 96 (September–October 1997), pp. 166–183.

[35] In France, Paul Rassinier was a revisionist, Roger Garaudy, Robert Faurisson and others are deniers (negationists): see *Le Monde*, 4 May 1996. Other groups are in Germany, Canada, the USA and other countries.

> word and delivered those it was protecting to their executioners. . . . We owe the victims a debt without statute of limitations.

Chirac's predecessor as President of the Republic, François Mitterand, had long hidden his work in Vichy as Commissioner for the re-employment of war prisoners (June 1942–January 1943), following which he became an active resistant. On 17 July 1993, Mitterand inaugurated a monument to the memory of the victims of the *Vel d'Hiv* roundup with an inscription on the monument recognizing the complicity of the 'Vichy, said government of the French State (1940–1944)'. Mitterand gave no speech on that occasion. The revelation in 1994 of his long friendship with René Bousquet caused a scandal.

Chirac's speech triggered violent hostile responses from Gaullist dignitaries, labelling his acknowledgement of France's responsibility as a 'bad action' for France.[36]

On 29 February 2000, the French Assembly adopted unanimously a law instituting on 16 July a 'National day to the memory of victims of racist and antisemitic crimes of the French State and as an homage to the 'Righteous of France' (*les justes*). On 25 January 2005, President Chirac inaugurated the Memorial of the Shoah, where are engraved the names of the 76 000 Jews deported from France. He renewed France's commitment to always remember the Jewish martyrdom and recalled France's promise 'to never forget that which it could not prevent'.[37]

On 30 September 1997, the Roman Catholic Church in France issued a Declaration of Repentance in Drancy: 'Today we confess that silence was a mistake. We beg for the pardon of God, and we ask the Jewish people to hear this word of repentance'. The Declaration denounced a deep-rooted antisemitism, excessive conformity, prudence and indifference in the ranks of the Church during the war, when the bishops of France had acquiesced through their silence to a 'murderous process'. 'Silence was the rule, and words in favour of the victims the exception'. Jean-Marie Le Pen, the leader of the extreme rightist National Front, said that the statement was 'absolutely scandalous' and 'showed disdain for historical truth'.

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[36] In particular, Maurice Schumann, Pierre Messmer and Maurice Couve de Murville, the latter a Director in the Finance Ministry of Vichy until early 1943.

[37] See 'Histoire et mémoire des deux guerres mondiales – La reconnaissance officielle et solennelle des crimes de l'Etat français', http://crdp.ac-reims.fr/memoire/enseigner/memoire_vichy/09reconn, 2000.

The French medical association had previously apologized for its profession's support for laws, during the Occupation, that barred Jewish doctors from practising. Lawyers and a police union had also apologized for their links with the Vichy administration.[38]

In 1997, Alain Juppé, then Prime Minister, set up a Commission to study the plundering of French Jews from 1940 to 1944. The spoliation measures, started by the Germans and adopted by Vichy, affected about 330 000 persons. They included bank accounts blocked, sales and liquidations of business firms and real estate, art objects and books stolen, appartments emptied. The Commission, in its report of 17 April 2000, found that 90 per cent of stolen Jewish assets had been restituted or indemnized at the end of the war. The remaining part amounted to about 1.5 milliards of Francs. Restitution was entrusted to an administrative Commission. In July 2000, a decree fixed the level of indemnification of orphans of the Shoah and all those who were minors when their parents were deported.[39]

The constant dilemma

Was it fair and decent to try old men for what they did 50 years before? Considering that Touvier, Bousquet and Papon themselves (and the French political and judiciary authorities) caused the delays in having them brought to justice, and the gravity of their crimes, it was indeed necessary to let the judiciary process be carried out even after all these years. The trials have recalled that even senior administrative officials should be accountable for their official actions and decisions, without hiding behind higher authority or the Germans, and/or alleged ignorance of the consequences of their actions. Responsibility and morality are, slowly, intruding in the domain of the all-powerful 'reason of state'.

Were the trials necessary, should not civil peace and reconciliation be left alone? This raises the perennial dilemma between justice and civil peace, justice or amnesty, a well-known issue for international criminal tribunals.

In our view, the apparent civil peace was based on false assumptions and historical fabrication, and thus fragile. There remained an underlying,

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[38] *New York Times*, 1 October 1997.

[39] A capital of Frs. 180 000, or a monthly allowance of Frs. 3 000: see 'Histoire et mémoire des deux guerres mondiales – La spoliation des Juifs de France pendant la 2ème guerre mondiale', http://crdp.ac-reims.fr7memoire/enseigner/memoire_vichy/11spolia, 2000.

unhealthy political and social tension and division which had to be resolved through the exposure of historical facts and a thorough public discussion.

It is true that the trials, based on historical research, have re-opened old wounds by challenging the very foundation of French society, its own vision of a generous and humane France, its political establishment and institutions – administration, police, justice – the Catholic Church, by making them face unpleasant historical facts. The slow-moving judiciary process showed, again, French judges' dependence on the executive.

However, this painful process has had positive results, as shown by the official statements of recognition and repentance by high French officials, professional associations, Church officials and others, which have started a healing process. At last, the voice of the victims was heard.

Furthermore, the trials, thanks to historians' research and their testimonies during the trials, have established historical facts about the Vichy years, Vichy's association and complicity with the Germans, in the same way as the Nuremberg trials collected an invaluable factual documentation about Nazi Germany and its crimes.

More concretely, at last, the victims, or their families, have benefitted from a measure of compensation for material losses, besides the moral recognition given to them by historians and by the judgments.

PART III

International Criminal Tribunals
and Commissions

(1945–2005)

France has played a role in the creation and working of several international criminal tribunals, starting with the creation of the Nuremberg International Military Tribunal, the first international criminal court which lasted from November 1945 to October 1946. French influence was applied, to a limited success, to the negotiations leading to the London Agreement of 8 August 1945, which approved the Nuremberg Charter.

Two French judges sat in the Tribunal and several French prosecutors carried out their part in the prosecution of the accused senior Nazi defendants. France was also present, to a lesser extent, in the Tokyo International Military Tribunal through the presence of one judge and one prosecutor. The Tokyo Tribunal lasted from May 1946 to November 1948.

More details are given in Chapter 9.

France has been involved directly or indirectly in the events leading to the genocide in Rwanda and in the wars which followed the partition of the Former Yugoslavia, including the Srebrenica massacre. Both events led the creation of the first *ad hoc* international criminal tribunals set up after the Nuremberg and Tokyo Tribunals. French influence is however less direct concerning the International Criminal Tribunals for the former Yugoslavia and for Rwanda than for the Nuremberg and Tokyo tribunals, except that France, as a permanent member of the UN Security Council which created these tribunals, participates in their organs and their functioning.

In the case of the Tribunal for Rwanda, France has been embarrassed by its political and military support to the Hutu government before and during the genocide of the Tutsi. The degree of its involvement has been investigated by a French Parliamentary Commission, and, in part, by international commissions. Two Rwandans have recently introduced a complaint against France for complicity of genocide to a military tribunal in Paris (Chapter 10).

In the case of the Tribunal for Yugoslavia, France has not participated fully in the arrest of accused individuals indicted by the Tribunal, in view of its long alliance and friendship with the Serbs. France's leading military role as part of the UN Protection Force and the responsibility of the United Nations and France as unable to prevent the Srebrenica massacre have been investigated by international and national commissions (Chapter 11).

France has been present and both active and reluctant in the negotiations leading to the Rome Agreement which created the International Criminal Court. It is an active participant in the Court's operations since it started its work in 2000. Details are in Chapter 12.

Chapter 9

The Nuremberg and Tokyo Tribunals

The Nuremberg and the Tokyo Tribunals were the first international criminal courts set up to judge individuals at the highest levels of government and armed forces for grave violations of international humanitarian law. In spite of the tribunals' limitations, they created a legal and judiciary precedent which has been decisive for the later creation of other ad hoc international criminal tribunals and for the creation of the permanent International Criminal Court.

The Nuremberg Trial

As noted in the previous Chapter, in 1945, France was a devastated and ruined country, the French people had to recover from four years of German occupation and they were still in a difficult transition between the Vichy regime and the newly recovered democracy brought by General De Gaulle and the Allied troops. The French prisoners of war were returning from German camps, and the few Jewish survivors of Nazi extermination camps were quietly returning to a France which had betrayed them. Knowledge of the Nazi atrocities in those camps was slowly and sparsely coming to light.

There were mixed feelings of relief over the Liberation, and feelings of revenge over both the German occupiers and the French collaborators. Illegal and legal purges followed.

The Nuremberg trial was to give a civilized, judicial response to the potential uncontrolled outbursts of hate and rage against the perpetrators and their accomplices. The detention and trial of the major Nazi leaders (except for Hitler and Goebbels, who had committed suicide, and Bormann, who had probably escaped) were an object of satisfaction and hope for retribution for many French people. However, the French and international media interest in the trials faded slowly, as the trial went on with weeks, and months of tedious legal proceedings, with only a few dramatic sessions.

The French authorities duly participated in the preparation of the trial and in its proceedings, but France's resources were limited in all areas: it hardly had adequate resources to research and present reliable documentation for the trial, its judges and prosecutors had to adjust to different judicial procedures heavily influenced by Anglo-American legal procedures.

Among the four countries which established the Nuremberg Tribunal, France was more a victim than a victor. The real victors were the powerful USA, the resilient Britain and the USSR, which had suffered millions of deaths. The USA and Britain had comparable legal and judiciary systems based on common law, different from the continental systems of France and the USSR. The three Western countries had similar democratic and legal values, while the Soviet political and ideological differences, already apparent during the 1945 San Francisco Conference on International Organization, became manifest during the preparation and running of the Nuremberg trial.

The origins

The main promoter of the decision to create an international tribunal to judge the major German war criminals was the USA, after a change of its initial position. Without US leadership, the Nuremberg trial might have never taken place. Even if it had, the trial itself would not have been carried out with the same high professional standards without US leadership and support.

The trial took place in the US zone of defeated Germany and benefitted from substantial US legal expertise, documentation, logistic and financial resources, and, not least, the determined US political will to overcome the many obstacles which threatened the Tribunal from the initial negotiations to the final judgments.

The St James's Palace Declaration, issued by the representatives of nine governments-in-exile on 13 January 1942, explicitly repudiated retribution 'by acts of vengeance on the part of the general public' and declared that the 'sense of justice of the civilized world' required that the signatory powers

> 'place among their principal war aims the punishment, through the channel of organized justice, of those guilty of or responsible for these crimes, whether they have ordered them, perpetrated them or participated in them.'

When he signed the Declaration in the name of France, General Charles de Gaulle, as leader of the Free French in London, added: 'We declare our firm intention to watch that those guilty and all those responsible for whatever reason, cannot evade, as did those of the other war [World War I], the deserved punishment'.[1]

In July 1942, Churchill, Roosevelt and Stalin endorsed the Declaration. However, a judicial process was not immediately agreed by the major powers. The Moscow Declaration signed by the three leaders on 1 November 1943 stated, in part, that German officers and men and members of the Nazi Party responsible for or who had taken a consenting part in atrocities, massacres and executions would be sent back to the countries where they had committed these acts in order to be judged and punished according to their laws. The declaration concluded that these provisions were 'without prejudice to the case of the major criminals whose offences have no particular geographical location and who will be punished by a joint decision of the Governments of the Allies'.[2]

Churchill and Roosevelt were initially in favour of summary executions, but Roosevelt's advisers convinced him of the value of a tribunal. His successor, Harry Truman, was strongly in favour of a trial, and with the support of De Gaulle and Stalin, the British government formally accepted his position

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[1] François de Fontette, *Le procès de Nuremberg* (Presses universitaires de France, Paris, 1996), p. 24. The major reference book on Nuremberg is: Telford Taylor, *The Anatomy of the Nuremberg Trials* (Knopf, New York, 1992). General Taylor was Prosecutor of the German High Command at Nuremberg.

[2] The full text of the Moscow Declaration is in: Michael R. Marrus, *The Nuremberg War Crimes Trial 1945–46, A Documentary History* (Bedford Books, Boston/New York, 1997), pp. 20–21. It contains essential correspondence, reports and excerpts from speeches by the major actors of the trial, prior to and during the trial, with useful comments. Legal analyses are found in George Ginsburgs and V.N. Kudriavtsev (Eds.), *The Nuremberg Trial and International Law* (Martinus Nijhoff Publishers: Dordrecht/Boston/London, 1990).

on 23 April 1943. In October 1943, the Allies created the United Nations War Crimes Commission to investigate evidence of war crimes and identify their perpetrators.

France became actively involved only after its Liberation from German occupation and the US reluctant recognition of De Gaulle's legitimacy. On 6 December 1944, a French ordinance created a 'service of research of enemy war crimes'.

During the San Francisco Conference on International Organization which negotiated and approved the Charter of the United Nations (25 April to 26 June 1945), on 30 April 1945 US Secretary of State Edward R. Stettinius Jr. informed his counterpart foreign ministers Vyacheslav Molotov (USSR) and Anthony Eden (UK) that President Truman had just appointed (on 2 May) Robert H. Jackson, Justice of the US Supreme Court as the US representative to take charge of the prosecution of the trials of War Criminals. US Judge Samuel Roseman said that he had been sent by the President to place US proposals for the treatment of war criminals before the Foreign Ministers of the UK, USSR and France who with the US were the four powers represented on the Control Council for Germany.[3]

The US plan was that an international military, not civilian, tribunal should be set up. It would consist of one representative of each of the four powers. Nazi organizations should be prosecuted rather than individuals: once convicted of engaging in a criminal conspiracy to control the world, to persecute minorities, to break treaties, to invade other nations and to commit crimes, each person who had joined the organization voluntarily would *ipso facto* be guilty of a war crime. The meeting agreed to bring the French into these discussions and accepted the US plan in principle.

Negotiating the London Agreement

On 26 June 1945, the International Conference on Military Trials opened at Church House in London to negotiate and finalize the terms of the founding Charter of the Tribunal. The basis for the discussions was the draft proposal of the US, presented by Justice Jackson, who played a key role in the debates. The chief British representative was Attorney General Sir

[3] The Control Council was a military occupation governing body of defeated Germany. On 5 July 1945, in Berlin, the supreme commanders of the four occupying powers, USA, USSR, UK and France, declared that they had assumed 'supreme authority with respect to Germany'.

David Maxwell-Fyfe, then replaced by Sir Hartley Shawcross. The Soviet representative was Major General Ion Timofeevich Nikitchenko, vice president of the Soviet Supreme Court, assisted by Professor A.L. Trainin, a specialist in international legal questions. The representative of the French provisional government of the French Republic was Robert Falco, a Counsellor at the Court of Cassation – France's highest court –, assisted by professor André Gros, French delegate to the United Nations War Crimes Commission, who played an active role in discussing the substance and form of the future Charter. Nikitchenko was later the senior Soviet judge on the Tribunal. Falco had first been designated as the French prosecutor but became the alternate French judge.[4]

Initially, Gros challenged the justification for judging individuals for acts of state. In traditional international law, the only subjects are states, not individuals. He said: 'It may be a crime to launch a war of aggression on the part of a state that does so, but that does not imply the commission of criminal acts by individual people who have launched a war . . .'. The British delegate countered: 'Don't you imply that the people who have actually been personally responsible for launching the war have committed a crime?' But the French delegate held his ground: 'We think that would be morally and politically desirable but that is not international law'.[5]

There was then a basic difference between the Soviet view of the trial, and that of the three Western powers. The latter wanted a 'real' trial, with due process guarantees and a judgment based on evidence for each of the defendants. Nikitchenko declared in the second session that

> We are dealing here with the chief war criminals who have already been convicted and whose conviction has been already announced by both the Moscow and the Crimea declarations by the heads of the governments, and those declarations both declare to carry out immediately just punishment for the offenses which have been committed.

For the Soviet member, the Tribunal's task was 'only to determine the measure of guilt of each particular person and mete out the necessary punishment – the sentences'.

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[4] Robert Falco, as a Jewish Judge, was excluded from the Court of Cassation in accordance with the Vichy's laws on the 'Statute of the Jews' of 3 October 1940 and 2 June 1941. He took refuge in the South of France and was re-instated in the Court after the Liberation.

[5] Robert H, Jackson, *International Conference on Military Trials* (Government Printing Office, Washington, D.C., 1947), p. 297.

Jackson replied that an accusation is not a conviction, it requires a judicial finding.

Other problems arose quickly. On procedure, there was a basic difference between the American and British judicial criminal procedures and the continental ones, shared by the Russians and the French. Under the 'adversarial' Anglo-American judicial system, the defendant goes to trial on a comparatively summary indictment to which no evidence needs to be attached. The evidence is presented in open court by the lawyers who examine and cross-examine the witnesses. Under the continental 'inquisitorial' system, most of the evidence is obtained by an examining magistrate and a detailed indictment is given to the defendant and to the court. During the proceedings, questions are asked by the judge, rather than by lawyers. Judge Falco did not insist upon the adoption of the French system. For him, it would be simpler to leave the prosecution in full charge of the prosecutors and leave the court sitting and judging apart from the prosecution. As a conciliator between the Anglo-Americans and the Soviets, he suggested that they should extract the best elements from their different laws. The French delegation had no preference.[6] However, both French and Soviet participants insisted that the initial indictment should be accompanied by evidentiary material.[7]

As a major substantial issue, the French and the Russians were opposed to the notion of a common plan or conspiracy to commit the crimes, an American and British legal concept unfamiliar to continental legal practice. For Jackson, the trial would link the conviction of groups and organizations to the actions of the major Nazi criminals so as to facilitate the subsequent prosecution of accused individuals. The French viewed this concept as 'a barbarous legal mechanism unworthy of modern law'.[8]

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[6] This was in line with the 'Observations of the French Delegation on the Draft Agreement Submitted by the American Delegation in http://www.yale.edu/lawweb/avalon/imt/jackson/jack15.htm

[7] See 'International Conference on Military Trials: London 1945, Minutes of Conference Session of June 26, 1945': http://www.yale.edu/lawweb/avalon/imt/jackson/jack13.htm, accessed on 5 February 2005. The Conference was held in closed sessions. Details are known through Robert H. Jackson, *Report of the United States Representative in the International Conference on Military Tribunals* (Department of State Publication 3080, US GPO, Washington, D.C., 1949) and the Avalon Project has published the minutes of all sessions.

[8] See Stanislaw Pomorski, 'Conspiracy and Criminal Organization', in Ginsburgs and Kudriavtsev, pp. 218–219.

Again, the French and the Russians opposed Jackson's proposal that initiating an aggressive war was a crime under international law. Professor Gros argued:

> We do not consider as a criminal act the launching of a war of aggression. If we declare war a criminal act of individuals, we are going farther than the actual law. We think that in the next years any state which will launch a war of aggression will bear criminal responsibility morally and politically; but on the basis of international law as it stands today, we do not believe these conclusions are right . . . We do not want criticism in later years of punishing something that was not actually criminal, such as launching a war of aggression.[9]

For Gros, if the Nazi leaders were criminals, it was not because they had started a war of aggression, but because in launching this war, they had committed atrocities and other violations of the law of war. To this legal argument, he added: 'The Americans want to win the trial on the grounds that the Nazi war was illegal, and the French people and other people of occupied countries just want to show that the Nazis were bandits'.

The Russians were concerned that such a charge against the Germans might be extended to their aggressions against Poland, Finland and the Baltic countries.

For Jackson, the prime purpose of the trial was indeed to establish the criminality of aggressive war under general international law.

The London discussions over the issues of conspiracy, individual responsibility, and aggression showed strong differences as to whether these principles were or not part of international law. Only conventional war crimes were unquestionably part of international law, but the Geneva Conventions left it to states, not to an international tribunal, to punish the violators.

Replying to the possible charge of retroactivity, Jackson argued that defining the law was within the competence of the Conference. He said:

> Our basic purpose is that article 6 [listing the crimes to come under the jurisdiction of the Tribunal] should settle what the law is for the purposes of this trial and end the argument . . .

The French delegate replied:

> . . . there is a difference in saying that, if they are convicted in . . . those criminal acts, they will be dealt with as major war criminals, and declaring those acts

[9] Jackson, p. 295.

> are criminal violations of international law, which is shocking. It [declaring those acts to be criminal violations] is a creation by four people who are just four individuals – defined by those four people as criminal violations of international law. It is *ex post facto* legislation . . . It is declaring as settled something discussed for years and settling a question as if we were a codification commission.

Jackson replied that 'we are a codification commission for the purposes of the trial as I understand it'.[10]

After very tense negotiations, mostly between Jackson and the Russians, and veiled American threats that they might give up the international tribunal for an only-US trial, Nikitchenko revealed that: 'As a matter of fact, we came here authorized to sign an agreement for the establishment of an International Military Tribunal. We have no power to sign an agreement saying that we do not need an International Military Tribunal'.[11]

Negotiations ended with the signature on 8 August 1945 of the London Agreement by the four powers, to which was annexed the Nuremberg Charter. Nineteen other governments later adhered to the Agreement, thus reinforcing its international credentials.

Following the Agreement, on 18 August, an ordinance signed by De Gaulle and other members of the provisional government authorized the French prosecutors on the Tribunal to investigate the charges and carry out the prosecution of the accused. Another ordinance of 2 November authorized the French judges to exercise jurisdiction within the competence of the Tribunal and render judgments, in the name of France, on the accused.

The Nuremberg Charter

The Charter is preceded by a quadripartite Agreement which decided the establishment of 'an International Military Tribunal for the trial of war criminals whose offenses have no particular geographical location whether they be accused individually or in their capacity as members of the organizations or groups or in both capacities'. Article 1 of the Charter limited the geographical competence of the Tribunal: it was established for 'the just and prompt trial and punishment of the major war criminals of the European axis'.

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[10] Jackson, pp. 329–330.

[11] Robert E. Conot, *Justice at Nuremberg* (Carroll & Graf Publishers, Inc.: New York, 1983), p. 24.

The Tribunal would consist of four members and four alternates. The members would agree, before the trial, on the selection of a President among themselves. Decisions would be taken by a majority vote and in case they were evenly divided, the vote of the President would be decisive, provided always that convictions and sentences required the affirmative votes of at least three members. Each of the four countries would appoint a Chief Prosecutor.

The crimes within the jurisdiction of the Tribunal were defined as follows (Art. 6):

> a) *Crimes against peace:* namely, planning, preparation, initiation or waging a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation of a Common Plan or Conspiracy for the accomplishment of any of the foregoing;
> b) *War Crimes:* namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity;
> c) *Crimes against humanity:* namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war,[12] 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 domestic law of the country where perpetrated.
>
> Leaders, organizers, instigators, and accomplices participating in the formulation or execution of a Common Plan or Conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.

Sentences would include death or other punishment.

Jackson had won: the objections of the French and the Russians had been set aside. The crimes included wars of aggression, and the concept of conspiracy was part of the crimes.

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[12] Comma substituted in place of semicolon by Protocol of 6 October 1945. This ensured the limited scope of *all* crimes against humanity – limited, that is, to acts committed 'in connection with any crime within the jurisdiction of the Tribunal'.

The judges

Lord Justice Geoffrey Lawrence of the Court of Appeal was the British judge and Sir Norman Birkett, a barrister and Judge of the High Court, was his alternate. The US judge was Francis Biddle, a former Attorney General and a Democrat. His alternate was John F. Parker, a Republican, who had valuable experience as jurist and Appeals Court Judge. The Soviet judge was General I.T. Nikitchenko, Vice-President of the Supreme Court of the USSR, and his alternate, Colonel Alexander Volkoff, professor of international law in Moscow.

The French judge was Henri Donnedieu de Vabres, a renowned specialist in international criminal law, a professor at the Paris Sorbonne law school. He was the only judge in Nuremberg without judicial experience, although this was somewhat compensated by the long experience of his alternate, Robert Falco, a judge at the Court of Cassation.[13] Both French members kept a low profile during the public proceedings.

[13] Why choose an eminent international criminal law professor without judicial experience to be an international judge? The other three judges all had judicial experience. Could it be that, in 1945, a French judge experienced in criminal law would necessarily be a Vichy judge who had sworn allegiance to Marshall Pétain, and would then be unwelcome to the US and British authorities and judges? Donnedieu de Vabres, as a university law professor was not subject to such a requirement. His major legal treaty was published in 1928 and re-printed in 2004: *Les principes modernes du Droit pénal international* (Ed. Panthéon-Assas, Paris, 2004). Donnedieu de Vabres continued teaching criminal law at the Sorbonne during the German occupation of France. The printed record of his 1942 course updates his earlier Treaty on Criminal Law and Comparative Criminal Legislation, describing the various Vichy legislative and procedural 'innovations', including the Statute of the Jews, 'introduced, in imitation of Germany, under the influence of a racist viewpoint'. Condemning the new legislation, he wrote that the new French criminal law had 'become, alas, a weapon of war' and 'science and barbary were no longer the scandalous paradox of a few years past'. He also noted that the Chief of State had assumed legislative, executive and regulatory powers, without respect for the principle of separation of powers, – that in 1940–1941, the new laws showed a strong repressive spirit, new crimes had been included in the criminal code, that some of them had a retroactive effect, that they were not bound by the principle of the required legality of crimes and punishment (that these should have been included in the laws), the 'exception' courts were political courts, such as the special courts, set up in reaction to 'circumstances', and were temporary – not part of the regular judiciary structure. Their powers were extremely broad, their judgments were expeditious, without judiciary recourse: see H. Donnedieu de Vabres, *Deuxième supplément au Traité élémentaire de Droit criminel et de Législation Pénale Comparée, le Droit pénal de la guerre et de la Révolution nationale, Septembre 1939 – Mars 1942* (Sirey, Paris, 1942).

Early October 1945, Lawrence was elected President of the Tribunal. An able and dignified judge, he was respected for his impartiality and became the central figure at the trial. In his later writings, De Vabres gave him full credits:[14] Lawrence's appointment was at the same time 'a tribute given to his eminent personality, a tribute to British judicial body, known for its high reputation of integrity and competence, a tribute to England, for its attitude and decisive role when in 1940 it was left alone to face the aggressor'. He added: 'To the professional experience of this senior magistrate, [Lawrence] added the virtue of a unwearying composure, a smiling dignity, a discreet skill in preventing anything which might have upset the good order of the debates'.

The prosecutors

The Chief US Prosecutor was Jackson, who played a major role in the preliminary negociations leading to the approval of the Charter, in the physical building up of the Tribunal's premises in Nuremberg, in staffing the US teams and in his prosecuting role during the trial. Jackson was assisted by two general advocates, three assistant prosecutors, and 16 substitutes. Altogether, the US staff numbered 640 persons, including 150 lawyers: the British staff at its maximum consisted of 168 persons, and the French and Russian combined did not exceed half the British.[15]

The Chief British Prosecutor was first Sir David Maxwell-Fyfe, then Sir Hartley Shawcross, Q.C., Attorney General of Great Britain, when the Labour government came to power. He was assisted by a general advocate, King's Counsel and four substitute prosecutors.

The Chief Russian Prosecutor was General Roman Rudenko, General Prosecutor of the USSR. He was assisted by one deputy and seven advocates general.

France was first represented by François de Menthon, a law university professor, a resistant during the German Occupation who joined de Gaulle in Algeria in August 1943. After the Liberation, he was appointed Minister of Justice in September 1944. De Menthon was in Nuremberg from

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[14] H. Donnedieu de Vabres, *Le Procès de Nuremberg, Cours de Doctorat professé à la Faculté de Droit de Paris par M. Henri Donnedieu de Vabres, Professeur à la Faculté de Droit de Paris, Juge au Tribunal Militaire International des grands criminels de guerre à Nuremberg* (Ed. Donat-Montchrestien, Paris, 1947) – thereafter called Doctorate Course, pp. 108, 171.

[15] Conot, p. 60.

29 August 1945 until 20 January 1946, when he returned to political life in France. He was then replaced by Auguste Champetier de Ribes, a lawyer. On 10 July 1940, he was one of the 40 parliamentarians who voted against the constitutional law granting full powers to Marshall Pétain. Also an active resistant during the Occupation, he was arrested and interned for 18 months beginning in December 1942. The French prosecutors were aided by two assistants and several substitutes.[16]

Registrar

A registrar was set up in accordance with Article 17(e) of the Charter, which entitles the Tribunal to 'appoint officers for the carrying out of any task designated by the Tribunal'. The Statutes of the future international criminal tribunals nominally include a Registrar as one of their three organs, judges, the prosecutor and the Registry.

The Nuremberg registrar, or general secretariat, was composed of four members and their assistants placed under the direction of a secretary-general (an American military officer), appointed by the Tribunal. Each of the four secretaries was appointed by the judge of his nationality.

The proceedings

The trial lasted from 14 November 1945 to 1 October 1946. The prosecution phase took place between 20 November 1945 and 7 March 1946, the defence followed from 8 March until July 1946. The defence counsels' speeches were limited to a period of 15 days in July, followed by the prosecutors' final statements. The trial of the organizations took place in August. On 31 August, each defendant made his final statement to the Court. On 1 September, the judges sat *in camera* to decide on their judgment. The judges read their judgment on 30 September and 1 October 1946. The condemned defendants were executed by hanging on 16 October 1946.

The prosecutors had agreed that the Americans would present the case against the Nazi organizations as well as the general conspiracy and the crimes against peace. The British would also deal with crimes against peace, including the breaches of specific treaties and crimes on the high seas. The French would present war crimes and crimes against humanity in Western

[16] The assistants were Paul Coste-Floret, replaced by Edgar Faure on 1 December 1945, and Charles Dubost, who attended the trial during its full duration.

Europe, speaking for France, Norway, Denmark, the Netherlands, Belgium and Luxembourg. The Soviets would do the same for Eastern Europe.

Jackson opened the trial with an eloquent address. He made a legal defence of the trial, a trial of 'the first war leaders of a defeated nation to be prosecuted in the name of the law, [but] they are also the first to be given a chance to plead for their lives in the name of the law'. He linked every dimension of Nazi criminality to a conspirational plan. The trial would serve a useful purpose in condemning aggression by all nations.[17] Sir Hartley Shawcross followed for the UK. He focused on German aggression as a breach of international law.

The French prosecutors' presentations

The French presentations were given from 17 January to 7 February 1946. On 17 January 1946, three days before his leaving Nuremberg for Paris, de Menthon gave his well-received opening address. As noted by Marrus, de Menthon kept with the Gaullist myth of the French resistance to the Germans, and portrayed a unified and martyred France, without any reference to the collaborationist Vichy regime.[18]

De Menthon exposed that 'all this organized and vast criminality' was a 'crime against the spirit', the 'monstrous doctrine' of racialism, '[which] aims to plunge humanity back into barbarism', the 'original sin of National Socialism from which all crimes spring'. This totalitarian doctrine 'necessarily brought Germany to a war of aggression and to the systematic use of criminality in the waging of war'. The defendants' responsibility was 'that of perpetrators, co-perpetrators, or accomplices in the War Crimes systematically committed between 1 September 1939 and 8 May 1945 by Germany at war'.

Reading de Menthon's speech forty years later, Taylor noted a 'jarring omission of reference to Jews and the Hocolaust'.[19] The only explicit reference was:'It is also known that racial discriminations were provoked against citizens of the occupied countries who were catalogued as Jews, measures particularly hateful, damaging to their personal rights and to their human dignity'. Taylor, however, did not mark this fact when hearing the address.

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[17] Marrus, pp. 79, 83, 85.

[18] Marrus, p. 88. The texts published by Marrus on de Menthon's Opening address of 17 January 1946 are on pp. 89–93, 150–151, 190–191.

[19] Taylor, p. 296.

On 24 January 1946, Charles Dubost, a French Deputy Prosecutor, argued that the defendants 'systematically pursued a policy of extermination' not primarily motivated by war aims, but rather 'as a policy of domination, of expansion, beyond war itself'. The greater part of his presentation related to the German concentration camps, while shorter portions dealt with hostages, assassinations, and prisoners of war. Evidence on concentration camps was given by witnesses, including the dramatic testimony of Marie-Claude Vaillant-Couturier, who had been arrested by the Germans in Paris early in 1942 as a member of the Resistance. In March 1943, she was sent to Auschwitz and then to Ravensbrück. She told of the torture and murder of Resistance members, the convoys to Auschwitz, the gassing of the Jews, the sicknesses and the medical experiments. Another French Deputy Prosecutor, Edgar Faure, followed Dubost. He showed, on the basis of German documentation, that if Nazism had a philosophy of criminal action, it also had at its disposal a criminal bureaucracy. In contrast with de Menthon, Faure was explicit about anti-semitism, carried out by legislation and police action. He produced the document of 6 April 1944 concerning the deportation of Jewish children from Izieu in France to Drancy which later served as basic element in the condemnation of Klaus Barbie for crimes against humanity (see Chapter 8). Faure also referred to the complicity of Vichy in enumerating the French anti-Jewish laws.[20]

During the examination and cross-examination of Ribbentrop (26 March-3 April 1946), Faure successfully challenged Hitler's foreign minister, who had claimed not to be anti-semitic. He produced the record of a meeting of Hitler and Ribbentrop with Admiral Horthy on 17 April 1943, which had been presented to Goering previously during the trial. When Horthy had asked what he should do with the Hungarian Jews, Ribbentrop had declared 'the Jews should be exterminated or taken to concentration camps'.[21]

Taylor acknowledged that the French on the bench [the judges] had no reason to be ashamed of their countrymen at the lectern [the prosecutors]: 'The French evidence was, despite the administrative difficulties, well-organized and forceful, and the presentation was both dignified and skillful'. In his final assessment, Taylor somewhat qualifies this praise: 'The four

[20] Annette Wieviorka (Ed.), *Les procès de Nuremberg et de Tokyo* (Editions Complexe, Paris, 1996), pp. 72–77.

[21] Conot, pp. 344–345, 352–354.

groups of prosecutors teamed surprisingly well, but their motivations and outlooks differed sharply, and only between the British and some of the Americans was there warmth and camaraderie. The French, still pulling together after the shock of the German occupation and the resistance, were the most reticent and least effective'. He singled out Dubost, Faure and Gerthoffer as the most effective French prosecutors.[22]

The French and Soviet prosecutors demanded the death penalty against all the defendants. The American and British prosecutors requested a verdict of guilt without assigning specific punishment.

After 216 days of testimony, examinations and cross-examinations, the public proceedings ended on 31 August 1946, with the final words of each defendant. Lawrence announced that the tribunal would now adjourn until 23 September 1946, the date on which the judgment would be announced. That date was postponed until 30 September.

The judges' deliberations

The first formal meeting of the judges' deliberations was held on 27 June 1946, followed by 21 more meetings. These deliberations were to remain secret for all times by those who attended the meetings: the judges and their alternates, and two interpreters. However, details were later revealed by Smith's, Conot's and Taylor's books, respectively published in 1977, 1983 and 1992.[23]

The judges first met to consider Birkett's draft of a 'long preliminary opinion', which had already been reviewed by Lawrence, Biddle and Parker.

After remaining silent during the public proceedings, Donnedieu de Vabres and Falco took an active part in the deliberations. On 27 June, de Vabres produced a memorandum moving that Count One, the Conspiracy to Commit Aggressive War, be stricken. He argued that the crime of conspiracy did not exist in international law and that the evidence had shown that there had been no common plan. No practical purpose would be served

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[22] Taylor, pp. 306, 632–633.

[23] B.F. Smith, *Reaching Judgment at Nuremberg* (Basic Books, New York, 1977), – Conot, pp. 482–492, Taylor, pp. 549–570. Both Conot and Taylor mention the papers of Francis Biddle, the American judge, at the University of Syracuse, – Conot also mentions the papers of John J. Parker, the alternate American judge at the University of North Carolina. Donnedieu de Vabres, Falco and the other judges and alternate judges did not leave any personal written documentation about the deliberations.

by a finding of 'conspiracy', since all the defendants had been involved individually in waging aggressive war, in crimes against humanity, or in war crimes. He contended that a conspiracy required a certain degree of equality among the participants, but no such equality existed in Nazi Germany: Hitler was totally dominant in the planning stage. Those who listened to and then worked to carry out his orders could be convicted as criminal accessories, but they were too lowly to be considered as participants in a common plan or conspiracy.[24]

Opposition to de Vabres' proposal was violent at times: Nikitchenko said: 'We are practical, not a discussion club . . . The Tribunal is not an institution to protect old law and to shield old principles from violation'. Discussions went on for many meetings. Only Biddle was inclined to concur with the French and he offered a compromise: the application of conspiracy was limited to the charge of waging aggressive war, it did not apply to war crimes or crimes against humanity. Overriding Nikitchenko's contrary view, the three other voting judges agreed. However, de Vabres' contention that there could be no common plan because of Hitler's dictatorship was rejected. On this issue, de Vabres was criticized by the other judges (except Biddle) 'for raising the wrong issue at the wrong time': an unfair criticism as he was entitled to make his case at any time in accordance with his legal knowledge and experience, his own assessment and his conscience, as were the other judges.

On another issue, Biddle strongly opposed the concept of the criminality of accused organizations, and suggested that the charges against all six organizations be thrown out. Nikitchenko wanted all the organizations declared criminal. De Vabres supported the criminal organization idea. He

> found that it was simply impossible for him to vote to exempt groups such as the Gestapo and the SS. The inhabitants of every French village knew that there was a fundamental difference between the SS and the units of the German Army, de Vabres claimed, and public opinion simply would not understand or accept the failure of the Court to declare groups like the SS to have been criminal.[25]

On 2 September, at the ninth sitting, the judges started to review the cases of the individual defendants and vote on the convictions and penalties to be applied. De Vabres showed himself as the most compassionate of the judges,

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[24] Conot, p. 482.

[25] Ginsburgs and Kudriavtsev, pp. 240–241.

proposing a milder sentence than the others. On the other hand, he joined with the Russian judges in not wishing, as a matter of principle, to acquit anyone, but did not agree with the Russians' intent to have all the defendants sentenced to death.[26]

There was a disagreement about the method of carrying out death sentences. The military defendants wanted the capital sentences be carried out by shooting rather than by hanging, the latter deemed dishonourable for a soldier. De Vabres wanted to distinguish between 'honourable' and 'dishonourable' penalties. For instance, he felt that Jodl and Goering should be shot, not hanged. The other three judges rejected his views on this matter.

The judgments

The judgment was rendered on 30 September and 1 October 1946. It confirmed the compromise agreement that conspiracy would be applicable only to crimes against peace, and took into account the opposition to the conspiracy principle expressed by de Vabres and the Russians by restricting its application: 'But in the opinion of the Tribunal the conspiracy must be clearly outlined in the criminal purpose. It must not be too far removed from the time of decision and action.' On crimes against humanity, the Tribunal kept to a strict interpretation: 'The Tribunal cannot make a general declaration that the acts before 1939 were Crimes Against Humanity within the meaning of the Charter'. It had affirmed that 'by 1939 those rules [the Hague Conventions] laid down in the Conventions were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war which are referred to in Article 6(b) of the Charter'. Thus, the Tribunal declined jurisdiction over the Nazi atrocities in Germany prior to the aggression against Poland.

The judgment summarized the evidence on war crimes and crimes against humanity and had a separate section on the persecution of the Jews. It recalled the Nazi plans made in the summer of 1941 for the 'final solution' of the Jewish question in Europe, e.g., the extermination of the Jews, one of Hitler's declared threatened consequences of an outbreak of war. Evidence of the treatment of the inmates and of the killing methods was given in detail.

Also taking into account the judges' differences of opinion on the criminality of the organizations and its consequences, the judgment limited

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[26] Conot, pp. 487–488, Taylor, pp. 550–553.

its scope and effects: a declaration of criminality 'should be exercised in accordance with well-settled legal principles, one of the most important of which is that criminal guilt is personal, and that mass punishment should be avoided.' The Nazi Party, the Gestapo and the SD, the SS were declared criminal, with minor exceptions. The SA, the Reich Cabinet and the General Staff and High Command, not criminal.

Twenty-four individual defendants were indicted, including political and military leaders, high nazi officials. Twelve were sentenced to death by hanging, three to life imprisonment, two to twenty years imprisonment, one to fifteen years and one to ten years, three were found not guilty and released. One had committed suicide in his cell before the trial and a senior industrialist was not tried on account of his senility.

In concluding, Lawrence announced that the Soviet member had dissented from the decisions in the three cases of the acquittals (Schacht, von Papen and Fritzsche) and in declaring non-criminal the General Staff and High Command and the Reich Cabinet. The Soviet member also dissented from the life sentence given to Hess: he should have been sentenced to death.

Public reactions

There was a wide media coverage of the trial, at its beginning, during a few dramatic expositions and at judgment time. Public opinion on the continent, where countries had been occupied by the Germans and people had suffered directly from that occupation, was for a harsh treatment of Germany. When the French were asked in October 1944 about what to do with Hitler, 40 per cent favoured the option 'shoot, kill, hang him' while 30 per cent wanted 'torture before killing him'. Trying the surviving Nazi leaders was at best a second option for most, but it helped by replacing the straight revenge by a decent judicial process. The dignity ensured by Lawrence over the long trial, the due process given to the defendants, the accumulated documentary and testimonial evidence produced by the prosecution, all contributed to give popular acceptance to the judiciary process.

The French press focused on individual portraits of some of the defendants, complained about the length and slowness of the trial, and was, at times, critical of the 'victors' trial.[27]

The acquittals of three accused (Schacht, von Papen and Fritzsche) were violently denounced as scandalous by the Paris press. *Le Monde* even

[27] Wieviorka, pp. 78–80.

qualified the trial as a 'tragi-comedy' and darkly hinted that 'one day we will know by what secret influences these three were not judged guilty'.[28]

Donnedieu de Vabres' later views

In an article published in 1947, Donnedieu de Vabres gave a legal assessment of the Nuremberg Trial in relation with the modern principles of international criminal law.[29]

In his introduction, he acknowledged that the innovation provided by the London Agreement – the individual accountability of political and other leaders for their crimes, rather than the 'State' responsibility – responded to an exigency of universal conscience. However, he added that criticisms should not be discarded, such as the Tribunal was not an international jurisdiction, but an interallied jurisdiction, a victors' jurisdiction. The fragility of human justice, in particular political justice, which included Nuremberg, was an obvious truth. He qualified the International Military Tribunal as 'an *ad hoc* jurisdiction, an institution created later than the crimes that it was to punish. Charges were vague, the punishments almost entirely left to the discretionary appreciation of the judges'. De Vabres recalled the words of the Nuremberg judgment that 'the Charter was not an arbitrary exercise of power on the part of the victorious Nations, but in the view of the Tribunal, ... it is the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law'. In his conclusion, he wrote that the affirmation of the Nuremberg principles was illusory, unless a permanent institution was created, which would be entitled to apply them.

De Vabres developed his views in a Doctorate course given in 1946–1947 at the Sorbonne in Paris.[30] Some of these views represented those expressed by Judge Falco during the London Conference, and those he submitted to the other judges during the *in camera* debates of August-September 1946 before the judgment was rendered. These views were then reviewed by De Vabres after the end of the trial.

Recalling that national law is the result of experience accrued during years, if not longer periods, the Nuremberg Charter was drafted to deal with a situation without precedent: it was a law of 'circumstances'. The London Charter was the work of only a few persons, some of them were later members

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[28] Raymond Krakovitch, 'La France au tribunal de Nuremberg', presentation in a *Colloque*, 29–30 November 2001.

[29] H. Donnedieu de Vabres, *Le Procès de Nuremberg devant les principes modernes du droit pénal international*, Rec. Acad., La Haye, 1947.

[30] Donnedieu de Vabres, Doctorate Course.

of the Tribunal. What gave a legal basis to the Nuremberg judgment was less its conformity with the Charter than its conformity with the 'movement of ideas', the evolution of treaties. In summary, the London Agreement of 8 August 1945, the Charter, the Rules of procedure and the judgment itself were only 'moments' in the evolution of customary law.[31]

De Vabres recalled the affirmation of the French philosopher Pascal that 'Justice without force is powerless, force without justice is tyrannical. One must therefore join force and justice', De Vabres wrote that this was done in Nuremberg: even though this was a human justice, an incomplete justice, a relative justice was better than no justice. What were the alternatives: kill discreetly the alleged criminals, following the Gestapo methods; a political punishment, such as applied to Napoleon when he was exiled to Elba Island, then to St. Helena; a widely-publicized moral punishment. De Vabres discarded all these alternatives as they all presumed the accused guilty: a judiciary examination is required before a punishment is decided.[32]

In summary, for De Vabres, the Nuremberg judgment ratified the supremacy of international law over national law. It also affirmed the primacy of conscience over the exigencies of discipline.

In 1951, Henri Donnedieu de Vabres was appointed rapporteur of a Commission created by the Institute of International Law, whose mission was to study the creation of an International Criminal Court. He submitted a draft 'final' resolution recommending, in part, that the Court be created by a resolution of the UN General Assembly, that its jurisdiction include crimes against mankind's peace and security allegedly committed by heads of state, government agents or their accomplices, common law crimes involving the responsibility of a state vs. other states, or those having an international interest. The Court would be composed of nine judges, elected for nine years by the UN General Assembly and the Security Council. Prosecution would be initiated by the UN Secretary-General or by a concerned state.[33]

Fifty-two years elapsed after the Nuremberg judgment until the Rome Statute instituting the permanent International Criminal Court was adopted in July 1998.

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[31] Doctorate Course, pp. 90–91.

[32] Doctorate Course, pp. 93–95.

[33] Institut de Droit international, Session de Sienne (1952), Vingtième Commission, 'L'institution d'une Cour pénale internationale, Rapport et projet de Résolutions définitifs présentés par M. H. Donnedieu de Vabres (Imprimerie de la 'Tribune de Genève, Geneva, December 1951).

The Tokyo Trial

While the Nuremberg trial was of direct and geographically proximate concern to the French, the Tokyo trial was far removed from Europe, aroused little interest in devastated France and remains mostly unknown to the French even now.

Judging the Japanese war criminals was of obvious interest to the Americans who won the Far Eastern war, to the colonial British and Dutch with Asian possessions, to Australia, New Zealand, China and other Asian countries and populations who fought with them and suffered from the Japanese aggressions.

France's involvement in the trial could only be justified by the forced collaboration of French Indochina with Japan in 1940–1941 and the massacre of French war prisoners by Japanese forces in 1945 (see Chapter 3). France had no political nor military role in the war led by the USA and other countries against Japan.

The Tokyo trial, a twin to Nuremberg, was also led by the Americans, but even more controlled by them. France appointed an Assistant Prosecutor to the American Chief Prosecutor – one of ten – and one Judge – one of eleven. The Tokyo trial was lengthy (twice the duration of the Nuremberg trial) and was another instance of victors' justice but without leaving the same legal and judicial heritage as Nuremberg.

The establishment of the Tokyo Tribunal

The background of the Tokyo trial was different from that of the Nuremberg trial. At the Cairo Conference, China, the UK and the USA issued a declaration on 1 December 1943 stating that 'the purpose of this war is to stop and punish Japanese aggression'.[34]

On 26 July 1945, the three Allies, China, the UK and the USA – later joined by the USSR – issued the Potsdam Declaration, announcing their

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[34] Details on the Tokyo trial are in Beigbeder (1999), Chapter 3. The main reference book is Richard H. Minear, *Victors' Justice, The Tokyo War Crimes Trial* (Princeton University Press, Princeton, N.J., 1971). For a comprehensive, factual description of the Tokyo Trial, see Solis Horwitz, *The Tokyo Trial*, in International Conciliation, Carnegie Endowment for International Peace, No. 465, November 1950. See also: Arnold C. Brackman, *The Other Nuremberg, The Untold Story of the Tokyo War Crimes Trials* (Quill-William Morrow, New York, 1987).

intention to prosecute high-level Japanese officials for the same crimes committed by the Germans in the European war. Articles 6 and 10 of the Declaration, entitled 'Proclamation Defining Terms for Japanese Surrender', stated, *inter alia:*

> (6) There must be eliminated for all time the authority and influence of those who have deceived and misled the people of Japan into embarking on world conquest, for we insist that a new order of peace, security and justice will be impossible until irresponsible militarism is driven from the world.
>
> (10) We do not intend that the Japanese shall be enslaved as a race or destroyed as a nation but stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners . . .

In the Instrument of Japanese Surrender of 2 September 1945, Japan accepted the terms of the Potsdam Declaration. The authority of the Emperor and the Japanese government was made subject to General Douglas A. MacArthur, the Supreme Commander for the Allied Powers. A directive issued by the US Joint Chiefs of Staff on 21 September 1945 was approved by all nations taking part in the occupation of Japan. The directive ordered the investigation, apprehension and detention of all persons suspected of war crimes. The Supreme Commander was to appoint special international courts and to prescribe their rules of procedures. On 19 January 1946, MacArthur issued a Proclamation establishing an 'International Military Tribunal for the Far East for the trial of those persons charged individually, or as members of organizations, or in both capacities, with offences which include crimes against peace'.

As with Nuremberg, the intent was to assign criminality to individuals, and to reject the charge of collective responsibility of a whole nation and people. However, unlike Nuremberg, the drafting of the Tokyo Charter was not submitted to an international conference: it was essentially an American project. The Tokyo Charter was drafted by the Americans only and was approved unilaterally, also on 19 January 1946, by MacArthur, in the form of an excecutive order. The Allies were only consulted after its issuance, a subordinate position explained by the primary military role played by the USA in fighting the Japanese and achieving victory. The Charter, dated 26 April 1946, established the International Military Tribunal 'for the just and prompt trial and punishment of the major war criminals in the Far East'. Its seat was in Tokyo.

The supremacy of the USA was again asserted by the authority granted to the Supreme Commander, MacArthur, to appoint the eleven members (judges) of the Tribunal from the names submitted by the Signatories to the Instrument of Surrender, ie. Australia, Canada, China, France, New Zealand, the Netherlands, the UK, the USSR and the USA. India and the Philippines were added later, although they were not yet sovereign states. There were no alternates. The Supreme Commander also had authority to appoint the President of the Tribunal from among its members: he appointed to that position Sir William Webb, a former Justice High Court of the Australian Commonwealth and Australian war crimes commissioner during the war: he was a competent and fair President.

There was one Chief of Counsel (Chief Prosecutor), Joseph B. Keenan – a US political appointee – and ten associate counsels, each having the nationality of the ten countries other than the USA. Responsibility for investigation and prosecution rested solely on the Chief of Counsel, in contrast with Nuremberg, where there were four equal Chief Prosecutors.

The crimes within the jurisdiction of the Tribunal were the same as those of the Nuremberg Charter: crimes against peace, conventional war crimes and crimes against humanity, including the participation in a common plan or conspiracy to commit the first and third category of crimes. 28 defendants of 'class A' were selected among a list of 80 high-level officials alleged to have planned and directed the war. They were charged with 'offences which included crimes against peace'. The mandate of the Tribunal covered acts committed between 1 January 1928[35] and 2 August 1945.

The procedures were similar to those of Nuremberg. The proceedings were conducted in English and Japanese, to which Russian was added, with simultaneous interpretation in these languages. Japanese and American lawyers represented the defendants. As at Nuremberg, sentences included the death penalty.

The indictment and the proceedings

The trial was held from 3 May 1946 to 12 November 1948 in Tokyo.

The defendants were nine senior civilian Japanese officials and 19 military officers. The civilians included four prime ministers, nine government ministers (foreign, war and navy), two ambassadors, three economic and

[35] Zhang Zoulin, warlord in North China, was murdered in 1928 by non-commissioned officers of the Japanese army in Manchuria, considered as the first act of aggression by Japan – although it was condemned by the Tokyo government.

financial leaders, one imperial adviser and the theorist of Greater Asia. The military included six generals, one admiral and one colonel. Japan's Emperor, Hirohito, was granted immunity by the Allies.

The indictment was issued on 29 April 1946, in the name of the Chief Prosecutor and his ten Assistants. Its central theme was that, since 1928, Japan's foreign and domestic policies had been dominated by a 'criminal militaristic clique'. There were 55 specific counts to the indictment: 36 representing crimes against peace, 16 represented murder ('being at the same time Crimes against Peace, Conventional War Crimes, and Crimes against Humanity') and three represented conventional war crimes and crimes against humanity. Twenty-one of the defendants were charged specifically with planning and initiating aggressive war against China, beginning with the invasion of Manchuria in 1931. All the defendants except two were charged with conventional war crimes and/or crimes against humanity in violation of the Hague and Geneva Conventions. The majority of the accused were charged with plotting aggressive war against the US, the UK, or the USSR, singly or collectively: however, this 'grandiose statement', in the words of the final judgment, was dismissed by the Tribunal, as for example, 'the conspirators [n]ever seriously resolved to attempt to secure the domination of North and South America'.

The indictment accused the defendants of promoting a scheme of conquest that 'contemplated and carried out . . . murdering, maiming and ill-treating prisoners of war [and] civilian internees . . . forcing them to labour under inhumane conditions . . . plundering public and private property, wantonly destroying cities, towns and villages beyond any justification of military necessity; [perpetrating] mass murder, rape, pillage, brigandage, torture and other barbaric cruelties upon the helpless civilian population of the over-run countries'.[36]

The period between 4 June 1946 and 24 January 1947 was given to the prosecution. The defence developed its arguments until 12 January 1948. The public hearings ended on 16 April 1948.

After seven months of discussions, the judgment was rendered from 4 to 12 November 1948.

The judgment

In Nuremberg, only the Soviet judge filed a separate Opinion. At the commencement of the proceedings in Tokyo, the nine judges then present had

[36] Minear, pp. 23–26, Brackman, Chapter 6.

unanimously decided to refrain from separate or dissenting opinions. Only one judgment was to be delivered, reflecting the opinion of the majority, and the secrecy of the deliberations *in camera* was to be respected. The Indian judge, Radhabinod Pal, when he arrived later, declared himself not bound by the agreement, since he would thus forfeit his right to a dissenting opinion. The agreement was therefore cancelled.

The outcome was disastrous for the credibility of the Tribunal: there was one majority judgment of the judges from the USA, the UK, China, the USSR, the Philippines, Canada and New Zealand – followed by four separate or dissenting Opinions and one concurring Opinion. All those who dissented signed the majority judgment, except Judge Pal. Röling and Bernard signed with the proviso that their separate opinions form part of the record.

The majority judgment did not 'find it necessary to consider whether there was a conspiracy to wage wars in violation of the treaties, agreements and assurances specified in the particulars annexed to Count 1. The conspiracy to wage wars of aggression was already criminal in the highest degree'. The judges found the existence of the criminal conspiracy to wage wars of aggression as alleged in Count 1 had been proved, subject to limiting the conspiracy to East Asia, the Western and South Western Pacific Ocean and the Indian Ocean, and a few islands in these oceans. The judges held that aggressive war was an international crime, basing itself on part of the Nuremberg judgment, with the latter's interpretation of the legal effect of the Pact of Paris of 1928.

The Tribunal then considered charges against individual defendants in respect only of the following Counts: Numbers 1, 27, 29, 31, 32, 33, 35, 36, 54 and 55. Count 33 was the only one of direct concern to France: a charge of 'waging aggressive war against France (Indochina)'. Two defendants were found guilty of this charge (and of others): General Hideki Tojo, former Minister of War and Prime Minister in 1940–1944 – sentenced to death, and Mamoru Shigemitsu, former Foreign Minister in 1943–1945 –, sentenced to seven years in prison, paroled in 1950, and then again Foreign Minister in 1954.

The judges found all the defendants guilty by a vote of eight to three – the three dissenters were Judges Bernard (France), Pal (India) and Röling (the Netherlands).

All defendants but two (Matsui, Commander-in-Chief of the Japanese Forces in Central China in 1937–1938 and Shigemitsu, Foreign Minister in 1943–1945) were found guilty of 'conspiracy to wage aggressive war'. These two defendants were found guilty, the first of war crimes only – for which

he was hanged – and the second of six other counts of aggressive war and war crimes, for which he was sentenced to seven years' imprisonment. Five defendants were found guilty of 'atrocities', namely crimes against humanity, in addition to other crimes, chiefly the 'over-all conspiracy'. They were all hanged. In summary, seven defendants were condemned to death by hanging – two former Prime Ministers, Hirota and Tojo – and five generals. The others were given jail sentences ranging from life to seven years. None was acquitted. The Australian President, Judge Webb, Bernard and Pal were on record in opposition to any death sentence. The Soviet judge may have joined them in their opposition.[37]

The Australian President did not record any formal dissent with the sentences pronounced by the majority, but offered some reasons why imprisonment for life could have been preferred to the death sentence, including a parallel with Nuremberg sentences. He raised one of the main challenges to the Tribunal judgment: the granting of immunity to the Emperor. For Webb, the Emperor's immunity should be taken into account when determining the punishment of the accused found guilty.

As did Judge Donnedieu de Vabres in Nuremberg, both President Webb and Justice Pal held that conspiracy had never been a part of international law, although the Chief Prosecutor and the majority judgment held the opposite view.

In his Dissenting Opinion, Pal stated that new crimes cannot be created under international law and enforced without precedent. Aggression and conspiracy to commit aggression did not exist as crimes against international law and therefore cannot be created *ex post facto.* That crimes were committed as a consequence of aggressive wars was beyond doubt. In fact, any war, an aggressive or self-defence war, is the cause of crimes. That the Pact of Paris made aggressive wars illegal under international law was more than doubtful. Finally, Pal rejected the notion that those individuals who initiated such wars had committed crimes under the then applicable international law, and could then be punished by an international tribunal as highly questionable.

Pal held that all the accused must be found not guilty of all charges in the indictment and should be acquitted of all those charges. For him, the 'name of Justice should not be allowed to be invoked only for the prolongation of the pursuit of vindictive retaliation'.

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[37] Minear, p. 91n44.

Pal and Judge Jaranilla (Philippines) opposed the decision of the Tribunal that evidence concerning the use of the atomic bombs over Hiroshima and Nagasaki was inadmissible.

Pal condemned their use. Referring to the charge of execution of Allied airmen by the Japanese, he asserted that

> the real horror of the air warfare is not the possibility of a few airmen being captured and ruthlessly killed, but the havoc which can be brought by the indiscriminate launching of bombs and projectiles. The conscience of mankind revolts not so much against the punishment meted out to the ruthless bomber as against his ruthless form of bombing.

Justice Röling held that aggressive war was not a crime under international law at the beginning of the Second World War. In his more nuanced Opinion, he asserted that, from the law as it stood, no one should be sentenced to death for having committed a crime against peace: internment for life would be the appropriate punishment for this crime. Those found guilty of conventional war crimes should be punished with the supreme penalty. He then challenged several of the sentences given by the majority Judgment.

France and the Tokyo Tribunal

France had judicial, administrative, financial and logistical problems in participating in the Nuremberg trial. These problems were even larger for the more distant and less compelling Tokyo Trial and were compounded by political problems.

France was trying to recover from the war and the Occupation, and its resources were limited. Its interest in the Tokyo trial was limited to Indochina, still a French possession, but far away from metropolitan France and its own political, economic and judicial problems. Although the Tokyo Agreement of 30 August 1940 maintained France's sovereignty over Indochina, France had to recognize the primary role of Japan in the Far East, and had granted Japan military facilities. On 9 March 1945, the Japanese forces attacked the French garrisons. There were at least 2 650 French casualties, and 3 000 were taken prisoner. Among the 19 000 French civilians, 3 000 were interned and some were tortured. Japan placed all French military and police authorities under their command. Japan recognized the independence of Annam-Tonkin, Cambodia and Laos, a large part of French Indochina. The Japanese troops had to withdraw from Vietnam in August-September 1945.

After the Japanese withdrawal, France still tried to re-establish its sovereignty over Indochina and to block the Indochinese people's long will and fight to regain their independence.

The Tokyo trial started in May 1946: in December 1946, Ho Chi Minh proclaimed the insurrection against the 'French colonialists' aggression, thus weakening further France's status in the Far East.

On 7 February 1945, the French Minister of Justice asked the General Direction of Studies and Research (*Direction générale des études et recherches, DGER*), France's intelligence service, to create an information service on Japanese war crimes in Indochina.[38] On 30 December 1945, Chief Prosecutor Keenan asked the French to nominate at least one judge and one assistant prosecutor, and repeated this request on 22 January 1946. The final choice of the French for the position of judge was Henri Bernard, a colonial magistrate who sided with the Free French in August 1940 when the French authorities in the Congo (Brazzaville) joined De Gaulle's fight.[39] The designated French prosecutor was Robert Oneto, prosecutor in France, and a former Resistance member. Neither Bernard nor Oneto knew much English, but they were helped by a French professor of English (not a professional interpreter).

The language crisis

Oneto created a language and judiciary crisis when he opened the French case on 30 September 1946, because of a wounded national pride and a resentment to the perceived loss of prestige and power of France in postwar East Asia.

Article 9 b. of the Tokyo Charter states:

> The trial and related proceedings shall be conducted in English and in the language of the accused. Translation of documents and other papers shall be provided as needed and requested.

English and Japanese were therefore the original official languages of the trial. Russian was added as a courtesy to the Russian judge who spoke neither language: the simultaneous interpretation channels were operated in

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[38] This section is based in part on Jean Esmein, 'Le juge Henri Bernard au Procès de Tokyo', *Vingtième siècle, revue d'histoire*, No. 59 July–September 1998, pp. 3–14.

[39] France's first choice was Henri Heimburger, a former legal adviser to the French Ministry of Overseas, who resigned on 5 April 1946 for personal reasons.

English, Japanese and Russian. Judge Bernard stated that the French government considered the Russian arrangement 'prejudicial to the French delegation'. Webb replied that Russian was not really a third language at the trial, but explained the Soviet judge's need for a private channel. A majority of the judges agreed to permit the French phase to be conducted in French, although the documentation would continue to be read in English. When Oneto started his presentation, the Japanese defence objected to the use of French. The bench overruled the objection. Oneto could read and write English well, but the interpreters and court reporter complained that his accent was 'not understandable' when he spoke English. During a discussion between the Chief Prosecutor and the judges, Oneto began to shout excitedly in French. He said, in part: 'I represent the great country of France. I demand the right to be heard. If I am not heard, I shall withdraw from the case'. Webb later announced that Oneto's behaviour 'appears to constitute contempt of court' and demanded a satisfactory explanation or an apology. Eventually, Oneto expressed 'regret that a misunderstanding arose'. His apology was accepted.[40]

The French prosecution

After long discussions between the Paris government and the French authorities in Saïgon (now Ho Chi Minh City), the French indictment was submitted to Keenan on 20 June 1946, a weak file containing mainly press extracts from Indochina, French army reports concerning the entry of Japanese troops in Dong Dang and Lang Son in September 1940. The defence had already rejected the accusations of crimes against peace from countries which had signed agreements for their own occupation, like Thailand and France, and could not therefore be treated as 'victims'. Oneto thought that he could demonstrate that Japan's war policy against France had been the object of a plot as early as 1939, an unbased allegation.

The French case dealt with crimes of aggression. Japan was accused of invading and occupying Indochina, and of exploiting the territory economically – a charge that the Vietnamese were making against their colonial master.

Oneto introduced the 1941 pact between Vichy and Tokyo as an example of Japanese pressure on the French in Indochina. Under its terms, both parties 'promised to cooperate militarily for the joint defense of French

[40] Brackman, pp. 213–216.

Indo-China'. This essentially showed Vichy France's weakness and compliance with the Japanese, but France's even reluctant agreement could not demonstrate a 'war conspiracy against France' set out in Indictment Count 15: this Count was later dismissed by the judges. Count 23, 'Invasion and occupation of the Tonkin', following the Japanese ultimatum of 9 March 1945, was also rejected by the judges.

In 1946, the Americans asked Oneto to call Admiral Jean Decoux as a witness. Oneto refused, as Decoux, who had been appointed Governor of French Indochina by the Vichy government, had been indicted by the High Court of Justice in Paris for collaboration. His case was dismissed by the High Court in 1949. On 9 March 1945, Decoux had been jailed by the Japanese until their surrender in September of the same year.

Witnesses for the French prosecution were heard on 15 and 16 January 1947. Captain Ferdinand Gabrillagues, director of the French Indochinese Bureau of War Criminal Suspects said that 'The number of war crimes was considerable, the documentation concerning them voluminous, but there is no question of making a complete exposé of them', because evidence had been systematically destroyed by the Japanese, and witnesses killed.[41] The defence countered that the 1620 French military killed in combat in March 1945, had been rebels to their own government (Gaullists vs. Vichy authorities).

The French indictment

The formal French indictment was submitted on 23 and 24 January 1948 and on 16 February 1948. Again, Oneto referred to a Japanese conspiracy of expansion and aggression which included French Indochina:[42]

> By the end of 1938, the conspirators were ready to take the first step to expand beyond the borders of China. The first movement was into French territory. For geographically strategic reasons it was necessary for the success of the conspiratioral plan of expansion and aggression that the move be made in that direction. French Indo-China occupies . . . a strategic position of the highest importance.

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[41] Brackmann, p. 42.

[42] Doc. F delta rès 874/06/1-54, 'The Summation', 16 February 1948, paras. G-26, G-34, G-36, G-37, G-43, G-46, G-47, in *Fonds du Juge Henri Bernard, Le Procès de Tokyo, 1946–1949*, Bibliothèque de documentation internationale contemporaine, Musée d'histoire contemporaine, Nanterre (France). The *Fonds* contains mainly official documents of the Trial, but no personal memoirs by Judge Bernard.

Oneto then recalled the military threats from Japan to obtain the rights of passage of Japanese troops through Indochina in August 1940, then the 'combined pressure of Japan and Germany' which made Vichy 'succumb' and accept Japan's plan of mediation between France and Thailand in March 1941, followed by a peace agreement in May. In July 1941, ceding to a Japanese ultimatum, France also granted Japan's demands and signed a protocol for the joint defence of Indochina under special arrangements. The French losses were relatively minimal in relation to other countries' charges: the number of French prisoners of war who died in Japanese camps was only the 40th of Dutch deaths, the tenth of Commonwealth deaths, the five hundredth of Chinese deaths.[43]

Judge Bernard's views on the Tribunal's jurisdiction

Justice Webb, President of the Tribunal, requested each member of the Tribunal to send him a 'short memorandum setting forth views on the Tribunal's jurisdiction'. Bernard replied on 10 October 1946, before receipt of the text of the Nuremberg judgment.[44] He justified the setting up and jurisdiction of the Tribunal by a reference to natural law, what he called 'universal conscience', and submitted that the principle of non-retroactivity should not be an obstacle to judging the defendants:

> International law is not merely composed of conventions, treaties and assurances. It is not entirely written. It is also the product, non formulated, I admit, of the universal conscience. Therefore it precedes its written formulation.
>
> As a result of this opinion and the universal conscience having from all time condemned wars of aggression, judging the responsible men should receive the most severe punishment, our Tribunal could, even in the absence of the Potsdam Declaration and other instruments of International Law, declare guilty and punishable the wars of aggression of which the present defendants are charged – provided, of course, that the facts are proved.
>
> In the event the Tribunal should consider that the censure emanating from the universal conscience does not constitute a sanction of International Law and that the condemnation of the defendants could be authorized only from written laws, nevertheless the principle of non-retroactivity could not be an obstacle to the application of the Potsdam Declaration. This principle constitutes a

[43] Esmein, p. 9.

[44] Doc. F delta rès 874/10/8, *Fonds du Juge Henri Bernard*.

> rule of interpretation of law and guides the judge in the event of discussion regarding the date of application, but it does not bind the legislator. Even if, in a general way, the latter believes it advantageous not to have his decisions retroacted, this cannot prevent him from thinking differently at times and making a contrary decision. Such has been the case when the Allied Nations decided to sue the men responsible for the war.

On 28 April 1948, Bernard wrote to the other judges. He believed that the only possible defence was for the accused to plead self defence, eg, that the Japanese were aggressed by their enemies. He suggested, either provocatively or somewhat naïvely, that

> if one wanted that our judgment enjoyed a reputation of perfect impartiality, the defense lawyers should have had access to the files of Japan's adversaries: the USSR, the USA, France, the UK, China, in the same way that the prosecutors have been able to review Japan's files.[45]

This suggestion was of course ignored.

Judge Bernard's Dissenting Judgment

Judge Bernard said that "The crimes committed against the peoples of a particular nation are also crimes committed against members of the universal community" a formula which was later used to justify the concept of universal jurisdiction for crimes against humanity and other conventional crimes. Judge Bernard acknowledged that the authors of the Charter were the victors and that only the government leaders of the defeated nations could be prosecuted. He blamed the 'political non-organization of the world' for the decision reached by 'the victorious nations both judges and partakers in this decision', to exclude the 'eventual proclamation of the responsibility of the conquerors'. However, he gave legitimacy to the trial in finding the provision of a trial instead of summary punishment

> sufficient proof of the good will of the Allies . . . Inaction on the part of the victor nations would have deprived the world of a verdict, the necessity of which was universally felt.[46]

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[45] Esmein, p. 12.

[46] Bernard, 'Dissenting Judgment of the Member from France of the International Military Tribunal for the Far East', 12 November 1948, [MB 1549, Tokyo War Trials, Box 334, Opinion of the member from France, 1948, – Macmillan Brown Library], pp. 2–3.

On conventional war crimes, Bernard wrote that 'There can be no doubt that on all stops of its hierarchy the members of the Japanese Army and Police made themselves guilty of the most abominable crimes in respect of the prisoners of war, internees and civilians of the occupied regions'. He then gave a scale for the punishment of the accused according to their degree of responsibility in the violation of the laws of war, punishment by death, or life imprisonment, or imprisonment for a limited duration.[47]

Bernard faulted the procedure on several grounds. On due process, he wrote:

> Though I am of opinion that the Charter permitted granting to the accused guarantees sufficient for their defense, I think that these actually were not granted to them. Essential principles, violation of which would result in most civilized nations in the invalidity of the entire procedure, and the right of the tribunal to dismiss the case against the accused, were not respected.

A second point was, for Bernard, the lack of a preliminary inquest conducted equally in favour of the prosecution and of the Defence by a magistrate independent of them both, and with the benefit of the assistance of the Defence counsel: he missed the French process by an investigating judge, the *juge d'instruction*. In Tokyo, the prosecution was carried out *in personam* and not *in rem*, claiming the right not to prosecute all the suspects at the same time, without proper control by the Tribunal.[48]

Another point was the lack of proper deliberations of all the judges in drafting the judgment. The 1050 pages of the judgment relating to findings of fact were drawn up first by a drafting committee, then submitted to the majority of seven judges, and then distributed to the remaining four justices. Bernard said in his dissent: '. . . the eleven judges were never called to meet to discuss orally a part or in its entirety this part of the judgments'. He considered that '. . . oral deliberations outside of all influence bearing on all produced evidence among all the judges who sat at the trials are a guarantee of justice . . . A verdict reached by a tribunal after a defective procedure cannot be a valid one'.[49]

Another procedural argument to invalidate the trial, was, for Bernard, the failure to indict the Emperor Hirohito. He argued that the evidence

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[47] Bernard, pp. 12, 17.
[48] Bernard, pp. 18–19.
[49] Bernard, pp. 18, 19, 20.

brought forward at the trial had implicated him. On the Japanese declaration of war in December 1941, Bernard wrote:

> It cannot be denied that, it [the declaration] had a principal author who escaped all prosecution and of whom in any case the present Defendants could be considered as accomplices.

Bernard agreed with Webb that the emperor's absence from the trial 'was certainly detrimental to the defense of the accused'.[50]

Bernard (and Pal) disagreed with the prosecution and the majority judgment that there had been a conspiracy, a position also shared by the French judge in Nuremberg for the Nazi crimes. He wrote, in a Cartesian mood:

> No direct proof was furnished concerning the formation among individuals known, on a known date, at a specific point, of a plot the object of which was to assure to Japan the domination . . . of some part of the world'.

What had been proved was only

> . . . the existence among certain influential classes of the Japanese nation of the desire to seat at all costs the domination of Japan upon other parts of East Asia . . . the question remains completely to ascertain whether by doing so they did or did not act criminally. The question was neither raised by the prosecution nor answered by the judgment of the majority.[51]

Bernard agreed with Judges Pal and Röling, with some nuances, that the 1928 Pact of Paris had not established that aggressive war was illegal under international law. He appealed to natural law and morality to conclude that aggressive war did constitute a crime and that individuals could be held responsible for acts of state. He wrote:

> There is no doubt in my mind that such a war of aggression is and always has been a crime in the eyes of reason and universal conscience – expression of natural law upon which an international tribunal can and must base itself to judge the conduct of the accused tendered to it.[52]

In concluding, Bernard refrained from 'venturing further in the formulation of verdicts, the exactitude of which would be subject to caution or to sentences, the equity of which would be by far too contestable'.[53]

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[50] Bernard, pp. 19, 22.
[51] Bernard, pp. 21–22.
[52] Bernard, p. 23.
[53] Bernard, p. 23.

Review of the judgment and sentence

Under Article 17 of the Tokyo Charter, the record of the trial was to be transmitted directly to the Supreme Commander for the Allied Powers for his action. 'Sentence will be carried out in accordance with the Order of the Supreme Commander for the Allied Powers, who may at any time reduce or otherwise alter the sentence, except to increase its severity'.

Before MacArthur made his decision, he called for a meeting of the Allied Council for Japan, made up of diplomatic representatives of the Allied Powers in Tokyo to give their opinions, although this step was not part of the Charter. The US representative recommended no change in the judgment. The other diplomats reflected the position of their own judges. France made no official comment, but the French diplomat, citing Judge Bernard's dissent, made a personal appeal for clemency.

Mac Arthur found nothing of commission or omission itself of sufficient import to warrant his intervention in the judgment. He directed the Commanding General of the Eighth Army to execute the sentences as pronounced by the Tribunal.[54]

Conclusion

In 1945–1946, after its liberation by Allied troops from German occupation, France was in the aftermath of some of the worst events of its long history, military defeat, foreign occupation, material hardships, moral dilemmas, and was trying to deal with its recent past and recreate a democratic identity. Post-Liberation trials were starting in France, with the difficult task of restoring the rule of law in a climate of political and social strife, violence and a need for revenge and retribution.

Finding its place again among its former democratic friends and allies, France was admitted as a partner in the two International Criminal Tribunals to judge the major German and Japanese war criminals.

French legal doctrine was still based on traditional international law, a law of states, and the prosecutors and judges called to Nuremberg and Tokyo had to accept a legal revolution, the individual judiciary accountability of high-level political and military leaders for their acts or omissions.

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[54] Minear, pp. 164-167.

They had to accept British/American judicial concepts such as conspiracy and the guilt of organizations, and unknown and unpracticed judicial procedures such as the accusatory process with examinations and cross-examinations. They had to accept *ex post facto* international criminal legislation, that is punishing the German and Japanese leaders for 'crimes against peace', a 'crime' not part of international law when they were committed. They took part in international tribunals which only judged the leaders of defeated countries and ignored the crimes committed by the Allies: in Europe, the Soviet aggressions in Poland, Finland and in the Baltic countries, the British-American terror bombing of German cities, and in the Far East, the American terror bombing of Japanese cities, and the atomic bombing of Hiroshima and Nagasaki. The Tokyo tribunal did not indict the Japanese Emperor, a political decision, thus laying more criminal responsibility on the Japanese defendants in the dock. Immunity was also granted to the Japanese leaders of Unit 731, the secret site of inhumane bacteriological experiments on prisoners, in exchange for giving the results of their 'research' work to the Americans.[55]

The French prosecutors and judges were faced with practical difficulties related to France's lack of resources, its inability to carry out research, to obtain relevant documentation and to call witnesses, – the recognition, especially in Tokyo, that the French language was no longer an international language, but had now been dominated and replaced by English.

Both Nuremberg and Tokyo were American projects planned and carried out in all aspects – legal, judiciary, logistical, financial – by the Americans, with resources well beyond those of the French.

Within their domain, the two Tribunals painfully revealed to the French representatives that France was no longer the 'great country' affirmed by Prosecutor Oneto, although De Gaulle had saved its honour and regained, with Churchill's support, a place in the leaders' international groups and institutions. In Nuremberg, France positioned itself in part as a victim of the Nazi, and in part, as one of the victors on the basis of the Free French military participation in the Allies' combat and acts of internal Resistance: this served to set aside its Vichy past. France's position in Tokyo was more difficult. In the first place, Indochina remained under Vichy rule until the Japanese defeat, France had (under duress) signed an agreement of military cooperation with Japan in 1941, and France had no role in the military

[55] See Beigbeder (1999), pp. 72–73.

operations and final victory against Japan. Secondly, France had maintained its colonial domination over Indochina, which involved exploitation of the colony's resources and forced labour of the natives: similar arguments could hardly by used by the French prosecution against Japan's military aggression and abuses.

In the circumstances, the French prosecutors in Nuremberg did a valuable job with very limited resources. In the far away Japan, the French prosecutor was left with little support from Paris and Saigon, but did his part valiantly against considerable odds.

Legal and judiciary objections to the proposed Nuremberg Charter were made by Judge Falco during the London negotiations. Judge Donnedieu de Vabres raised similar objections during the closed debates of the judges over the final judgment, in a challenge to the validity of a 'crime against peace' under international law and to the concept of conspiracy, with a limited impact over the final judgment.

Judge Bernard expressed his objections in a more striking, public way by submitting a Dissenting Judgment which tended to invalidate the majority judgment on procedural grounds, which also tainted the legitimacy of the Tribunal.

The French judges were right to protest: they were also right to participate in these historical experiments of an innovative international justice which shocked traditional international law into new, uncharted territory.

The warts and limitations of the Nuremberg and Tokyo tribunals are well-known. Both applied 'victors' justice', insofar as only the vanquished were called to account for violations of international humanitarian law before the victors' judges and prosecutors. Secondly, the defendants were tried and punished for crimes expressly defined in Charters adopted well after the alleged crimes were committed, a violation of the principle of non-retroactivity of criminal law. Furthermore, no provision in the Hague or Geneva Conventions, nor in the 1928 Pact of Paris prescribed that individual violators would be prosecuted and condemned by an international tribunal. Thirdly, the Tribunals' procedural rules inadequately protected the rights of the accused. Fourthly, the victors' governments or armed forces had committed some of the same crimes for which the defendants were tried: yet they were not subjected to international justice.

In addition to these valid charges, the Tokyo tribunal had its own problems: an excessive American (MacArthur's) domination, too many judges, and an American prosecutor who did not match the standards of Justice Jackson in Nuremberg.

In spite of their imperfections and partiality, the Tribunals created a major judiciary precedent: for the first time, high level political and military leaders were made accountable for crimes committed in their name or in the name of their regime: individual responsibility replaced state responsibility. A civilized, punctilious judicial process replaced raw vengeance and summary executions. Nuremberg Law added the concept of crimes against humanity to the crimes defined in the Geneva and Hague Laws. Nuremberg was a first step (or 'moments', in Donnedieu de Vabres' words), in the slow evolution from toothless international humanitarian law, poorly enforced by national authorities or courts, to a regime of effective sanctions applied by international tribunals under international criminal law. International law finally addressed individuals, rather than being restricted to relations between states.

The Nuremberg and Tokyo precedents served in the creation of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda respectively in 1993 and in 1994 (see next two Chapters). They showed the feasibility of creating such international tribunals, they gave a legal and judiciary basis for the later Tribunals' creation and jurisprudence. The creation of the International Criminal Court is another tribute to be given to Nuremberg.

Chapter 10

The Genocide in Rwanda

France has been actively involved in Rwanda at least since 1975, by giving political support to the Hutu government, the government who planned and carried out the genocide of the Tutsi and moderate Hutu in 1994, and by providing military training and armament to its forces and to militia. France has been accused of complicity in the genocide, a charge which French national authorities have denied.

Following a summary of the events leading to the genocide and the genocide itself, this Chapter describes the creation, statute and achievements of the International Criminal Tribunal for Rwanda set up in 1994. It then reviews the creation and findings of a French Parliamentary Mission, in a report submitted in 1998 that essentially rejected any charge of criminal responsibility related to the genocide on the part of the French political and military authorities.

An independent Commission set up by the Secretary-General of the United Nations carried out an inquiry into the actions of the UN during the 1994 genocide. Its report, submitted in 1999, referred only in part to the role of France in these events.

In another report submitted in July 2000, the International Panel of Eminent Personalities appointed by the Organization for African Unity labelled France as one of the 'major villains' which could have prevented, halted or reduced the slaughter.

Finally, the complaints of two Rwandans to a military tribunal in Paris for alleged 'complicity with genocide' are considered.

The Genocide

The genocide, the mass elimination of the Tutsi minority in Rwanda together with the killing of moderate Hutu, started on 12 April 1994. It had been triggered on 6 April by the crash of the jet plane carrying the President of Rwanda, Juvénal Habyarimana and his colleague, President Cyprien Ntariyamira of Burundi. All aboard were killed, including several senior members of Habyarimana's staff and the French air crew. On the day after, ten UN Belgian Blue Helmet soldiers were murdered by Rwanda government soldiers. Belgium then withdrew all its military personnel from the UN Peacekeeping Force in Rwanda (UNAMIR), in which it had been the largest contingent.

The genocide ended on 18 July 1994 with the victory of the Rwandan Patriotic Front (RPF), originally based in Uganda grouping exiled Tutsi and dissident Hutu, and the formation of a new government, replacing the interim Hutu government.[1]

In a population of seven million before the slaughter, the genocide caused the violent death of between 500,000 and 800,000 Rwandans – women, children and men – mostly Tutsi: over three-quarters of the population registered as Tutsi were killed. Victims were treated with sadistic cruelty and suffered a long and unbearable agony. Thousands more were raped, tortured, and maimed for life. About two million, mostly Hutu, were displaced internally and another two million fled as refugees to neighbouring

[1] Details on the International Criminal Tribunal for Rwanda are in Yves Beigbeder (2002), Chapter 3. References are in the report entitled *Rwanda: The Preventable Genocide*, called *OAU Report* hereunder, submitted on 29 May 2000 by an International Panel of Eminent Personalities mandated by the Organization of African Unity, supplemented by other references. The Panel's mandate was 'to investigate the 1994 genocide in Rwanda and the surrounding events in the Great Lakes Region … as part of efforts aimed at averting and preventing further wide-scale conflicts in the … Region'. Panel Members were the former Presidents of Botswana and Mali, the Chairperson of the Swedish Committee for UNICEF, a former Liberian Government Minister, a former Chief Justice of the Supreme Court of India, a former Algerian Ambassador, a former Canadian Ambassador and Permanent Representative of Canada to the UN. See www.oau-oua.org/Document/ipep/ipep/ipep.htm

countries. In the words of an American NGO report: 'Rwandans have been through a national nightmare that almost defies comprehension. Theirs is a post-genocide society that has also experienced civil war, massive refugee displacement, a ruthless [post-genocide] insurgency, deep physical and psychological scars that are likely to linger for decades . . . and economic ruin so extensive that it is now one of the two least-developed countries in the world'.[2]

Without recalling colonial German, then Belgian, responsibility for differentiating Tutsi from Hutu,[3] periodical killings of Tutsi by Hutu and of Hutu by Tutsi in Rwanda and Burundi preceded the genocide. In 1959, a bloody Hutu revolt in Rwanda caused the massacre of 20,000 Tutsi and a first exodus, mainly to Uganda. In 1972, the government of Burundi, controlled by the Tutsi, tried to eliminate the educated class of the Hutu. Out of a population of 3.5 million inhabitants, from 100,000 to 200,000 Hutu were killed. In 1973, in Rwanda, the head of the armed forces, General Habyarimana, a Hutu, seized power. In October 1990, the Rwandan Patriotic Front attacked on the north-east of Rwanda from Uganda, causing the arrest and massacres of Tutsi, accused of being RPF accomplices. A guerrilla war followed the RPF retreat back into Uganda. In February 1993, an RPF offensive in the north of the country provoked the exodus of a million Hutu. The RPF carried out summary executions. In March 1993, an International Commission of Inquiry set up by four human rights NGOs published a report condemning human rights violations in Rwanda, some of which qualified as genocide.[4] The Rwandan government denied the existence of 'death squads' and that some of the incidents were planned in advance.

Following the plane crash of 6 April 1994, a Hutu-led interim government was formed in the French Embassy in Kigali, and 'Hutu Power' took control in Rwanda.

Jean Kambanda, the Prime Minister during the genocide, accepted his responsibility at his trial four years later when he pleaded guilty to genocide. Not only had the genocide been planned in advance, he admitted that there was in Rwanda in 1994 a widespread and systematic attack against the civilian population of Tutsi, the purpose of which was to exterminate them.

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[2] US Committee for Refugees, 'Life After Death', quoted in para. 17.1 of *OAU Report.*

[3] See Beigbeder (1999), p. 170, – A. Destexhe, *Rwanda and Genocide in the Twentieth Century* (Pluto Press, London/East Haven, CT, 1995), with a Chronology in Appendix 2.

[4] *Rapport de la commission internationale d'enquête sur les violations des droits de l'homme au Rwanda depuis le 1er octobre 1990 (7–21 Janvier 1993), Rapport final*, March 1993, p. 96.

Mass killings of hundreds of thousands occurred in Rwanda, including women and children, old and young, who were pursued and killed at places where they sought refuge: prefectures, parish offices, schools, churches, and stadiums.[5] All Hutu authorities and a large part of the population were involved in the genocide.

At the United Nations, neither the secretariat nor the Security Council took any effective action to prevent or stop the genocide. The cable sent by General Romeo Dallaire (Canada), Commander of the UN peacekeeping force in Rwanda (UNAMIR), on 11 January 1994 to the UN peacekeeping department in New York was a clear warning of events to come: an informant in the Hutu government had warned that the President's party was training militia, stockpiling weapons, planning to kill Belgian troops and registering members of the Tutsi minority. 'He suspects it is for their extermination'. Dallaire recommended that UN troops seize weapon caches. UN headquarters' answer was to stop him from taking any initiatives, give this information to the President of Rwanda (the key planner of the future genocide) and inform various embassies. The Security Council's incredible and irresponsible decision, during the genocide, was to reduce the size of the UN Mission from 2500 soldiers to 270.[6] The UN secretariat's insistence of being 'neutral' between the killers and their victims amounted to appeasement and led to inaction.

The International Criminal Tribunal for Rwanda

France's role in the creation of the Nuremberg tribunal was important, as related in the previous Chapter, because of the contribution of a French judge and a jurist in the London negotiations that led to the adoption of the Nuremberg Charter and the constitution of the quadripartite Tribunal. It was also important in view of the participation of the French prosecutors and the two judges in the trial.

France had no role in the drafting of the Tokyo Charter, a strictly American work. In view of the overpowering US presence in Tokyo, the composition of the Tribunal and some of the problems mentioned in the previous Chapter, the influence of the French prosecutor was limited. The

[5] ICTR Judgement 97-23-S, quoted by the *OAU Report*, para. 14.4.

[6] Security Council res. 872 of 5 October 1993 and 912 of 21 April 1994.

French judge's Dissenting Opinion, among others, did not affect the majority judgment.

The role of France in the creation and operations of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda was of a different nature. The two Tribunals were created by the UN Security Council, where France has a permanent seat: its approval was therefore essential. In a progression over the Nuremberg and Tokyo 'victors' tribunals, the new tribunals are international, and their members are no longer limited to the 'victors' of World War II, where France was admitted, – four victors for Nuremberg and eleven for Tokyo. In view of the large membership of the UN, France's influence is necessarily limited in the new tribunals, and can no longer formally claim any particular position – such as prosecutor or judge – by right. However, as a permanent member of the Security Council, France has had a generous share of French nationals elected as judge, President or Deputy Registrar.

Creation of the Tribunal

The Security Council created on 8 November 1994, by resolution 955, the International Tribunal for the Prosecution of Persons Responsible for Genocide or other Serious Violations Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and other Such Violations Committed in the Territory of Neighbouring States. Between 1 January 1994 and 31 December 1994, – in short the Rwanda Tribunal, or the ICTR. The Council created this Tribunal, as was the International Criminal Tribunal for the Former Yugoslavia (ICTY) created in 1993, as an enforcement measure under Chapter VII of the UN Charter. The seat of the ICTR is Arusha, Tanzania.

The new Tutsi-dominated Rwandan government proposed the creation of an international tribunal by letter to the President of the Security Council dated 24 September 1994. On 6 October, the President of Rwanda, Pasteur Bizimungu, urged the UN to establish an international tribunal in his country quickly to bring those responsible for genocide to justice. An international presence would ensure an exemplary justice which would be seen to be completely impartial and fair. The new government believed that it was impossible to build a state of law and arrive at true national reconciliation without eradicating the culture of impunity which had heretofore characterized Rwandan society. However, Rwanda voted against resolution 955. Its main objection was that the Tribunal's Statute ruled out capital

punishment, which is provided for in the Rwandan penal code. As a consequence, leaders who designed, planned and implemented the genocide would escape the death penalty, while lower-rank perpetrators tried under national law 'would be subjected to the harshness of [the death] sentence'. Other objections related to the temporal jurisdiction of the Tribunal, considered too restrictive, and to its composition and structure.[7]

When the Office of the Prosecutor, based in Kigali, Rwanda, started its work, it was confronted with a climate of general hostility towards the UN, because of its inaction during the genocide. In 1997, the Rwandan government criticized firmly the Tribunal, requesting the dismissal of Prosecutor Louise Arbour and the designation of a Prosecutor exclusively in charge of Rwanda. The Deputy Prosecutor, Bernard Muna, attempted to improve relations with the authorities and was successful to the extent that, in July 1998, Vice-President Kagame finally declared that his government and the Tribunal were 'partners'. He congratulated the Tribunal for the important progress accomplished in difficult circumstances and promised to give it all necessary assistance. However, when the first sentence was pronounced by the ICTR in September 1998 – Jean Kambanda, sentenced to life imprisonment – , Gérald Gahima, Secretary-General of the Ministry of Justice declared that if Rwanda had received one-twentieth of the sums given to the Tribunal, Rwanda 'would have much advanced towards the solution of its problems'. The Tribunal's geographical site in Arusha and its fair, but slow and complex procedures have not helped the Rwandans to understand and appreciate its work.[8]

Mandate and structure

The jurisdiction of the Tribunal extends to genocide, crimes against humanity, violations of Article 3 common to the Geneva Conventions and of Additional Protocol II (Art. 2–4). The organs of the ICTR are the Chambers, the Prosecutor and the Registry. The original Statute established two Trial Chambers and an Appeals Chamber, composed of 11 judges: three served in each of the Trial Chambers, five served in the Appeals Chamber (Art. 11, 12). On 30 April 1998, a Third Trial Chamber was

[7] Beigbeder (1999), p. 174.

[8] Alison Des Forges, *Aucun témoin ne doit survivre, Le génocide au Rwanda*, Human Rights Watch/Fédération internationale des Droits de l'Homme (Ed. Karthala, Paris, 1999), pp. 865–867.

created by resolution 1165 of the Security Council. As a result, the number of judges was increased from 11 to 14. Three judges sit in each of the Trial Chambers and five judges sit in the Appeals Chamber which is shared with the International Criminal Tribunal for the Former Yugoslavia. On 30 November 2000, the Security Council decided unanimously to increase the number of judges of the Appeals Chamber common to the two Tribunals from five to seven by the election of two additional judges to the ICTR. Thereafter, the President of the ICTR assigned two of the eleven judges to sit in the Appeals Chamber. This decision should enable the two Tribunals to speed up their work, reduce the backlog of cases more quickly, and conclude their work at the earliest possible date. It was also intended to redress the absence of representation by ICTR judges in the Appeals Chamber.[9]

The Tribunal's budget for 2004–2005 was $255,909,500. In March 2004, the Tribunal employed 919 staff members from more than 80 nationalities.

The Tribunal's achievements

On the positive side, the judgments delivered by 2005 have involved one Prime Minister, four Ministers, one Prefect, five Bourgmestres (mayors) and others holding leadership positions during the genocide, as well as businessmen and journalists. In addition to these seventeen judgments involving twenty-three accused, nine trials were in process by mid-2005, involving twenty-five accused. They include eight Ministers, one Parliamentarian, two Prefects, three Bourgmestres, three military officers, a medical doctor and a pastor, and others.[10]

In the Akayesu case, the Tribunal gave an interpretation of genocide as defined in the 1948 Convention for the Prevention and Punishment of the Crime of Genocide. It also defined the crime of rape. The guilty plea and subsequent conviction of Jean Kambanda, former Prime Minister of Rwanda during the genocide, set a number of precedents. This was the first time that an accused person acknowledged his guilt for the crime of genocide before an international criminal tribunal. It was also the first time that a head of government was convicted for the crime of genocide.

On the negative side, the Tribunal had a slow beginning. The first judgment was only rendered in September 1998, four years after the Tribunal's

[9] Doc. ICTR/INFO-9-2-253.EN, 5 December 2000 and res. 1329.

[10] 'ICTR, The Tribunal at a Glance', *Fact Sheet No. 1*, http://65.18.216.88/ENGLIS/factsheets/1.htm, accessed on 31 December 2005.

creation. There were initial financial and staffing shortages. The first courtroom was only completed in November 1996. The ICTR's location in Tanzania, a small, poor and remote African country added to staffing and material problems. The difficulties of calling witnesses and obtaining evidence also slowed the judicial process. The ICTR also suffered from the initial priority given by the Prosecutors to the ICTY. The first Prosecutor had encouraged the Deputy Prosecutor to focus on national figures, a strategy which was not properly applied by the latter. The strategy of focusing on the architects and leaders of the genocide – the 'big fish' as opposed to relatively 'small fry', has been applied since 1997. Mismanagement has been a serious problem for the ICTR.

After initial obstacles, the Tribunal has received effective support in the arrest and surrender of accused persons. International cooperation has also been effective concerning the appearance of witnesses. Several countries, including France, have helped the Tribunal in developing special travel documents for the witnesses to come to Arusha. A number of governments have signed agreements with the Tribunal on the enforcement of the Tribunal's sentences. On 14 March 2003, France became the fourth country, after Mali, Bénin and Swaziland, to sign such an agreement. France has provided two of the Tribunal's courtrooms with sophisticated video equipment for the recording of the Tribunal's proceedings.

In July 2003, the Tribunal submitted its Completion Strategy to the UN headquarters, revised on 23 May 2005, in conformity with Security Council resolution 1503 (2003), which urged the Tribunals for Rwanda and for the Former Yugoslavia to complete all investigations by 2004, all trials by 2008, and all appeals by 2010. The resolution also established a separate prosecutor for the Tribunal. Another similar resolution was adopted in March 2004 (Res. 1534 (2004). In its Report for 2005,[11] the Tribunal confirmed that it was on course to complete trials involving 65 to 70 persons by 2008, depending on progress in present and future trials, and on the assistance and cooperation of national States. Member States are also asked to accept the transfer of cases for further investigation and trials. The Prosecutor is to concentrate on those individuals who are alleged to have been in positions of leadership and bear the gravest responsibility for the crimes committed. Mid- or low-level accused will be transferred to national jurisdiction, including Rwanda, for trial. By 30 June 2005, the files of 15 suspects had been transferred to Rwanda.

[11] Doc. A/60/229-S/2005/534 of 15 August 2005.

Critics blame the Tribunal for not having given public statements on precise criteria for selecting high-level, mid- or low-level accused, without setting a clear hierarchy. A French expert with the Tribunal's Prosecutor considers that the proofs of a 'conspiracy' or planning for the genocide remain very tenuous, and are essentially built *a posteriori* for each group of accused persons. Another charge is that the successive Prosecutors have chosen to ignore one of the major actors, the Rwandan Patriotic Front (RPF), now the Rwandan Patriotic Army (RPA). To acknowledge crimes allegedly committed by the RPF is not to exonerate the Hutu leaders from their crime of genocide, but on the contrary, to make the trials more credible.[12] However, the Tribunal has clearly met strong opposition from the Kagame government to any indictment and prosecution of RPF leaders for war crimes and crimes against humanity allegedly committed between 1 January and 31 December 1994, the period covered by the jurisdiction of the Tribunal. Opposition also came from France. On 22 October 2004, the Tribunal's Prosecutor 'respectfully requests [ed] the Republic of France, under Article 28 of the Tribunal's Statute, to facilitate the meeting of the Bagosora Defence with Mr Marlaud and Colonel Maurin'.[13]

Article 28 imposes an obligation on States to 'cooperate with the International Criminal Tribunal for Rwanda in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law'. Jean-Michel Marlaud was France's Ambassador in Rwanda during the genocide, and Colonel Emmanuel Maurin was a former French military instructor in Rwanda. Colonel Théoneste Bagosora is being prosecuted by the Tribunal as a central actor in the genocide. He denies that a genocide against the Tutsi has taken place. It is reported that Marlaud and Maurin have only accepted to reply to the questions of Bagosora's lawyer off the record.[14]

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[12] André Guichaoua, French sociologist and Tribunal expert, 'La France n'a jamais eu la volonté d'organiser des procès', *Le Monde*, 28 June 2005.

[13] ICTR, Trial Chamber I, 'The prosecutor v. Théoneste BAGOSORA, Gratien KABILIGI, Aloys NTABAKUZE, Anatole NSENGIYUMVA, *Case No.: ICTR-98-41-T*, Request to the Republic of France for cooperation and assistance pursuant to Article 28 of the Statute', http://www.ictr.org/ENGLISH/cases/Bagosora/decisions/221004.htm, 22 October 2004.

[14] *Le Monde*, 26 October 2005.

Belgium's Parliamentary Inquiry Commission

The genocide in Rwanda was of direct concern to Belgium because of its colonial past: Rwanda had become independent in 1962, after being under a Belgian League of Nations mandate, then a trust territory under the United Nations. The Belgian contingent had been the largest one in UNAMIR, and ten Belgian soldiers had been murdered on 7 April 1994, before the genocide started.

At the end of 1995, Belgian Senator Alain Destexhe submitted a request to the Belgian Senate for the creation of a commission of inquiry on the events in Rwanda. However, the request was rejected. Following press revelations, another vote was held in the Senate on 21 March 1996, which ended, again , in a rejection. An opinion poll showed that the Belgians were massively (74 per cent) in favour of an inquiry commission. A compromise solution was found: the Senate created an *ad hoc* group of four senators and two retired magistrates. The group submitted its report on 7 January 1997. It showed that the Belgian government had information about the sabotage of the Arusha Agreements, the preparation of mass massacres, threats against UNAMIR in general and against the Belgian Blue Helmets in particular. On 19 February 1997, a Special Commission on Rwanda was set up, which became the Parliamentary Inquiry Commission. Its report dated 6 December 1997 was released in January 1998.[15]

By its nature, most of the report is about Belgium, the shortcomings of its participation in the UNAMIR Peacekeeping Operation, the lack of effective technical preparation of Belgian troops in UNAMIR, internal information and coordination problems within the government and the military, and the Belgian decision to withdraw Belgian troops from UNAMIR.

Besides these issues, the report stated that the murder of the ten Belgian paratroopers and the genocide were committed by Rwandans, and that the role of the International Criminal Tribunal for Rwanda is to identify and punish the guilty. In addition to the Rwandan leaders, the Commission was convinced that 'the political and military authorities of Belgium, the United

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[15] '*Sénat de Belgique, Session de 1997–1998, 6 décembre 1997, Commission d'enquête parlementaire concernant les évènements du Rwanda, Rapport fait au nom de la Commission d'Enquête par MM. Mahoux et Verhofstadt*', Doc. 1-611/7, see http://senate.be, with an English version of the report's Chapters 4 on 'Failures, errors and responsibilities' and Chapter 5, 'Recommendations' – and '*Le Rwanda et la Commission d'enquête sur les évènements d'avril 1994*' http://destexhe.be/commission_parlementaire_rwanda.htm

Nations and the entire international community are directly or indirectly responsible for certain aspects of the dramatic events following 6 April 1994 in Rwanda. No single authority or individual is fully responsible for what happened'.

The Commission notes that most of the members of the Security Council had little interest in the Rwandan events and were even less willing to provide troops to UNAMIR. The Commission felt that the governments of the permanent members of the Council bore considerable responsibility in this area. Responsibility also laid with the UN organizational structure, the Secretariat, led by Boutros Boutros-Ghali and the Department of Peacekeeping Operations, led by Kofi Annan. The Commission believed that the UN Secretary-General's special representative for Rwanda, Jacques-Roger Booh Booh, as well as several high-ranking UNAMIR officers did a poor job of assessing the scope of events during the night of 6 to 7 April 1994.

The Commission deplored, 'in the strongest possible terms', the refusal of the United Nations Secretary-General, Kofi Annan, to allow UN employees to testify before the Commission.

The only reference to France in this Chapter was to say that, although this did not fall under its competence, the Commission felt that it was necessary to examine more closely the role played by France before, during and after the events.

On 7 April 2004, Guy Verhofstadt, Belgium's Prime Minister since 1999, was present in Kigali for the tenth anniversary of the genocide, and, in the name of Belgium, publicly asked forgiveness from the Rwandan people.

The French Parliamentary Information Mission

In 1998, Médecins Sans Frontières, the International Federation of Human Rights, the (French) League of Human Rights, historians and other individuals signed an appeal asking for the creation of a parliamentary inquiry commission on the role of France in Rwanda between 1990 and 1994.[16] Referring to the report of the Commission of the Belgian Senate, they wrote that the official version of the role and action of France in Rwanda between 1990 and 1994 had been stated by President Mitterand and the government

[16] 'Commission d'enquête parlementaire sur le Rwanda', 29 May 2005. http://www.msf.fr/site/site.nsf/pages/1998rwanda

in 1994, and had not changed. France's African policy was a domain forbidden to citizens and their representatives. Hence the need for a Parliamentary Inquiry Commission with real powers to *sub poena* the French actors and to obtain access to the archives.

This appeal was satisfied only in part. On 3 March 1998, an Information Mission composed of members of both the Commission of National Defence and Armed Forces and the Commission of Foreign Affairs of the French National Assembly was created to report on 'the military operations carried out by France, other countries and the United Nations in Rwanda between 1990 and 1994'.[17]

This was only an 'Information Mission', not an 'Inquiry Commission' with judiciary powers as in Belgium.

However, for France, creating a Parliamentary Mission to investigate a major foreign political event was a considerable innovation: until then foreign affairs and decisions have been the privilege of the President of the Republic since De Gaulle's Constitution was adopted in 1958. The Parliament has rarely raised any probing question about foreign policy of the head of state, nor challenged his decisions. The Fifth Republic was being innovative in opening such 'high politics' to the scrutiny of parliamentarians.

The Mission was composed of twenty members, ten from each of the two Commissions, with twenty alternates. It held 110 hours of debates during 45 meetings. It heard 88 civilian and military personalities. Its fact-finding rapporteurs interviewed officials at the UN in New York, officials at the US capital in Washington, D.C., representatives of the Belgian government and parliament, including the Inquiry Commission of the Belgian Senate, and went to the Great Lakes region including Rwanda.

The first part of the report reviewed the history of Rwanda, the second considered the events in Rwanda from 1990 to 1994, including the French military operations in the country. The third part was an analysis of responsibilities. It first stressed that the Rwandan state organized the genocide, and the killings were made by Rwandans against other Rwandans. On French policies, it criticized a military cooperation which was too committed to an army in rout and to a weakened and discredited Rwandan government. The

[17] '*Rapport d'information [de] la Mission d'Information de la Commission de la Défense Nationale et des Forces Armées et de la Commission des Affaires Etrangères, sur les opérations militaires menées par la France, d'autres pays et l'ONU au Rwanda entre 1990 et 1994*', No. 1271, Assemblée Nationale, 15 December 1998, President, Paul Quilès, http://www.assemblee-nationale.fr/dossiers/rwanda/r1271.asp

report recalled that the *Noroit operation* sent to Rwanda on 4 October 1990 by orders from President Mitterand consisted of a small staff and two companies, a total of 314 military persons. Mitterand had agreed to a request from Rwanda's President Juvénal Habyarimana that had warned him of serious risks of disturbances in Kigali and asking for the intervention of the French Army. This operation was to protect the French Embassy, to protect the French residents and prepare for their possible evacuation, as well as that of other foreigners, on demand. Kigali airport was to be controlled together with Belgian and Rwandan forces. The French force was not to interfere with the maintenance of order, which concerned only the Rwanda government. At the same time, a French Lt-Colonel was sent to Rwanda to reinforce the French military assistance mission and help the Rwandan military authorities improve the operational capacity of their army. The Lt. Colonel had the function of adviser to the Chief of Staff of the Rwandan Armed Forces. In March 1991, thirty more military were added to the military assistance mission. In 1992, France increased its shipments of armament to Rwanda, which had started in 1975, in accordance with a military agreement between the two countries: the agreement provided for French technical military assistance to the Rwandan gendarmerie (national police force). It was extended to the whole Rwandan Armed Forces in 1992.

The report stated that, without French support, the Rwandan Patriotic Front (RPF), the Kagame-led forces originally based in Uganda that grouped exiled Tutsi and dissident Hutu, would have achieved a decisive victory in February 1993. While the French soldiers did not participate in combat, they carried out patrols, and verified the identity of Rwandans at points of access to Kigali.

The report acknowledged that one of France's objectives was to avoid a military victory of the RPF. The French military knew, already in 1990, about the prospect of the extermination of 700 000 Tutsi by 7 million Hutu.[18]

Following the signature of the Arusha Agreements of August 1993, French forces in Rwanda withdrew progressively, down to 23 military assistants in December 1993, leaving the place to the UN Assistance Mission to Rwanda (UNAMIR).

The report denied that the French military had ever trained non-military militia, who were particularly active in the later genocide. It said that they only trained the Rwandan Armed Forces.

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[18] French Mission report, p. 174.

The French *Amaryllis operation* was initiated on 8 April 1994, after the plane crash of 6 April. Its objective was to prepare the evacuation of French residents in Rwanda, control Kigali airport, as UNAMIR was failing to control it. About sixty passengers were to be evacuated, all selected by the French Ambassador. Forty-three French citizens and twelve relatives of President Habyarimana left in a French plane on 9 April. It was to be a temporary operation with a strictly humanitarian objective, which would not interfere with the Rwandan 'political process'. The operation ended on 14 April with the withdrawal of the French forces by plane.

At the initiative of France, the Security Council adopted resolution 929 on 22 June 1994 which agreed that a multinational operation be set up for humanitarian purposes in Rwanda until UNAMIR was brought up to the necessary strength. It was to be a 'temporary operation under national command and control aimed at contributing, in an impartial way, to the security and protection of displaced persons, refugees and civilians at risk in Rwanda . . .' Acting under Chapter VII of the UN Charter, the member states conducting the operation were authorized to use 'all necessary means' to achieve the set humanitarian objectives. The resolution was adopted by ten votes – including that of the Rwandan interim Hutu government still sitting in the Security Council – in favour and five abstentions.

The heavily armed *Operation Turquoise*, led by France – 2 330 French soldiers and 32 Senegalese by early July – was deployed under the authority of this UN Security Council resolution, and under French, not UN, command. It ended on 21 August 1994. In spite of the humanitarian objective of the operation, France also had a unannounced political objective: that of reactivating the Arusha Agreements, by stopping massacres and enforcing the respect of a cease-fire as *sine qua non* conditions for a dialogue between the parties as the only solution of the conflict. The French effort to 'stabilize' the situation in the zone controlled by the operation was tantamount to freezing the military situation, while Kagame's forces were winning the battle.

The report noted that members of the Hutu interim government (who carried out the genocide) were present in the French-controlled area, but that the French Ministry of Foreign Affairs had declared on 16 July that the UN mandate had not authorized the French military forces to arrest them. The French forces let them take refuge in Zaire (now Congo). A Note from the Africa Direction of the French Ministry of Foreign Affairs of 18 August 1994 said that 'in the [French-controlled] safe humanitarian zone, the militia have been dismantled, the Rwandan Army Forces disarmed'. The report questioned this affirmation, as neither the militiae nor these Forces had

been systematically disarmed in the zone. A large part of these Forces (10 000 out of 30 000) had escaped to Zaire with their armament.[19]

One of the Information Mission's proposals was to improve the French Parliament's control over military operations conducted outside the French national territory. It noted that, in the Rwanda crisis, the executive's freedom of action was large insofar as the legal obligations contracted by France towards Rwanda were not known by the Parliament. In conclusion, the report found that France had entered into an over-extensive military cooperation with a discredited Rwandan government. France had underestimated the authoritarian, ethnic and racist nature of the Rwandan regime. It showed the limits of a policy attempting to obtain a cease-fire at all costs from the RPF, while one of the French objectives was to avoid its military victory. The report stressed that, at no time, had France in any manner incited, encouraged, aided or supported those who had planned and initiated the genocide in the days following the 6 January 1994 plane crash. It affirmed that the French military presence in the first quarter of 1994 had no role in training the militiae.[20]

On the other hand, the report blamed the 'international community' for its incapacity in implementing an effective preventive diplomacy and in imposing respect for the Arusha Agreements, and the 'errors' of the United Nations, which included its refusal to acknowledge that a genocide, not a civil war, was taking place, and concerned the whole international community. The report also blamed the American obstruction, but dismissed the allegation that there was an American 'plot' to replace French influence in Rwanda. It noted Belgium's disarray.

Official witnesses to the Mission, both Socialists and Gaullists, fully supported France's position in Rwanda and considered that any challenge to it was an 'extreme injustice' (Admiral Jacques Langlade, Chief of Staff of the French Armed Forces between 1991 and 1995), or a 'hateful campaign' (Edouard Balladur, Gaullist Prime Minister from 1993 to 1995), and an exercise of 'self-flagellation' (Bernard Debré, Gaullist Minister of Cooperation between 1994 and 1995), while France was 'desperately alone' (Socialist Hubert Védrine, diplomatic adviser then Secretary General of the Presidency between 1991 and 1995), that France was the only country to have tried something (Balladur) and had showed the example (Gaullist

[19] French Mission report, pp. 165–166.

[20] French Mission report, pp. 176, 177.

Alain Juppé, Foreign Affairs Minister from 1993 to 1995). Most officials affirmed that they had no regret for what had been done (Roland Dumas, Socialist Minister of Foreign Affairs from 1988 to 1993). Juppé even expressed a 'legitimate pride' for France's intervention (the Turquoise operation). Védrine openly said that 'one could not let a legitimate government be overthrown', as if it was France's responsibility and duty to intervene. Debré saw a 'hegemonic will of the Americans on the region and perhaps on the whole of Africa'. On the other hand, Michel Rocard, the former Socialist Prime Minister, thought that France had committed a 'geopolitical fault', and had chosen the wrong side.[21]

The French Communist newspaper *L'Humanité*, noting that more than 60 percent of testimonies given in closed sessions, allegedly the most important ones, would be published, deplored that forty per cent would not.[22]

The UN Carlsson Commission

Kofi Annan, as Secretary-General of the United Nations, with the support of the Security Council, set up an Independent Inquiry Commission into the actions taken by the UN at the time of the genocide in 1994. The Commission was chaired by Ingvar Carlsson, former Prime Minister of Sweden and included Han Sung-Joo, former Foreign Minister of the Republic of Korea and Lt.-General Rufus M. Kupolati of Nigeria. The Commission's report was issued on 15 December 1999.[23]

The Commission was given the mandate to establish the facts relating to the response of the United Nations to the genocide in Rwanda covering the period October 1993 to July 1994, and to make recommendations to the Secretary-General.

Among its findings, the Commission recorded, as did previous commissions, the 'costly error' of judgment on the part of the UN Secretariat, the leadership of UNAMIR and members of the Security Council on the continued emphasis on a cease-fire, more than the moral outrage against the massacres. One of the causes for these errors was the institutional weakness in the lack of analytical capacity of the UN, for which the Secretariat under

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[21] Philippe Lemaire, 'Une avancée de la démocratie parlementaire, La politique française au Rwanda en questions', *Le Monde diplomatique*, September 1998, pp. 16–17.

[22] *L'Humanité*, 16 December 1998.

[23] UN Doc. S/1999/1257, 16 December 1999, enclosing the report dated 15 December 1999.

the leadership of the Secretary-General was primarily responsible. Also noted in other reports was the lack of political will of Member States, as Rwanda was not of strategic interest to other countries. UNAMIR failed to protect political leaders, civilians and national staff, due to a lack of direction from its own leadership and to the peacekeepers themselves.

On *Operation Turquoise*, the Commission noted the 'sudden availability of thousands of troops' for this operation, while the UN Department of Peacekeeping Operations had attempted for over a month to expand UNAMIR. The Commission found it unfortunate that the resources committed by France and other countries of Operation Turquoise could not instead have been put at the disposal of UNAMIR. There was an imbalance between the mandate of UNAMIR, a UN Charter Chapter VI operation, and the Chapter VII authorization given to Turquoise, – the distinction between a peacekeeping operation and an operation allowed to use 'all necessary [military] means' to fulfil its mission. Also noted was the confrontation, or risk of confrontation, between the Turquoise force and the RPF.

The report ended with a list of recommendations for the United Nations.

In its Conclusions, the Commission found that the response of the UN before and during the 1994 genocide in Rwanda failed in a number of fundamental respects. The responsibility for these failings laid with a number of different actors, including the Secretary-General, the Secretariat, the Security Council, UNAMIR and the broader membership of the UN:

> This international responsibility is one which warrants a clear apology by the Organization and by Member States concerned to the Rwandese people. As to the responsibility of those Rwandans who planned, incited and carried out the genocide against their countrymen, continued efforts must be made to bring them to justice – at the International Criminal Tribunal for Rwanda and nationally in Rwanda.

On 15 April 2000, the Security Council, in the first formal response to the report, explicitly accepted responsibility for failing to prevent the genocide. Council members acknowledged the report's main finding that their governments lacked the political will to stop the massacres. This was not a clear and formal apology: members focused on the lessons to be learned from their failure to act, particularly in Africa. Kofi Annan said that he fully accepted the report's conclusions.

On 26 March 2004, Kofi Annan expressed some regrets at a UN memorial conference on the genocide in Rwanda. He said that 'The international

community is guilty of sins of omission . . . The international community failed Rwanda and that must leave us always with a sense of bitter regret'. He added: 'I believed at that time that I was doing my best. But I realized after the genocide that there was more that I could and should have done to sound the alarm and rally support.'[24]

The OAU Report

A further report, this one commissioned by the Organization for African Unity (OAU, now, African Union) was considered by many as the most significant report yet on the genocide, as well as a 'scathing indictment' of the failure to halt the worst genocide since World War II. The report of the 'International Panel of Eminent Personalities to Investigate the 1994 Genocide in Rwanda and the Surrounding Events' blamed the UN Security Council, the USA, France, Belgium, and the local Anglican and Catholic churches for allowing the genocide, and called for reparations to be paid by those who failed to stop the massacres.

The report was issued on 7 July 2000.[25]

Regarding France, the report quoted among the most steadfast friends and champions throughout the Western world of President Habyarimana, President François Mitterand, his son, Jean-Christophe, and many important diplomats, politicians, officers and senior civil servants, including the French Ambassador to Kigali, Georges Martres, labelled locally as 'the Rwandan ambassador to France'.

On events prior to the genocide, the OAU report advanced these propositions:

– that the key Western members of the UN Security Council knew that a major catastrophe was imminent in Rwanda: that with a relatively modest military effort that catastrophe could very possibly

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[24] BBC News, 'UN admits Rwanda genocide failure', 15 April 2000, – 'UN chief's Rwanda genocide regret', 26 March 2004, http://news.bbc.co.uk/1/hi/world/africa/714025.stm, /3573229.stm

[25] OAU Doc. CM/Dec.379 (LXVII), 'Report of the Secretary-General on the Establishment of an International Panel of Eminent Personalities to Investigate the Genocide in Rwanda and Surrounding Events' (Doc. CM/2048 (LXVIII). The report is on http://www.oau-oua.org/Document/ipep/ipep.htm. See also 'Africa Policy E-Journal, Rwanda: OAU Report' http://www.africaaction.org/docs00/rwan0007.htm, 8 July 2000.

have been averted entirely; and that once the genocide began, it was still possible to minimize the appalling destruction . . .
- Beyond Rwanda, the main actors were the OAU, the international civil servants in the UN Secretariat, the members of the Security Council collectively, and France, the US, and Belgium in particular. . .
- Of these (the US and France), France was far and away the most influential power in Rwanda itself. . .
- Virtually from the moment of the RPF invasion in 1990 to the end of the genocide almost four years later, the French were the Rwandan government's closest ally militarily, politically and diplomatically.[26]

The report further identified French African policies as follows:

> From the perspective of Paris, the main elements were clear enough: France's unilateral insistence that its former African colonies constituted its indivisible sphere of influence in Africa; the conviction that it had a special relationship with francophone Africa; the understanding that its role in Africa gave France much of its international status; a general attitude that France had to be permanently vigilant against a perceived 'anglo-saxon' (i.e., American) conspiracy to oust France from Africa; the close links between the élite in France and francophone Africa, which in Rwanda notably included the two countries' Presidents as well as their sons; and finally, France's need to protect its economic interests in Africa, although Rwanda, as such, was not a great prize.[27]

The report gave evidence of these affirmations. Admiral Langlade told the French Information Mission that 'the RPF aggression was a determined action against a francophone zone' . Other French officials acknowledged that their objective was to prevent an RPF military or political victory.

Militarily, French troops assisted in the expansion of the Rwandan army from about 6000 on the eve of the RPF invasion of October 1990 to 35 000 three years later. France was one of Rwanda's major sources of military supplies, together with an international network of nine other countries.

The 'irresistible' conclusions of the Panel, with regard to France, were:

> First, until the genocide began, the French government was the closest foreign ally of a Rwandan government that was guilty of massive human rights abuses. Secondly, as a matter of deliberate policy, it failed to use its undoubted inflence

[26] OAU report, paras. 9.3, 12.2, 12.3, 12.4.
[27] OAU report, para. 12.10.

> to end such behaviour. Thirdly, we find it impossible to justify most of the actions of the French government that we have just described. Fourthly, the position of the French government that it was in no way responsible for the genocide in Rwanda is entirely unacceptable to this Panel.

The report also quotes Mitterand's reply to a journalist asking about the genocide: 'The genocide, or genocides?' as an attempt to treat the genocide aimed at exterminating the Tutsi as equivalent to massacres committed by RPF troops but without intent to exterminate the Hutu, that is, Hutu and Tutsi were equally guilty of genocide. At a news conference presenting the report at the UN in New York, former Canadian ambassador and panel member Stephen Lewis said, in part, that 'there is almost no redemptive feature to the conduct of the government of France'. He said that the Vatican and France were complicit in the rise of the Hutu extremists in Rwanda, and owed the country the same apology the Anglican Church had issued for its failure to stop the killing.[28]

Challenges to the Official Position of France

Before the 2000 OAU report, a number of French, Belgian and American historians, researchers, journalists and French and international NGOs had already questioned some basic tenets of the French official position.[29]

From 12 to 15 January 1998, Patrick de Saint-Exupéry published four articles on 'France-Rwanda' in the conservative, mainstream Paris daily, *Le Figaro*, giving evidence of France's political and military implication in the Rwanda drama.[30] It was one element which decided the French Parliament to create its Information Mission on Rwanda. Dissatisfied with the conclusions of the Mission's report, a French federation of local NGOs, a number of NGOs and private individuals organized, between 22 and 26 March

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[28] Edith M. Lederer, 'Panel: Anglican, Catholic Churches Share Blame in Rwanda, The UN, US and France were also judged responsible for failure to stop the 1994 slaughter of over 500 000 Rwandans', United Nations (AP), 7 July 2000. http://www.beliefnet.com/story/32/story_3226.htm

[29] Among many, Gérard Prunier, *The Rwanda Crisis, History of a Genocide* (Columbia University Press, New York, 1995), published in French as *Rwanda 1959–1996, Histoire d'un génocide* (Dagorno, Paris, 1997). A Bibliography is found in Alison Des Forges *Aucun témoin . . .*

[30] See also Patrick de Saint-Exupéry, *L'inavouable, La France au Rwanda* (Les Arènes, Paris, 2004).

2004, a 'citizens' inquiry commission' on the role of France in the genocide of the Tutsi in Rwanda (*Commission d'Enquête Citoyenne sur le rôle de la France dans le génocide des Tutsis au Rwanda*), at the initiative of the NGO *Survie* with the support of 8000 signatories. Its provisional conclusions, adopted on 26 March 2004, were published on 3 February 2005.[31] The documents and testimonies reviewed by the commission led to the conclusion that the French state and some of its official or non-official representatives might have been accomplices to the genocide. Pending complementary inquiries subject to confirmation, the commission considered that the responsibility of the former President of the Republic, François Mitterand, appeared the greatest, without excluding the responsibilities of other members of the executive, of Parliament, and of military leaders. The commission asked for further inquiries, and, if evidence of the active involvement of some French persons at various levels was given, judiciary complaints should be submitted either to the International Criminal Tribunal for Rwanda or to French courts. It also asked the Parliament to exercise its constitutional role of control over the executive, being dissatisfied with the findings of the Parliamentary Information Mission.

France-Rwanda relationships

Following the genocide, a diplomatic 'cold war' opposed France and Rwanda. Official France was as hostile to Paul Kagame as head of the new, Tutsi-dominated, Rwanda, as it had been against the Tutsi rebel Paul Kagame. Kagame retaliated by publicly accusing France of complicity with the Hutu-organized genocide, for having armed and trained the Rwandan Armed Forces and militia, and having helped Hutu leaders flee towards Zaire. France, for its part, has constantly denied any implication in the genocide.

On 30 January 2004, a report by French anti-terrorist judge Jean-Louis Bruguière designated Paul Kagame as the one who ordered the destruction in flight of President Habyarimana's plane by two ground-to-air missiles on 6 April 1994, the action which triggered the genocide. This revelation could

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[31] The report is in Laure Coret and François-Xavier Verschave (Eds), *L'horreur qui nous prend au visage, L'Etat français et le génocide au Rwanda, Rapport de la Commission d'enquête citoyenne* (Karthala, Paris, 2005), – see also Laure Coret (Ed.), *Rwanda 1994–2004: des faits, des mots, des oeuvres* (L'Harmattan, Paris, 2005). The *Association internationale de recherches sur les crimes contre l'humanité et les génocides (Aircrige)*, Cimade, *l'Observatoire des transferts d'armements* and *Survie* set up the project, together with jurists, historians, witnesses and activists. *Survie* is a French-based NGO which fights against France's support to African dictators, against corruption in North-South relations, and for an equitable development.

be interpreted as transferring the responsibility for starting the genocide – still carried out by the Hutu – from the Hutu to the Tutsi RPF, an alleged deliberate decision by Kagame to provoke the Hutu in retaliation against the Tutsi, and to sacrifice the Tutsi in Rwanda. However, it was alleged that President Chirac instructed the judge not to proceed, for the moment, with formal judiciary proceedings.[32]

Ceremonies to mark the tenth anniversary of the genocide organized by the Rwandan government, started on 7 April 2004 in Kigali. They were presided over by Rwandan President Paul Kagame, and were attended by the Presidents of Uganda, South Africa and Kenya, the Prime Ministers of Belgium, Ethiopia and Tanzania, the vice-presidents of Burundi and the Democratic Republic of Congo, and the President of the African Union. The European Union was represented by the Irish Minister for Foreign Affairs, then presiding the Union.

Kagame said that the Rwandans should take primary responsibility for the genocide, even though the seed of the genocide was from the colonial government, and there were by-standers. He praised the Rwandan Patriotic Front for putting an end to the genocide single-handedly, but castigated the international community for abandoning Rwandans in their time of need.

Belgium's Prime Minister Guy Verhofstadt apologized before 30 000 people present at the Amahoro stadium for his country's failure to help Rwanda during the genocide.: 'Once again I ask pardon on behalf of the Belgians, they had not done enough to stop the killings'.

Kagame said that the Belgians deserved praise for 'having the good sense to apologize. We accept their apology'. South African President Thabo Mbeki also apologized: ' . . . we owe the people of Rwanda a sincere apology which I now extend in all sincerity and humility'.

US Ambassador Richard Prosper, while present, did not speak on behalf of his country.[33]

Kagame took France to task. He said:

> As for the French, their role in what happened in Rwanda is self-evident . . . They knowingly trained and paid government soldiers and militia who were going to commit genocide and they knew they would commit genocide . . .

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[32] *Le Monde*, 10 March 2004.

[33] See 'Rwanda/Genocide/Commemoration – News of April 7, 2004', Hirondelle Press Agency in Arusha, 7 April 2004 http://www.hirondelle.org/hirondelle.nsf/0/c7fbb3a2534186bfc125

> In 1992, I was invited to go to France. I was told this was an effort to find a peaceful resolution to the problems here in Rwanda. And officials that I met were senior officials, who told me very clearly, very openly, that if the RPF did not stop fighting, if we continue making advances into Rwanda, that we should bear in mind that we shall find none of our relatives alive . . .
>
> I have heard friends, very good friends of Rwanda come to me and advise me, I know they mean well, to advise me that when I am talking about powerful countries, I should be careful.
>
> I am not to going to be careful . . .
>
> I say to them when I am looking in their faces, I will tell them that what happened here ten years ago is not going to happen again come what may.[34]

France had only sent a mid-level official, Renaud Muselier, Secretary of State for Foreign Affairs to the ceremony. Kagame confronted him publicly for having the 'audacity to stay there without apologizing'. Muselier did not respond to Kagame's charges and returned to Paris the same evening.

On 1 August 2004, the Rwandan government decided to create, subject to Parliamentary approval, an independent national commission mandated to collect proof of France's implication in the 1994 genocide. This threat was believed to be Kagame's attempt to bring presssure on Paris in order to prevent the Bruguière report from proceeding to a judiciary phase.

On 15 April 2005, the French ambassador to Rwanda, with the full approval of the French authorities, expressed his most sincere regrets for the Rwandan employees of the Embassy 'abandoned to their fate' in April 1994.[35] This modest and limited apology was clearly not what Kagame expected from France.

The political and media battle continued, on the French side, with the publication of three revisionist books, rejecting the charge of genocide against the Hutu. Bernard Lugan's *Rwanda, le génocide, l'Eglise et la démocratie*, published in 2004, said, in part, that the genocide had not been planned and that there had not been a *coup d'Etat* by the 'Hutu extremists' on 6–8 April 1994. In his book published in 2005, the Cameroon writer Charles Onana alleged that the International Criminal Tribunal for Rwanda had no proof that the genocide had been planned. Pierre Péan's

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[34] BBC News, 'Excerpts: Kagame marks genocide', 7 April 2004, http://news.bbc.co.uk/1/hi/world/africa/3609001.stm

[35] *Billets d'Afrique et d'ailleurs*, No. 136, May 2005, p. 4.

book, also published in 2005, also tried to prove that the responsibility for the massacres laid with Kagame's RPF: he alleged (without substantive proof) that the RPF had killed 'millions' of Hutu, while only 280 000 Tutsi had been killed, instead of the accepted estimate of 500 000 to 800 000. Péan agreed with Bruguière's allegation that Kagame was responsible for the plane crash of 6 April 1994, and expressed support for France's official position and Mitterand's actions. He maintained that the attitude of France has been 'respectable' and that the French army could not be accused of complicity with the genocide. Péan has had access to French archives of the Presidency and of the Minister of Defence, not made available before.[36]

France's policy, and its Turquoise operation, were also supported by Jacques-Roger Booh-Booh, former Special Representative of the UN Secretary-General in Rwanda in 1993-1994, in an article published by *Le Figaro* on 11 April 2005.[37]

Charges against the French army

On 16 February 2005, with the support of the French NGO *Survie*, six Rwandans brought charges of crimes against humanity and complicity in a genocide against the French army during the Turquoise operation, charges filed with the Paris military tribunal, which was competent to hear cases involving the French military in operations outside of territorial France. Witnesses accused the French military of having facilitated the kidnapping of Tutsi by the Hutu militia during the Turquoise operation. Other charges accused the French military of killing Tutsi and of raping young Tutsi women. The judge, Brigitte Raynaud visited Rwanda in November 2005 to obtain more testimonies, in spite of warnings by the French Ministry of Defence of possible danger to her life. On receipt of the additional evidence, the prosecutor rejected four of the six complaints, the remaining two were accepted as valid.[38] At the time of this writing, the cases were not yet ready for judiciary proceedings.

On 22 April 2005, a former non-commissioned French officer with the *Groupe d'intervention de la gendarmerie nationale* (Intervention Group of

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[36] Bernard Lugan, *Rwanda, le génocide, l'Eglise et la démocratie* (Ed. du Rocher, Paris, 2004), – Charles Onana, *Les secrets de la justice internationale, Enquêtes truquées sur le génocide rwandais* (Ed. Duboiris, Paris, 2005), – Pierre Péan, *Noirs fureurs, blancs menteur (Rwanda 1990–1994)* (Mille et une nuits, Paris 2005). See also *Le Monde*, 3, 9 December 2005.

[37] *Le Figaro*, 'Paris n'est pas responsable du génocide', 11 April 2005.

[38] *Le Monde*, 25–26 December 2005.

the National Gendarmerie),[39] Thierry Prungnaud, told France Culture radio that he had seen French military members training Rwandan civilian militia on gun practice in 1992. He identified the trainers as members of the French Navy's First Parachute Regiment. Prungnaud had been sent to Rwanda to train members of the Rwandan Presidential Guard. Several months after his return to France, he had been told by a general in the French Ministry of Defence to 'forget everything'.[40]

Conclusion

The genocide in Rwanda has been a major shock for the international community. After the massacres committed by the Soviet Union and other Communist regimes, after the Holocaust, the collective massacres committed by Africans on Africans shattered the dream that the end of colonialism would bring peace and prosperity, if not democracy to the newly independent countries. More generally, it revived the spectre of man's inhumanity to its fellow human beings, shaking the idealist's beliefs of mankind's constant political, social and moral progress.

Whatever the historical colonial and racial background of the events in Rwanda and the attitude of governments and international organizations, the fact is that Rwandans killed Rwandans in a mass organized, systematic, and hysterical massacre.

At an international level, neither individual countries nor international organizations tried to prevent or stop the genocide.

The Organization for African Union showed no collective political will to intervene, nor did it have the material and financial means to do so if it had so decided.

The United Nations, mandated by its Charter to maintain peace and security among nations, and not originally to settle conflicts within countries, was paralysed by a lack of interest in a small African nation's disputes, by diverging views as to what to do, by a lack of reliable information on the events, by the presence of the genocidal Rwandan government as one of the temporary members of the Security Council during the crisis, by the reluctance of the UN and the USA to be drawn into a 'Somalia situation', by the

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[39] The *Groupe* is the French gendarmerie's elite counter-terrorism and hostage rescue unit.

[40] *International Herald Tribune*, 23–24 April 2005, – *Billets d'Afrique et d'ailleurs*, No. 136, May 2995, p. 5.

traditional 'impartial' and neutral position of the UN as an intermediary in previous peacekeeping operations. The question remains: can the UN be impartial when there is no ceasefire, when one party is committing genocide and the other is fighting to stop the genocide and assume political power?

The major Western powers, the US, the UK, France and Belgium, only wanted to protect or evacuate their nationals from Rwanda. They did not provide a mandate nor the military means to the UN peacekeeping force in Rwanda to protect Rwandans from killing Rwandans.

Official France found itself in a process of denial, denial that it had anything to do with the genocide, which has placed it in a defensive and internationally embarrassing position.

France had been involved in Rwanda since at least 1975, when Rwanda signed an agreement asking France to train its Presidential Guard and provide armaments. This agreement was later extended to training and equipping the Hutu-led Rwandan Armed Forces. In practice, the French military served as military advisers to the Rwandan government and Ministry of Defence, trained and provided armaments to the Rwandan Armed Forces. They went as far as controlling the identity of Rwandans near the capital, and training some of the genocidal militia. The heavily-armed Turquoise operation, under the guise of a humanitarian intervention, had the hidden aim of halting the RPF advance, obtaining a ceasefire and restoring the Arusha Agreements, then setting up a joint Hutu-Tutsi government, while ignoring the genocide of the Tutsi. The operation allowed Hutu leaders and thousands of armed Hutu troops to escape to Zaire, from where they intended to go back to Rwanda and fight Kagame's troops.

French political leaders (the late President François Mitterand, former Foreign Ministers Hubert Védrine and Dominique de Villepin[41]) and a few revisionist writers have argued that there were two genocides: one committed by the Hutu against the Tutsi, and another one committed by Kagame's RPF against the Hutu, so that they were both guilty, so that France's position in favour of the Hutu could not be condemned. It is true that the RPF has committed massacres of Hutu both in Rwanda and in Zaire, which is inexcusable, but the legal and real specificity of a genocide is the 'intent to destroy, in whole or in part, a national, ethnical, racial or religious group', as defined in Article II of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. Massacres committed by the RPF

[41] On de Villepin, see Saint-Exupéry, pp. 15–20, 287–288.

may be labelled as war crimes or crimes against humanity, but cannot be treated as a genocide, the intentional destruction of an ethnic group.

France's close collaboration with the Hutu government was motivated by the Gaullist ambition, adopted by Mitterand, to maintain a political, military and economic influence of France over its former colonies in Africa, through bilateral military and economic agreements, financial subsidies and close official and personal contacts between French and African leaders. In return, while economic benefits were minimal, France would benefit from broader international prestige, and from the 'automatic' vote of these countries in United Nations debates.

Rwanda was never a French colony; it had been a Belgian League of Nations mandate, then a UN Trust Territory. Rwanda was not part of what was called 'Françafrique', but the French leaders wanted to extend France's influence to all French-speaking countries, as De Gaulle had tried to do when he called for a free Quebec, independent from Canada, on 24 July 1967. The francophone Rwanda had to be defended by France against the 'anglo-saxon', that is, Kagame's forces stationed in English-speaking Uganda, against the 'evil' Americans eager to replace France in Africa. Official France then took and maintained a clear position in favour of the Hutu, ignoring Habyarimani's dictatorship and grave violations of human rights, and, later, ignoring the genocide and protecting its perpetrators.

No government, even in democracies, will willingly reveal secret positions and documents, particularly if they may be considered as detrimental to the national interest, or might be criticized as breaches of national or international law. The opening of archives requires public pressure from the national parliament, NGOs, or by rival governments, or by independent commissions, group or individual investigations, testimonies by victims or observers, publications in books and newspapers, exposure by the media, and, as appropriate, judiciary processes by national or international tribunals. France's position was progressively revealed by several national and international commissions. The creation of the French Parliamentary Information Mission was strongly and publicly encouraged by French and international human rights NGOs. It was a significant advance for France's democracy, even if its mandate and its report had limitations: for the first time, a Parliamentary Commission was allowed to look into the hidden secrets of the Executive, especially its foreign policy. In the event, it was shown that all decisions had been taken at the highest level of government – Mitterand's presidency – and conveyed directly for implementation to the military. Government ministers were not always consulted, nor always

informed, and the Parliament was never involved in these decisions. This government system had been 'invented' by and for De Gaulle with the 1958 Constitution, whereby the government prevailed over the Parliament, originally to make governing more efficient and to avoid the constant government changes of the Third and Fourth Republics.

The publication of the French Information Mission's report covered some of the ground but left a number of questions unanswered. The Carlsson report was a critique of the UN, but did not focus particularly on France. On the other hand, the OAU report identified France as one of the main 'villains' with a responsibility by commission and omission for the genocide. Finally, a few Rwandans have filed complaints against the French Army with a French military tribunal, for war crimes, crimes against humanity and complicity with genocide. The French judiciary, encouraged by the government, will undoubtedly set obstacles to an early trial. If and when a trial takes place, the prosecution and testimonies may help in uncovering at least part of the motivations and action of France. The purpose of maintaining pressure on the French government is first to obtain more of the truth that has yet been revealed, and, if appropriate, to ensure that French officials acknowledge a degree of responsibility, offer an apology if not reparations. More generally, it should encourage the French Parliament to exercise, in the future, more control over France's foreign policy and the Executive's decisions in this area. The 'honour' of the French army is not at stake: policy responsibility for military interventions abroad lies with the government. Any individual violations of international humanitarian law by the military should be examined by the judges, and if supported by evidence, prosecuted and sentenced under the French criminal system.

Chapter 11

Crimes in the Former Yugoslavia

The Turquoise operation ended in August 1994, and with the departure of the French troops from Rwanda, this was the end of France's implication in Rwanda's history and in its genocide.

In July 1995, France was again involved in another humanitarian disaster, the massacre of thousands of Muslim civilians by the Serb military in Srebrenica. In Rwanda, Rwandans killed Rwandans. In Bosnia, Serbs killed Muslims. In neither country was France directly at the origin of the crimes, nor did it act as direct actor. However, the French government had been a close associate of the Hutu government for many years, it had armed and trained the future murderers. In the Former Yugoslavia, France had a less direct role. France had a long friendship with the Serbs which influenced the attitude of its military commanders, French generals in charge of the major part of the United Nations peacekeeping operation, UNPROFOR, the UN Protection Force. A French general was in charge when the Srebrenica massacre started, and a controversy arose as to why air strikes were not ordered to prevent or stop the massacre. To be fair, the French generals in the field were not alone: they were part of a complex and unwieldy hierarchy going through many levels to the UN Security Council.

The common point about Rwanda and the Former Yugoslavia is that the French authorities have, in both cases, denied any responsibility or guilt, and

have not shared with other actors in offering apologies for France's role or 'errors'. France has never offered any compensation for the consequences of these dramatic events.

In this Chapter, the first part reviews the creation of the International Criminal Tribunal for the Former Yugoslavia, its structure and mandate, and its achievements.[1] The main focus will be first on France's position in relation to the creation and the operations of the tribunal, and, in particular on the interference of French national and international politics with judiciary exigencies. Secondly, the events leading to the Srebrenica massacre, the United Nations report on this event and the report of the French Parliamentary Commission to assess the role of France in relation with the Srebrenica massacre in Bosnia will be considered, followed by a brief reference to two Dutch reports on Srebrenica.

The International Criminal Tribunal for the Former Yugoslavia

France has had a strong legal and judiciary influence in the operations of the Tribunal, through the presence of well-qualified and competent French jurists in the three sections of the Tribunal: the Judges, the Prosecutor's office and the Registrar.

On the other hand, French politics, and the influence of the French military, aimed at what they perceived as a patriotic protection of France's national interests, played a dominant role in the French support for the creation of the Tribunal and later obstruction of the Tribunal's operations.

Creation of the Tribunal

The Security Council adopted resolution 808 on 22 February 1993 and resolution 827 on 25 May 1993. These resolutions determined that the continuing reports of widespread violations of international humanitarian law in the Former Yugoslavia, including reports of mass killings and the continuance of the practice of ethnic cleansing, constituted a threat to international peace and security. Acting under Chapter VII of the UN Charter, the Council decided to establish the Tribunal to prosecute persons responsible

[1] Details on the International Criminal Tribunal for the Former Yugoslavia are in Beigbeder (1999) Chapter 8, and (2002), Chapter 2.

for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991, and adopted its Statute.

This decision was taken as a result of international public opinion pressures, moved by the reports in the media of atrocities committed mainly by the Serbs. The creation of the Tribunal was motivated more as a substitute for an effective political or military intervention by the Security Council than by a genuine belief in the virtues of international justice.

The Bush Administration was originally hostile to intervening in the Balkan conflict and to the creation of an international tribunal: Secretary of State James Baker had said "We don't have a dog in this fight".[2] The US felt that the conflict should be dealt with by the Europeans. The Europeans were divided. Only Germany called for an intervention. France and the UK supported and participated in the UN humanitarian activities and in the UN Protection Force but resisted calls for a forceful, well-armed intervention to stop ethnic cleansing and its attendant massacres, torture and streams of refugees.

On 28 June 1992, President François Mitterand made a six-hour visit to besieged Sarajevo, the object of constant Serb attacks by artillery and snipers, to show his Serb allies that his tolerance was running out. In this undiplomatic move, without prior notice to and agreement with other countries, he incurred the dismay of the USA, Germany and other European countries.

Jacques Freymond, a former Vice-President of the International Committee of the Red Cross (ICRC) and a historian, pointed out the danger of allowing politicians to devote their energies to humanitarian work instead of to politics. He commented: 'When Mitterand leaves Lisbon for Sarajevo he is doing the ICRC's work, whereas his proper job should have been to bring about conditions in which the ICRC could do its work . . .'.[3]

More generally, this could be taken as a criticism of the Western countries' humanitarian approach, the creation by the Security Council of the UN Protection Force, UNPROFOR, a humanitarian operation incapable of preventing or stopping the wars and atrocities in ex-Yugoslavia, an alibi for these countries' lack of political will to respond by credible threats of a military intervention to the Serb aggression. Mitterand said 'Do not add war

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[2] R. Holbrooke, *To End a War* (Random House, New York, 1998), p. 27.

[3] Michèle Mercier, *Crimes Without Punishment, Humanitarian Action in Former Yugoslavia, Foreword by Cyrus Vance* (Pluto Press, London/ East Haven, Connecticut, USA, 1995), p. 22.

to war . . .'. In a vicious circle, the French and British governments then argued that the presence of their troops in UNPROFOR made assertive military action, such as airstrikes against the Serbs, impossible because the Serbs would (and did) retaliate against the UN forces. The United States agreed because it was opposed to the deployment of any US ground troops in Bosnia.

In August 1992, at the London Conference, the German minister of Foreign Affairs Klaus Kinkel proposed the creation of a tribunal, but no decision was taken by the Conference. Basically, the UK and France believed that the prosecution of war criminals would damage prospects for a peace settlement.

Roland Dumas, then French Minister of Foreign Affairs, proposed to President Mitterrand in 1992 the creation of an *ad hoc* tribunal, on the grounds that it would calm French public opinion, upset at the television views of atrocities and internment camps in ex-Yugoslavia, and that it would be a political assurance against possible later charges of French complicity with the Serb nationalists. Mitterrand was very reticent, he wanted a political solution, but finally agreed.

By resolution 780 of 6 October 1992, the Security Council established a Commission of Experts to investigate and collect evidence on 'grave breaches of the Geneva Conventions and other violations of international humanitarian law' in the conflict in former Yugoslavia. When the Commission first met in December 1992, US Secretary of State Lawrence Eagleburger gave his 'naming names speech': he announced that the US had identified ten suspected war criminals who should be brought to trial – among other actors, Slobovan Milosevic, President of the Federal Republic of Yugoslavia, Radovan Karadzic, leader of the self-proclaimed Serbian Republic of Bosnia and Herzegovina, and General Ratko Mladic, commander of the Bosnian Serb military forces.

However, the priority for the Western Powers and the UN was a political settlement, and they felt that an activist Commission might be an impediment to this aim. In September 1993, the Commission's Chairman, Frits Kalshoven, resigned his post in protest. He said in an interview that 'The Commission did not have the full support of major governments: the real problem was the lack of support by important UN member States such as France and Britain, which had refused to contribute to the trust fund or otherwise to cooperate with the Commission, thus depriving it of the resources it needed to do its work. He also blamed 'bureaucratic entanglements

at the UN'.[4] In spite of these obstacles, the Commission's Final Report of May 1994 stated that out of a population of six million, 1.5–2.0 million were refugees abroad after being deported or forced to flee their homes. Civilian and military casualties exceeded 200 000. Violations included murder, rape, torture, kidnapping, hostage-taking, forced eviction and imprisonment.[5] The reality of the atrocities was confirmed in another, separate investigation carried out by Tadeusz Mazowiecki, former Polish Prime Minister, appointed by the UN Human Rights Commission in August 1992 as a Special Rapporteur. Mazowiecki's requests to undertake missions to the Federal Republic of Yugoslavia in order to collect first-hand information and to investigate allegations of human rights abuses had been rejected. On 27 July 1995, he resigned from his position in protest for the UN having allowed the Srebrenica and Zepa 'safe areas' to fall to abusive forces. He deplored the lack of consistency and courage displayed by the international community and its leaders: 'Crimes have been committed with swiftness and brutality and by contrast the response of the international community has been slow and ineffectual'.[6]

By the time that the Clinton Administration took over from the Bush Administration (on 26 January 1993), the US had come around to support the proposed creation of a tribunal. Based on French and Italian draft resolutions, the Security Council approved resolution 808 on 22 February 1993 and 827 on 25 May 1993, including the Statute of the Tribunal in the latter's Annex. Roland Dumas told a French journalist later: 'The tribunal was a political weapon to threaten Karadzic and Mladic. I also hoped that it could play a dissuasive role'.[7] The Chinese were reticent, in line with their traditional position of principle of non-interference with matters within the domestic jurisdiction of member states, but were told that Tibet would not be involved. Russia had its own internal problems and Boris Yeltsin needed American support. Islamic countries, including Pakistan, a non-permanent member of the Security Council at the time, supported the resolutions.

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[4] *IHT*, 13–14 November 1993. See also Michael P. Scharf, *Balkan Justice, The Story Behind the First International War Crimes Trial Since Nuremberg* (Carolina Academic Press, Durham, North Carolina, USA, 1997), p. 46.

[5] UN Doc. S/1994/674.

[6] Human Rights Watch, 'Bosnia-Herzegovina, The Fall of Srebrenica and the Failure of UN Peacekeeping', Vol. 7, No. 13, October 1995.

[7] Pierre Hazan, *La justice face à la guerre, De Nuremberg à La Haye* (Stock, Paris, 2000), p. 68.

Mandate and structure

Under its Statute, the Tribunal has the power to prosecute persons who have committed or have ordered to be committed grave breaches of the Geneva Conventions of 1949 (the Law of Geneva), – persons who have violated the laws or customs of war (the Law of The Hague), – persons who have committed genocide (the 1948 Genocide Convention), – persons responsible for crimes against humanity (in part, the Law of Nuremberg), crimes committed in armed conflicts, whether international or internal in character, and directed against any civilian population. The Tribunal has primacy over national courts (Art. 1–5, 9).

The Tribunal, whose seat is in The Hague, consists of three organs (Art. 11).

The first organ, the Chambers were originally composed of eleven independent judges of different nationalities. Three serve in each of the Trial Chambers, five serve in the Appeals Chamber. High judicial qualifications are required of the judges. They are elected by the UN General Assembly from a list submitted by the Security Council. The judges elect their President (Art. 12-14). The revised Statute of 30 November 2000 has increased the composition of the Chambers: sixteen permanent independent judges and a maximum at any one time of nine ad litem independent judges. The second organ is that of the independent Prosecutor, who is appointed by the Security Council on nomination by the Secretary-General. The third organ is the Registry, responsible for the administration and servicing of the Tribunal (Art. 16-17).

States 'shall' cooperate with the Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law. They 'shall' comply without undue delay with any request for assistance or an order issued by a Trial Chamber including the identification and location of persons, the taking of testimony and the production of evidence, the service of documents, the arrest or detention of persons, the surrender or the transfer of the accused to the Tribunal (art. 29).

The Tribunal's expenses are funded by the UN regular budget (Art. 32). A few governments and organizations have made additional voluntary contributions and provided free legal assistance through gratis personnel.[8]

[8] In its Resolution 47/235 of September 1993, the General Assembly invited Member States and other interested parties to make voluntary contributions to the Tribunal in cash and in other form of services and supplies acceptable to the Secretary-General: see UN Doc. A/54/187-S/1998/846, Sixth Annual Report of the ICTY, 25 August 1999, VIII.

Staffing

The first eleven judges were elected by the UN General Assembly in September 1993, upon nomination by the Security Council. The judges, elected for a four-year term of office, were from Australia, Canada, China, Costa Rica, Egypt, Italy, France, Malaysia, Nigeria, and Pakistan. Under the unwritten rule that all permanent members of the Security Council should be represented on important UN institutions and bodies, judges from China, France, the UK and the USA were elected to the Tribunal. The Russian nominee, Valentin G. Kisilez, a member of the Presidium of the Kiliningrad Regional Court was defeated, presumably because of the pro-Serb position of Russia.[9] No Russian judge has been elected since then.

In November, they elected Antonio Cassese (Italy) as their President. He was succeeded by Gabrielle Kirk McDonald (USA) in November 1997. Claude Jorda (France), former general prosecutor in Bordeaux and Paris, a judge in the Tribunal since January 1994, replaced her in November 1999. In November 2005, Judge Fausto Pocar, ICTY judge since 2000, was elected President.

The current 16 judges (2005) are from Australia, Belgium, China, France, Italy, Germany, Guyana, Jamaica, Malta, Netherlands, Senegal, South Africa, South Korea, Turkey, UK, USA. *Ad Litem* judges are from Austria, Denmark, France, Germany, Jamaica, Madagascar, Netherlands, Spain, Sweden.

The first Prosecutor, Richard Goldstone (South Africa), was appointed in July 1994. He was replaced by Louise Arbour (Canada) in 1997. Carla Del Ponte (Switzerland) succeeded her in 1999. Theo van Boven (Netherlands) was appointed as Acting Registrar in 1994. The current Registrar is Hans Holthuis (Netherlands) and the Deputy Registrar is John Hocking (Australia). Bruno Cathala (France) was the previous Deputy Registrar from 2001 to 2004.

The Tribunal's achievements

By December 2005, the Tribunal had indicted 161 persons for serious violations of international humanitarian law committed in the territory of the Former Yugoslavia. 48 accused were in custody at The Hague Detention Unit. Forty-three accused have been transferred to serve their sentences in the jails of European countries, including two in France, and fifteen have already served their sentence.

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[9] Scharf, pp. 64–65.

The accused include the President of Serbia, the Chief of Staff of the Yugoslav Army, the former Acting President of the Serbian Republic of Bosnia and Herzegovina. Bosnian Serb Major-General Radislav Krstic, found guilty of responsibility for genocide, has been sentenced to 35 years imprisonment, which he is serving in the UK. In 1996, Bosnian Croat General Tihomir Blaskic surrendered to the Tribunal. His surrender was due mainly to strong US pressures and the threat of Security Council sanctions.

The trial of Slobovan Milosevic, transferred to the Tribunal in June 2001, continues in spite of many legal problems. The trial is frequently interrupted because of the accused's health problems. For the first time, as a major judiciary breakthrough, a former head of state was being judged by an international tribunal for crimes allegedly committed while in office.

As another victory for the Tribunal, Croat General Ante Gotovina was arrested in Spain's Canary Islands on 7 December 2005 and transferred to the Tribunal on the 10th. He was the Commander of Operation Storm and is charged with war crimes and crimes against humanity.

On 28 August 2003, the Security Council has called on both the ICTY and the ICTR to 'take all possible measures to complete investigations by the end of 2004, to complete all trial activities at first instance by the end of 2008, and to complete all work in 2010 (the Completion Strategies). A similar resolution was adopted on 26 March 2004. On 15 December 2005, Fausto Pocar, President of the ICTY, confirmed his predecessor's prediction that trials would have to run into 2009. This depended on several factors, the primary one being the arrest and trial of Karadzic and Mladic. He said: 'The Tribunal simply cannot close its doors until they have been brought to justice'.[10]

France's attitude towards the Tribunal

Although France approved the Statute of the Tribunal, it adopted unofficially a policy of non-cooperation with the Tribunal, initiated and carried out by its Ministry of Foreign Affairs with the full support of its senior military leaders. France and the UK tried unsuccessfully to find a political solution to the Former Yugoslavia wars, and supported a humanitarian intervention in preference to a military expedition.

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[10] Security Council resolutions 1503 of 28 August 2003 and 1534 of 26 March 2004, – ICTY, 'President Pocar addresses the Security Council', 15 December 2005 http://www.un.org/icty/pressreal/2005/speech/pocar-sc-o51215.htm

France provided its soldiers to UNPROFOR, had some of them taken hostages by the Serbs and had 68 soldiers killed in Bosnia between 1992 and April 1997.[11] France had a historical link with the Serbs which allowed, in the French sector of Bosnia, a covert collusion between the Serbs and the French military, with the initial blessing of local French military authorities and of the French government under Mitterrand's presidency. France was the only Western country to prevent its former peace-keeping commanders from giving testimonies to the Tribunal as witnesses, in violation of its legal obligations: the French Parliament had approved a law of judicial cooperation with the Tribunal in 1995. This attitude was based on the fear of the French military authorities that these commanders could become accused, and not only witnesses, in view of their role during the Balkan wars, and particularly before and during the Srebrenica massacre. The French non-cooperation policy was first revealed bluntly by Alain Richard, French Minister of Defence, during a lunch with the press in December 1997, when he accused the Tribunal of practising a 'show justice' (*justice spectacle*) and declared that no French officer would ever testify before the Tribunal.

A few days later, Louise Arbour met the French and international press in Paris and was asked about Richard's remarks. She began with the issue of arrests, answering that 'the vast majority of the indicted, including the most important ones, are in the French sector. We have an opportunity to take sizable actions [to arrest suspects] in the French sector. Yet, we are in the face of total inertia.' She added that war criminals felt 'absolutely secure' in the French sector. She then referred to Richard's 'shocking' remark about the tribunal being a 'spectacle', saying that it showed a 'contempt for witnesses . . . who have come to tell us about the atrocities they suffered'. She noted that generals from Britain and the US had already testified at The Hague and that these nations were joining others in contributing financially to the tribunal. She concluded that 'the French failing is therefore pretty remarkable'.[12]

The immediate French response was outrage. However, reports showed that a French military officer had foiled a planned arrest of Karadzic, and relations between France and the US became more strained.

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[11] Hazan, p. 68.

[12] See *Le Monde* 14–15 December 1997, – Charles Truehart, 'France Splits with Court over Bosnia: Generals Won't Testify in War Crimes Cases', *Washington Post,* 16 December 1997, quoted by John Hagan, *Justice in the Balkans, Prosecuting War Crimes in The Hague Tribunal* (The University of Chicago Press, Chicago/London, 2003), pp. 111–112.

In March 1998, Hubert Védrine, French Minister of Foreign Affairs, in a complete and welcome reversal, declared in The Hague that French officials and officers would now be allowed to testify to the Tribunal.

In June 1998, *The Independent* reported that 'US anger with the French is so great that Pentagon planners are now believed to be contemplating a snatch in the French sector without informing Paris'.

The first arrest made in the same month by French NATO troops, with the support of US troops, was that of Milorad Krnojelac, commander of a detention centre for women and children in Foca, in 1992–1993, publicly indicted for war crimes. Dragan Gagovic, a former police chief in the city of Foca, was killed in January 1999 by French troops at a French roadblock which he tried to force. In August 1999, French and German troops arrested Radomir Kovac, a former paramilitary leader and military policeman in Foca. He was accused of having enslaved and raped Muslim women in 1992 and 1993. In January 2000, Mitar Vasiljevic was arrested by French troops. A Bosnian Serb, he was indicted for having participated from May 1992 to October 1994 to the 'extermination and persecution' of the Moslem population of Visegrad.

In February 2000, Carla Del Ponte had, again, to press France into greater action, as French troops were still seen as providing a de facto haven for key suspects in their sector.[13]

The most important arrest by French NATO troops was that of Momcilo Krajisnik in April 2000, who had been the subject of a sealed indictment. He was considered as one of the masterminds of the genocide and ethnic cleansing in Bosnia, together with Karadzic. He was a signatory of the Dayton Peace Accords.[14]

In spite of this recent success, the French contingent has failed to arrest the most important indicted personalities, when such arrests were within their reach, those of Mladic and Karadzic.

The Srebrenica Massacre

The brutal massacre of Bosnian Muslims by Bosnian Serbs at Srebrenica in July 1995 raised consternation and anger in the world, in Europe and particularly in France, with questions raised as to the role played by a French

[13] *Le Monde*, 18 March 1998, *IHT*, 11 April 2000.

[14] *Libération*, 11 January 1999, *Le Monde*, 30 January 2000, *IHT*, 3 August 1999 and 4 April 2000.

general in charge of the UN Protection Force in the Former Yugoslavia (UNPROFOR): could the massacre have been prevented, or stopped, if airstrikes had been ordered and carried out in time ? Why had such orders not been given?

UNPROFOR was first set up on 21 February 1992 to provide security to UN Protected Areas in Croatia (Security Council res. 743). It was given a new mandate on 14 September to help the UN High Commissioner for Refugees (UNHCR) deliver humanitarian supplies. However, in view of the governments' concerns not to be drawn into the conflict, resolution 776 did not invoke Chapter VII of the UN Charter, that is the use of military force.

The main contingents of UNPROFOR were French forces, 7 500 (in March 1994), and the British, 3 500 (until the Summer of 1995), and a number of small contingents of 35 other countries, including 450 Dutch troops. A total of approximately 37 000 troops was under the command of French generals: Philippe Morillon, October 1992 – July 1993, – Jean Cot, July 1993-March 1994, Bertrand de La Presle, March 1994-February 1995, and Bernard Janvier, March 1995 – January 1996. The commanders were in charge of operations in Bosnia, Croatia and Macedonia. The forces in Bosnia were under the command of a British general, Rupert Smith, under the command of Janvier. Two hundred and sixteen UNPROFOR military personnel lost their life during their mission, including 56 French soldiers.

The line of command was long and unwieldy: at the time of the Srebrenica events, the UNPROFOR Commander in Sarajevo, Lt-General Rupert Smith (UK), reported to General Bernard Janvier (France), Force Commander, in Zagreb, who reported to Yasushi Akashi (Japan), Special Representative of the Secretary-General, also in Zagreb, who reported to Kofi Annan, Head of the Department of Peacekeeping Operations at UN headquarters in New York, who reported to Boutros Boutros-Ghali, the UN Secretary-General, who reported to the UN Security Council. At the bottom of the ladder, Colonel Tom Karremans, was in charge of the Dutch battalion in Srebrenica.

Events leading to Srebrenica

On 16 April 1993, the Security Council in resolution 819 expressed, in part, its 'deep alarm' concerning 'the rapid deterioration of the situation in Srebrenica and its surrounding areas, as a result of the continued deliberate armed attacks and shelling of the innocent civilian population by Bosnian Serb paramilitary units'. A 'tragic humanitarian emergency' had already

developed in the area. The Council condemned and rejected the 'deliberate actions of the Bosnian Serb Party to force the evacuation of the civilian population from Srebrenica and its surrounding areas . . . as part of its abhorrent campaign of "ethnic cleansing"'. It demanded that 'all parties and others concerned treat Srebrenica and its surrounding areas as a safe area which should be free from any armed attack or any other hostile act'.

The future showed that these denunciations and demands went unheeded and Serb military attacks and bombing of safe havens continued.

A tougher resolution was adopted on 4 June 1993 (Res. 836): acting under Chapter VII, it authorized UNPROFOR, acting in self-defence, to take 'the necessary measures' including the use of force, to reply to bombardments or armed incursions against the safe areas. It also authorized Member States acting nationally or through regional organizations (NATO), to use air power.

Following the adoption of this resolution, the Bosnian Serbs continued to bombard the safe areas at the same rate as before.[15] Shortly afterwards, the UN Secretariat convened a meeting of the sponsors of the resolution (France, Russia, Spain, the UK and the USA) and said that approximately 32 000 additional ground troops would be required to implement the safe area concept. This drew strong opposition, particularly from the UK, for whom the preferred approach would be closer to the 'light option' presented by the French, entailing only 5 000 additional troops.

A cease-fire agreed in late 1994 ended in April 1995 and the fighting resumed.

In a meeting in Paris, on 12 May, Boutros-Ghali met with Smith, who was advocating a robust response to Serb violations of the safe areas, and Akashi and Janvier, who favoured a more cautious approach. Akashi stressed that 'the costs of a more robust use of force [were] high, and suggested instead that it might be more appropriate to seek a 'drastic reduction' in the size and mandate of UNPROFOR. Janvier expressed his concern that UNPROFOR, could, at any moment, be dragged into 'an escalatory military adventure'. Janvier addressed some of these issues during his briefing to the Security Council on 24 May 1995, when he made a concrete proposal intended, in his view, to decrease UNPROFOR's exposure to hostage-taking. He proposed

[15] This section is based on the 'Report of the Secretary-General pursuant to General Assembly resolution 53/35, The fall of Srebrenica', Doc. A/54/549 of 15 November 1999, unless otherwise indicated.

to apply air strikes at a global level, which would imply removing the UN military forces from the enclaves, leaving only a few observers. He said: 'Let's us go away from the combat zones, zones on which lightning strikes'.[16]

A number of Security Council members expressed their strong concern that UNPROFOR leadership appeared to be averse, on principle, to using air power against the Serbs, other than in self-defence.[17]

On 25 and 26 May 1995, following various Serb attacks, NATO air raids struck ammunition dumps in Pale, destroying them. The Serbs then took hostage 270 UN peacekeepers, chaining some of them to ammunition dumps. NATO warned the Serbs that further strikes would follow if their heavy weapons were not returned to UN control and the hostages released. Akashi reported to New York that the need not to further complicate the security situation in UNPROFOR was paramount. Given the threat to UN detainees and the determined mood of the Bosnian Serbs, he said, he had instructed Smith that, for the time being, the execution of the mandate was to be secondary to the security of UN personnel.

In June 1995, more fighting was initiated by the Serbs. On 3 June, the Dutch Commander in Srebrenica requested close air support to defend a position, but the request did not reach the Zagreb headquarters, and 'appears to have been discouraged further down the chain of command, bearing in mind that hundreds of UNPROFOR personnel remained hostage'.

On 3 June 1995, European and NATO Defence Ministers met in Paris to discuss the composition, deployment and mandate of a 'rapid reaction force', to be drawn mainly from France and the UK, with significant elements from the Netherlands. UN representatives and Janvier insisted that the new force should operate under peacekeeping rules of engagement. Concern was expressed that UNPROFOR might find itself 'being sucked into the war'. Smith argued that the new force should be used to help implement the UNPROFOR mandate. Writing to UN headquarters, Akashi also expressed scepticism about the new force: UNPROFOR should continue to rely on negotiations.[18]

Elected President of the Republic on 7 May 1995 in replacement of François Mitterand, Jacques Chirac was appalled by the Serb taking of

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[16] Testimony of General Janvier at the French Parliamentary Information Commission on 25 January 2001, p. 7, in 'Rapport de la Commission', Doc. Assemblée Nationale, No. 3413, 22 November 2001.

[17] UN Doc. A/54/549, paras. 186–187.

[18] UN Doc. A/54/549, paras. 213–215.

French soldiers of UNPROFOR as hostages and supported the creation of the rapid reaction force.

Janvier met with General Ratko Mladic, Commander-in-Chief of the Bosnian Serb Forces, three times in June 1995, with the knowledge of Akashi.

A five-hour meeting took place in Mali Zvornik on 4 June 1995 between General Janvier and General Mladic,[19] Janvier said that the present situation of UN soldiers held as hostages was unacceptable and counterproductive for the Serbs. One result was the creation of a multinational force under his command. Food supplies had to be given to the Eastern safe havens, and the Serbs should stop occupying or encircling these safe areas. Mladic gave him the text of a draft agreement that he wanted signed immediately by Janvier (who did not):

1. The Serb Army commits itself not to threaten the life and security of UNPROFOR members by the use of force;
2. UNPROFOR commits itself not to use any type of force nor the use of air strikes on the targets and territory of the Serb Republic;
3. The signature of this agreement will lead to the immediate liberation of all the war prisoners.

As the news of this and other meetings, which had not been announced in the media, became known, reports circulated that Janvier had entered into an understanding with the Serbs. It was reported that the hostages were being released – they were released between 2 and 18 June – in return for an undertaking that NATO air power would not be used against the Serbs again. It was also reported that President Yeltsin of Russia had subsequently said that he had been assured by President Jacques Chirac that the use of air strikes in Bosnia and Herzegovina was over. After inquiry, Boutros-Ghali advised the Secretary-General of NATO, Willy Claes, that neither Akashi nor Janvier had given any assurance concerning the further use of air power. Following Janvier's report of 4 June concerning his meeting with Mladic, in response to a query from UN in New York, Janvier confirmed that he had refused to sign the agreement, and had instead told Mladic that the Serb's behaviour (the hostage-taking) was unacceptable. He had demanded the immediate release of the hostages.[20]

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[19] The account of the meeting of 4 June was only transmitted by Akashi to Kofi Annan on 15 June 1995, with 'apologies for the oversight'.

[20] UN Doc. A/54/549, paras. 195–198.

The conflict between Janvier, who opposed the use of force, and Smith, who believed that the UN had to use force, was continuing. On 9 June, Akashi summoned Janvier and Smith to resolve their differences. Janvier said that 'We are not able to use air power because we have soldiers on the ground . . . I insist we will never use force and impose our will on the Serbs.' Smith wanted the UN to 'establish ground rules and declare we are prepared to fight. . . . If we hit them, they will be more cooperative'. Akashi sided with Janvier, as the senior commander. On 9 June, Akashi issued a statement that UN troops would abide by 'strictly peacekeeping principles'.[21] Peacekeeping principles mean having the agreement of the parties in conflict to the UN force, maintaining impartiality between them , not becoming party to the conflict, using force only in self-defence.

On 18 June, the Serbs announced the resumption of 'cooperation' with the UN provided there were 'no hostile acts' in the future.

The Bosnian Serb Army launched their attack on Srebrenica early morning on 6 July 1995. Between 1300 and 1400 hours, Karremans verbally requested close air support. The UNPROFOR Commander's Chief of Staff (Netherlands) in Sarajevo (Rupert Smith was on leave) discouraged the request, with the concurrence of his superiors in Zagreb. The Dutch soldiers did not return fire at the Serbs. There was a pause in the Serb attack on 7 July. On 8 July, the Serbs advanced in the safe area and continued sporadic bombardment of the rest of the enclave. During the early afternoon, Karremans requested again close air support, request turned down by the Chief of Staff in Sarajevo who favoured instead the withdrawal of the UN personnel from a specific position.

On 8 July, a meeting was called by the UN Secretary-General at the UN Office in Geneva with the UN High Commissioner for Refugees, Akashi, the UN Co-Chairman of the International Conference on the Former Yugoslavia, General Janvier and General Smith (who was recalled from his leave to attend the meeting) and the Under-Secretaries-General for Peacekeeping Operations and Political Affairs. There was no discussion of the Serb attack, as the participants had not been informed of the seriousness of the situation in Srebrenica. They were only informed at 0840 hours on 9 July. During the meeting, Janvier assessed that the Serbs were 'holding all the cards' and that the UN deployment in the enclaves meant that 900 potential hostages could be taken by the Serbs.

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[21] The quotations are attributed by Gutman to minutes kept by a participating UN official who insisted on anonymity.

On 10 July, Akashi briefed the Security Council with information which turned out to be inaccurate. Asked for a chronology of requests for air support, he gave no clear answer. He did not report that there had been a series of requests by the Dutch battalion for close air support from 6 to 8 July and that they had been turned down in Sarajevo. Another request was submitted to Janvier in Zagreb on 9 July and on 10 July. Janvier sent a report to the UN headquarters in New York updating the situation at 2300 hours on 10 July. He explained why he had decided against the use of close air support that evening. As of 0600 hours the following day, NATO aircraft would be airborne and ready to conduct air support mission at short notice. At midnight, in a meeting in Srebrenica, Karremans said that the Bosnian Serbs had offered an ultimatum for 'surrender' which UNPROFOR rejected. He also said that as of 0600 hours on 11 July, NATO would conduct a massive airstrike against the Serb positions if they had not withdrawn to the original boundaries of the safe enclave.

In the morning of 11 July, from 0700 to 1000, no air strikes took place, through an apparent confusion between the Dutch battalion in Srebrenica, who had sent at least two requests for close air support, requests which had not been either received or satisfied, for such bureaucratic reasons as the submission of incomplete or wrong forms.

Before 1000, Akashi told his staff that, during a conversation with the Secretary-General, he had declined the latter's offer to delegate to him the authority to call air strikes.

At 1100, Zagreb received the request from the Sarajevo Command for close air support for the Dutch battalion. At the same time, the Bosnian Serbs resumed their attack. At 1217, Janvier's request for close air support was approved by Akashi.

At 1430, Srebrenica had fallen. At 1440, two NATO aircraft dropped two bombs on Serb vehicles. The Serbs then threatened to shell the town and kill the Dutch soldiers being held hostage, if NATO continued with its use of air power. The Netherlands Minister of Defence requested that air support action be discontinued, which was done by NATO.

On 12 July, the Security Council adopted resolution 1004. Acting under Chapter VII of the UN Charter, it demanded that 'the Bosnian Serb forces cease their offensive and withdraw from the safe area of Srebrenica immediately'. It requested the Secretary-General to 'use all resources available to him to restore the status, as defined by the agreement of 18 April 1993, of the safe area of Srebrenica in accordance with

the mandate of UNPROFOR'. During the debate on that resolution, the representative of Bosnia and Herzegovina read a statement by President Izetbegivic. In it, the President demanded that the UN and NATO re-establish by force the violated safe zone of Srebrenica within the borders of May 1993. He added: 'if they cannot or do not want to do this, we demand that this be publicly announced'. The French representative adopted a non-committal position. He stated that his government did not wish to 'impose the use of any particular means'. He added: 'we are simply saying that we are ready, if the civilian and military authorities and the United Nations force consider it appropriate, to make troops available for any operations they regard as realistic and realizable'. Italy favoured peaceful means through negotiation and persuasion. Russia noted again that the use of air power was not the road to a solution. Nigeria rightly said that 'today in Bosnia there is no peace to keep and no political will to impose one'. After the vote on the resolution, the US representative said that 'obviously, we all prefer peaceful means, but when brutal force is used the Secretary-General must have the right to use the resources available. The UK representative said that through demilitarization of the area, the civilian population could remain without fear. The Council was still divided and uncertain as to what to do.

Asked by the Secretary-General for his comments on the draft resolution the day before, Akashi had expressed concern about the possible use of force. He felt that the resolution would again raise unrealistic expectations. Authorizing the use of force by the rapid reaction force to retake Srebrenica would 'again blur the distinction between peacekeeping and peace enforcement'.[22]

The Bosnian Serbs' systematic extermination of the Bosnian Muslim males was carried out on 14 and 15 July. The first formal reports about atrocities were made on 20 July.

It is estimated that 7 000 Bosnian Muslim men and boys were murdered by the Bosnian Serb troops under General Mladic's command in Srebrenica, and 40 000 were deported.

On 16 November 1995, the International Criminal Tribunal for the Former Yugoslavia indicted Radovan Karadzic (President of the Republika Srpska in Bosnia) and Ratko Mladic (Commander of the Bosnian Serb Army) for their alleged direct responsibility for the atrocities committed in July 1995 against the Bosnian Muslim population of the UN-designated

[22] UN Doc. A/54/549, paras. 329–339.

safe area of Srebrenica. After a review of the evidence submitted by the Prosecutor, Judge Riad confirmed the indictment, stating that:

> After Srebrenica fell to besieging Serbian forces in July 1995, a truly terrible massacre of the Muslim population appears to have taken place. The evidence tendered by the Prosecutor describes scenes of unimaginable savagery: thousands of men executed and buried in mass graves, hundreds of men buried alive, men and women mutilated and slaughtered, children killed before their mother's eyes, a grandfather forced to eat the liver of his own grandson. These are truly scenes from hell, written on the darkest pages of human history.[23]

At this time of writing, neither Karadzic nor Mladic has been arrested.

This dramatic failure of the United Nations, involving the shared responsibility of the Security Council and its members, of Boutros Boutros-Ghali, the Secretary-General and of Kofi Annan, the Head of the Department of Peacekeeping Operations, and of the UN military field commanders caused long-lasting damage to the credibility of the UN, particularly as the July 1995 Srebrenica massacre followed the Rwanda genocide of April – July 1994, another major UN failure. In view of the presence and action of French generals as field commanders, the disaster also reached French public opinion and the French Government.

Two formal reports on the circumstances and responsibilities for the massacre were later released, one by the UN in November 1999 and one by a French Parliamentary Mission in November 2001, followed by two Dutch reports in April 2002 and January 2003.

The United Nations report

On 30 November 1998, the UN General Assembly requested the Secretary-General to provide, by 1 September 1999, a comprehensive report, including an assessment, on the events dating from the establishment of the safe area of Srebrenica on 16 April 1993 until the endorsement of the Dayton Peace Agreement by the Security Council on 15 December 1995 and encouraged Member States and others concerned to provide relevant information (Res. 53/35, para. 18).

Kofi Annan, the Secretary-General, who had been deeply and officially involved in these events as Head of the Department of Peacekeeping

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[23] Press release issued by the International Criminal Tribunal for the Former Yugoslavia (CC/PIO/026-E, The Hague, 16 November 1995.

Operations, submitted his report on 15 November 1999. All the facts in the previous section are based on this report.

He recalled that the UN had a mandate to 'deter attacks' on Srebrenica and five other 'safe areas' in Bosnia and Herzegovina. Despite that mandate, up to 20 000 people, overwhelmingly from the Bosnian Muslim community, were killed in and around the safe areas. In addition, most of the 117 members of UNPROFOR killed in Bosnia and Herzegovina, died in or around those areas. In reviewing these events, Annan said that he had in no way sought to deflect criticisms directed at the UN Secretariat. He was 'too painfully aware of the Organization's failures in implementing that mandate.'

He recognized that

> the Secretariat had convinced itself early on that the broader use of force by the international community was beyond the UN mandate and anyway undesirable. In a report to the Security Council, the Secretary-General had spoken about a 'culture of death', arguing that peace should be pursued only through non-military methods. When, in June 1995, the international community provided UNPROFOR with a heavily armed rapid reaction force, we argued against using it robustly to implement our mandate. When decisive action was finally taken by UNPROFOR in August and September 1995, it helped to bring the war to a conclusion.[24]

Annan pointed out that peacekeeping and war fighting are distinct activities which should not be mixed. Blaming the Member states for their indecision or lack of political consensus when faced with active military conflicts, he wrote:

> Peacekeepers must never again be told that they must use their peacekeeping tools – lightly armed soldiers in scattered positions – to impose the ill-defined wishes of the international community on one or another of the belligerents by military means. If the necessary resources are not provided – and the necessary political, military and moral judgments are not made – the job simply cannot be done.

Annan acknowledged errors of judgment on the part of the UN, errors rooted in a philosophy of impartiality and non-violence wholly unsuited to the conflict in Bosnia. Negotiations with the Serb leaders amounted to appeasement.

With a broad brush, he asked the whole international community to accept its share of responsibility for its prolonged refusal to use force in the

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[24] UN Doc. A/54/549, para. 497.

early stages of the war: the Security Council, the Contact Group[25] and other governments which contributed to the delay in the use of force, the UN Secretariat and the mission in the field. He rightly recalled that the primary and most direct responsibility lies with the architects and implementers of the attempted genocide in Bosnia, Radovan Karadzic and Ratko Mladic and their major collaborators. Finally, he expressed the 'deepest regret and remorse' in his review of the UN secretariat's own actions and decisions, through error, misjudgment and an inability to recognize the scope of the evil confronting the UN.[26]

Report of the French Parliamentary Mission

On 13 July 2000, Médecins sans Frontières (MSF) asked publicly that a parliamentary inquiry commission be set up in order to establish the part of French responsibilities which led to the paralysis of the UN and of NATO when the Serbs attacked Srebrenica.[27]

MSF had had teams in Srebrenica as from 1993. They stayed with the population, the only foreign presence together with the UN Blue Helmets, until the fall of the enclave in July 1995.

Initially, the French Parliament had decided to entrust only to two parliamentarians, including François Léotard, former Minister of Defence during the crisis, the task of preparing an information report. MSF protested and obtained that the Parliament set up, on 15 November 2000, a French Parliamentary Information Mission on the Fall of Srebrenica. As for the Parliamentary Information Mission for Rwanda, this was a weak alternative to creating an Inquiry Commission with *sub poena* powers: it was only a Mission set up to 'inform' the parliamentarians. The Commission, composed of five members of the Commission of Foreign Affairs and five members of the Commission of National Defence of the National Assembly, reviewed relevant documentation and heard forty witnesses.

Both Hervé de Charrette, then Minister of Foreign Affairs and Charles Millon, then Minister of Defence, like most French leaders laid the blame on the Dutch authorities refusing to authorize NATO airstrikes. Alain

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[25] The Contact Group was composed of France, Germany, Russia, the UK, the USA.

[26] UN Doc. A/54/549, paras. 498–503.

[27] 'Bosnie: La France lance une mission d'information parlementaire sur Srebrenica (MSF), 12-2000', http://listes.rezo.net/archives/courrier-balkans/2000-12/msg00023.htm, 19 December 2000.

Juppé said that the liberation of the hostages had been negotiated with the Serbs, but it was never, at any time, linked to any commitment not to use air strikes. The testimony of François Léotard did not offer any new information.

Yasushi Akashi explained that the security of the Blue Helmets prevailed over the security of the populations and the implementation of the protection mandate.

Colonel Karremans, in charge of the Dutch battalion in Srebrenica, confirmed that he had asked orally and in writing, on multiple occasions, recourse to air strikes between 6 and 11 July 1995 in order to defend Srebrenica, but these requests had all been rejected in accordance with instructions of 29 May 1995 from General Janvier according to which the implementation of the UN mandate was secondary to the security of UN personnel. Hans Van Mierlo, Dutch Minister of Foreign Affairs from 1994 to 1998, contradicted the French version. Joris Voorhoeve, Dutch Minister of Defence from 1994 to 1998, said that the Dutch government was consulted for the first time on the possibility of a close air support on 10 July and replied that whatever the danger for hostages, air support was indispensable in order to defend Srebrenica.

On 24 January 2001, the French Ministry of Defence issued a communiqué demanding that the hearings of Generals Bernard Janvier and General Philippe Morillon be held behind closed doors, on the grounds that it was necessary that the 'public agents to be heard by the parliamentary mission and whose cooperation was required by the International Criminal Tribunal for the Former Yugoslavia be heard according to modalities similar to those defined by the Tribunal'. The Tribunal replied that its own procedures have no relationships with those of a national commission, and that the French government had no obligations towards the Tribunal to respect the Tribunal's own procedures.[28]

In his hearing held on 25 January 2001,[29] General Janvier affirmed, in part, that he never negotiated with the Serbs concerning the liberation of UN hostages, and, secondly, that no agreement was made with the Serbs

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[28] ANNEXE I, 'Communiqué du Ministère de la Défence en date du 24 janvier 2001 demandant le huis clos pour les auditions des généraux Bernard Janvier et Philippe Morillon', Rapport de la Mission, Assemblée Nationale, No. 3413, 22 November 2001. AFP news release, 26 January 2001.

[29] The verbatim reports of General Janvier's testimonies *in camera*, and others are available on Réseau Voltaire: for Janvier, see http://www.voltairenet.org/article9987.html, 22 November 2001.

concerning the non-use of air weapons. He said that he never received any instructions from France for the implementation of his operational responsibilities. Finally he said that the Serbs, and particularly General Mladic, bore the full and entire responsibility for the massacres organized and planned by them. The reasons for the failures were: the lack of determination of the international community, paradoxically evidenced by 54 resolutions and 39 presidential statements of the Security Council; – the deployment of a peacekeeping force confronted with warring parties.

Concerning his decision not to use air strikes, he said that air support requested in the night of 10 to 11 July was not 'reasonable', that generally, the UN is not favourable to the use of air weapons. On his meeting with General Mladic on 4 June, he said that this was a meeting, not a negotiation. He only transmitted to the UN Mladic's proposed agreement on the non-use of air strikes. He had other meetings with Mladic on 17 and 29 June. The charge of 'secret deals' between Janvier and Mladic was an attempt to undermine France's credibility. He could not anticipate the massacres. He had no regrets, he acted within his soul and conscience.

On 17 May 2001, Pierre Salignon, Operational Director of MSF for the Balkan programme, was heard by the Mission.[30] He raised three questions:

1) Were the massacres predictable? He replied by the affirmative on the basis of previous atrocities, knowledge by the French authorities of Mladic's war methods, and his own field experience. UN Security Council resolution 819 creating the security zone of Srebrenica referred to the risk of genocide on the local population. He said that, besides MSF, everybody knew about this risk, the International Committee of the Red Cross, the High Commission for Refugees, the UNPROFOR headquarters.
2) Why did UNPROFOR abandon Srebrenica's population? Salignon did not know whether an agreement had been concluded between the French authorities and Mladic, outside of the UN, to allow the liberation of the hostages against the non-use of air strikes. No concrete action to protect the civilian population appeared to have been envisaged on 12 July by the hierarchy of UNPROFOR, led by two French generals, General Janvier in Zagreb and General Gobillard in Sarajevo. As from 6 July, MSF issued communiqués almost every day, describing the tragedy and expressing the strongest concern

[30] http://www.reseauvoltaire.net/article10005.html, 22 November 2001.

about the fate awaiting the civilians. In spite of this information, UNPROFOR remained passive, European countries including France only issued protests without taking action. France, the UK and the Netherlands could at least have organized the evacuation of the population in all security as soon as the Serbs attacked, on 6 July until the end of the massacres on 16 July.

3) The third issue raised by MSF was the use of humanitarian action by the French diplomacy, which entertained the illusion of the political determination of France to end violence against civilians: 'Confronted with war crimes and crimes against humanity, one country [France] sent the military to distribute medicaments, blankets and wheat'.

Other witnesses included Jean-Bernard Mérimée, France's ambassador to the UN Security Council during the period of the fall of Srebrenica, Admiral Jacques Lanxade, General Cot, General de Lapresle, General Germanos, General Heinrich, other senior civil servants, other MSF members.

The Mission submitted its report on 22 November 2001.[31]

It first said that its aim was to participate actively in the search for truth, not to act as prosecutors, judges or historians. The Mission relied on official documents, many of which were attached to the Report, and testimonies, public declarations, press articles and others, but its members recognized that there were points on which they were unable to attain absolute certainty. They regretted that such potential witnesses as General Rupert Smith, UNPROFOR Commander at the time, who was on leave during the crisis, and Mrs Sadako Ogata, the UN High Commissioner for Refugees refused to testify.[32] They regretted the UN's frequent refusal to provide various requests for information, and NATO's systematic rejection of all requests. They were disappointed by the attitude of the Ministry of Defence who demanded closed hearings for some of the military witnesses and whose policy on sharing documents was unclear – in other words, its real cooperation with the Mission was less than sincere and effective. Missing documents were produced by certain NGOs [mainly MSF].

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[31] The Report is in Doc. Assemblée Nationale, No. 3413. An unofficial English version of the Report's Conclusion, by Julie Woman, is available on MSF site: http://www.paris.msf.org/site/site.nsf/pages/ accessed on 12 October 2005.

[32] Bosnian commanders Rasim Delic and Naser Oric, who left the enclave several weeks before Srebrenica's fall, were invited to appear before the Commission but did not come.

The Report re-affirmed that the guilt for the Srebrenica massacre, this 'barbarous act', laid with the Bosno-Serbian authorities.

The Mission established that General Janvier had committed errors of judgment, his hesitations and his obvious misjudgment of General Mladic's character having played a part in the drama. The majority of the Mission was convinced that Janvier did not agree with Mladic's request of 4 June, that is the release of hostages vs. the non-use of air strikes. However, two members of the Mission did not support this opinion, on the grounds that in the absence of evidence, no firm conclusion should have been reached.[33]

The Mission blamed the errors committed by the Dutch battalion, who did not show the slightest resistance to the Serbs. Akashi's shortcomings and the 'astounding inertia' of the UNHCR leaders were also noted in the Report.

The UN institutional culture to remain neutral and not taking sides in a conflict which was inappropriate to the circumstances, and the heavy and complex chain of command explained the UN's lack of reactivity to the Srebrenica crisis. However the UN is only a tool, and the member states, particularly the UK and France, asked the UN to apply in Bosnia a policy riddled with ambiguities: the UN had an impossible mission, to maintain a non-existing peace using strictly humanitarian logic. The basic reason for the fall of Srebrenica was to be found in the absence of the political will to intervene by France, the UK, the USA and the Bosnian authorities themselves.

The Mission wondered whether the fall of Srebrenica, as an alternative to these reasons, might be the result of a deliberate, highly political calculation aimed at simplifying the diplomatic negotiations by clarifying Bosnia's ethnic map. Did Srebrenica fall for 'reasons of state' – to be sought in Paris, London, Washington and even Sarajevo? The Mission believed that none of these states had the will to save Srebrenica, but that there was no conspiracy. The Mission dismissed another hypothesis – that there had been a plot by the Bosnian government to abandon Srebrenica either in exchange for the Serbian suburbs of Sarajevo or to provoke an intervention by the West, because of the lack of evidence.

As France assumed a major role in the Bosnian crisis as a member of the Security Council, as a member of the Contact Group and as the greatest contributor of troops, Srebrenica was also a failure for France. In trying to explain why Janvier did not order defensive air support on 10 July, the

[33] 'Il restera toujours des zones d'ombre, interview de Pierre Brana, ancien parlementaire, membre de la Commission', by Arnaud Vaulerin, in *Libération*, 10 July 2005.

Mission felt that he was the man of a specific culture. The French military authorities were not opposed to air strikes in principle, but they saw them as threats to the French Blue Helmets. Additionally, they were less favourable to air power because the planes were flown by NATO, an organization dominated by a country, the US, having no troops on the grounds. This 'culture' led them to deliberately give priority to the lives of their soldiers over those of the Bosnian civilians.

The Mission finally demanded that the French, the British and the Americans, particularly, devote the necessary means to the capture of these [Ratko Mladic and Radovan Karadzic] criminals against humanity.

One member of the Mission later criticized the fact that the Report did not use the term 'genocide' in relation with Mladic and Karadzic, even though General Radislav Krstic had already been sentenced by a Chamber of the International Criminal Tribunal for the Former Yugoslavia for genocide. The majority of the members felt that this was for the courts to decide.[34]

The Dutch Reports

The Netherlands Institute for War Documentation started its investigation of the Srebrenica case in 1996.[35] The Institute had access to foreign material and to Dutch government's secret minutes concerning Srebrenica – secret minutes of the French government were denied to the French Parliamentary Commission. The Institute's report was released on 10 April 2002. It described the mission given to the Dutch soldiers sent to Bosnia between 1993 and 1995 as 'an ill-considered, and practically unfeasible peace mission'. The UN and the Dutch government should share responsibility. The Dutch battalion provided no deterrent to the Bosnian Serb Army of General Mladic. Lightly armed, they were allowed to return fire only when fired against, and could not initiate military action. They were morally and physically exhausted, and their commander was incompetent. The report blamed the troops for helping to organize the exodus of refugees gathered in Srebrenica, including those of men and boys who were never seen again. Furthermore communications had broken down, both within the Dutch base and between Dutch UN officials and the Defence Ministry in The Hague. After the mass murder, communications failed within the Netherlands. Army senior commanders

[34] Ibid.

[35] See 'Srebrenica Report Unveiled' by Margreet Strijbosch, www.2.rnw.nl/rnw/en/currentaffairs/region/easterneurope/bosnia020410.html 10 April 2002.

deliberately withheld sensitive information about the events in Srebrenica against the will of Defence Minister Joris Voorhoeve.

The conclusions of the report led to the resignation of the entire Dutch government and the head of the Dutch army, General Ad van Baal, who was also blamed for withholding vital information just before the enclave fell.

Seven months later, the Dutch Parliament started a series of public hearings, interviewing some 40 political and military figures under oath.[36] Its report 'Mission without peace', issued on 27 January 2003, basically confirmed the conclusions of the Institute's report, but included some sharp criticism. The decision to send troops to Bosnia had been made on the basis of 'emotional and humanitarian considerations'. Lacking a clear understanding of what peacekeeping in Bosnia required, both the government and the military had accepted the 'vague and limited UN mandate given to Dutchbat [the Dutch Battalion]'. The Parliamentary Commission stressed that the Dutch government could not hide behind the UN and international politics because it had made a conscious and voluntary decision to protect Srebrenica. The Wim Kok government had taken on a clear responsibility of its own and held political responsibility for the massacre. The report criticized the UN for failing to protect the Muslim civilians. It said that General Janvier was wrong to refuse to allow air strikes to support the Dutch peacekeepers. The report blamed General Couzy for not informing his superiors about war crimes in Srebrenica, thus exonerating General van Baal of this charge. The Inquiry Chairman, Bert Bakker, commenting on the report, made a clear distinction between political responsibility and blame for the events leading to the Srebrenica massacre: 'As a member of the international community, the Netherlands is responsible. When it comes to guilt, I would tend to blame the Bosnian Serbs'.

In reaction to the Dutch report, Médecins sans Frontières called for questions unanswered by the report to be taken up further by Britain and the United States.[37] The Dutch report reaffirmed that all the conditions were met for an air strike and concluded that the decision to not use air power was the responsibility of General Janvier. However, the report did not give any explanation of what led to the decision. It only commented that 'uncertainty

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[36] 'Mission without peace', Radio Netherlands www2.rnw.nl/en/currentaffairs/region/easterneurope/sreb030127.html, 27 January 2003.

[37] MSF *Press Release,* 'Dutch Inquiry Fails to Answer Key Questions into Srebrenica Massacre, MSF Calls for the US and the UK to Carry Out Investigations', 31 January 2003.

remains concerning the motivations of General Janvier' and that 'his decision was met with incomprehension from his team'. MSF also regretted that the French authorities did not allow General Janvier to testify before the Dutch Commission.

Conclusion

The merits of the International Criminal Tribunal for the Former Yugoslavia are now well established. It is a real international tribunal, and not a victor's tribunal as were the Nuremberg and Tokyo tribunals. The Tribunal has achieved an impressive number of indictments, trials, appeals and judgments. It has obtained custody of major military and civilian accused, including President Milosevic. The glaring exception of Mladic and Karadzic is due to the inaction of NATO, of a few governments including France, and of the Serb government, while the Tribunal's prosecutors have kept on prodding them. The number of voluntary surrenders and the number of accused pleading guilty have reinforced the legitimacy of the Tribunal. If the Tribunal had not been created, none of the accused is likely to have been arrested, tried and sentenced by national courts in the few years following the wars. The creation of the Tribunal, its structure, jurisprudence, procedures and problems, even its failings have been an essential basis and precedent for the drafting of the Rome Statute and the establishment of the International Criminal Court. These benefits largely outweigh the major criticism addressed to the Tribunal, that of its alleged lack of independence, the charge that the Tribunal is a political tool of the Western Powers and NATO.

Under the Completion Strategies mandated by the Security Council, the ICTY and the ICTR should complete all their work in 2010. This target date will probably have to be extended, in order to ensure that all principal indictees are brought to justice.

The US and the UK have been the best supporters of the Tribunal, while the French, who were instrumental in its creation, have shown reticence or even obstruction in arresting accused, and in providing witnesses and documentation. France's historical link with the Serbs, memories of World War I, support for Marshall Tito's unified Yugoslavia, led President Mitterand to remain too close to the Serb party to the conflict.

The Srebrenica massacre and its aftermath have raised difficult questions for the French authorities, for France itself, and for its relationship with the Tribunal. French government policy towards Yugoslavia, its support for a

non-aggressive humanitarian intervention, the leadership provided by French generals to UNPROFOR in Bosnia, its reluctance to call on NATO air strikes, a US-dominated organization, set France as one of the causal factors which allowed the massacre to take place.

Thanks to pressures by a few governments and by NGOs, the UN had to initiate an inquiry into the events leading to Srebrenica, its causes and responsibilities. Its internal report was issued on 15 November 1999, four years and four months after the massacre took place. Thanks to pressures by MSF and other human rights NGOs, another inquiry was carried out by a French Information Parliamentary Mission, whose report was issued on 22 November 2001. None of these inquiries was carried out by external, independent, non-government groups: the UN inquiry was internal to the organization, and the French one was carried out by ten parliamentarians. The first Dutch report was carried out by an independent Institute, the second one was the work of a Parliamentary Inquiry Commission with rights to summon witnesses to testify under oath.

The UN report gave a detailed narrative of the background preceding the Security Council resolution creating safe areas, later resolutions, the evolution of the safe area policy, events of January to June 1995, the fall of Srebrenica, 6–11 July 1995 and its aftermath, the new safe area policy, July-October 1995, and an assessment.

In addition to assigning the primary and direct responsibility of the Serb leaders, Radovan Karadzic and Ratko Mladic for the aggression on Srebrenica and the massacre, the report acknowledged errors of judgment on the part of the UN, errors based on the organization's philosophy of impartiality which was wholly unsuited to the conflict. Also blamed were the Security Council and individual governments.

The French report based most of its facts on the UN report, with the complement of documentation and testimonies. It also condemned the primary Serb actors and also underlined the UN peacekeeping culture as an important element in inaction in the face of the developing crisis. It also blamed the lack of political will to intervene on the part of France, the UK, the USA and the Bosnian authorities. The report blamed the Dutch battalion for its passivity, Akashi's failings and UNHCR inertia. The report was specific in blaming General Janvier for errors of judgment, linked to French foreign policy and military culture. The Mission recognized that Srebrenica was a failure for France.

For the second time, after the Parliamentary Information Mission on Rwanda, a Parliamentary Mission had been created to investigate a

major foreign political event with sensitive implications for France's foreign policy as decided and led by the President of the Republic. It was the modest but significant beginning of a more assertive stand by the French Parliament in front of an all-powerful executive, with another scrutiny and opening of secret 'high politics' to the parliamentarians, to French public opinion and foreign governments and observers.

However, this opening was narrow and reluctant.

First, the Mission was not an Inquiry Commission, only an Information Mission with no judiciary powers, in contrast with the Dutch Parliamentary Commission. Secondly, the Ministry of Defence denied open hearings to key witnesses. Thirdly, the Ministries of Defence and of Foreign Affairs were reluctant to provide all documents and internal notes requested by the Mission, while the Dutch Parliamentary Commission had access to their Ministries' secret archives. The French Ministries maintained an obsolete, undemocratic, counter-productive, tradition of secrecy. Its unfortunate implication was that the government was hiding important facts which might incriminate senior political and/or military leaders.

The Mission members themselves recognized that 'there were points on which they were unable to attain absolute certainty'. Their report is a useful step towards establishing facts but it remains incomplete and unsatisfactory. NGOs and historians will have to go further and more thoroughly into the actions, inactions and responsibilities of the principal actors, Serbs, Bosnian Serbs, Croats, French, British and Americans.

Members of the Mission also said that they did not see themselves as prosecutors, judges or historians.

Indeed, the publication of their report was not followed by any political, administrative or judiciary decision: no minister or general resigned or apologized, no one was dismissed, no one was prosecuted on civil or criminal charges. France did not acknowledge any responsibility nor guilt, it did not apologize for its actions or omissions, nor did it offer any compensation.

Chapter 12

The International Criminal Court

On 17 July 1998, the United Nations Diplomatic Conference held in Rome (Italy) established the International Criminal Court (ICC) by adopting its Statute by a vote of 120 in favour to seven against, with 21 abstentions. The USA, together with China, Israel, Libya, Iraq, Qatar and Yemen, voted against. Russia abstained, although it signed the Statute on 13 September 2000. The USA, Iran and Israel signed the Rome Treaty on 31 December 2000, but the USA withdrew from the Statute on 6 May 2002. France ratified the Rome Statute on 9 June 2000.

With the deposit of the sixtieth instrument of ratification on 11 April 2002, the Rome Statute entered into force on 1 July 2002.[1] By the end of 2005, 100 states had ratified the Stature.

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[1] A detailed description and discussion of the International Criminal Court, and of its Friends and Foes are in Beigbeder (2005), Chapters 6 and 7. The basic reference book is Roy S. Lee (Ed.), UNITAR, In cooperation with The Project on International Courts and Tribunals, *The International Criminal Court, The Making of the Rome Statute, Issues, Negotiations, Results* (Kluwer Law International, The Hague/London/Boston, 1999).

The origins of the ICC

Gustave Moynier, one of the Swiss founders of the International Committee of the Red Cross, felt that the First Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field of 1864, which had been widely ignored during the 1870 Franco-Prussian war, needed a complement: he proposed in 1872 the establishment of an international criminal court to deter violations of the Convention, and to bring to justice anyone responsible for such violations. This proposal was not considered by states. Between the two World Wars, a few scholarly and professional organisations and NGOs initiated and promoted the concept and the creation of an international criminal court. In 1927, during the Paris Congress of the 'Fédération internationale des ligues des droits de l'homme', the Austrian League proposed to promote the creation of a 'Permanent International Court of Moral Justice', the action of which would ensure an effective and international protection of human rights within the framework of the League of Nations. This proposal was adopted by the Congress and has been included as one of the main demands of the Federation since then.

A first reference to an 'international penal tribunal' was made in Article VI of the 1948 Genocide Convention as an alternative to a competent national tribunal:

> Persons charged with genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those contracting parties which shall have accepted its jurisdiction.

The International Law Commission was requested to pay attention to the possibility of establishing a Criminal Chamber of the International Court of Justice. Through the deliberate stalling of Member states, 50 years elapsed before the Court's Statute was adopted.

In 1950, the General Assembly set up a Special Committee to prepare a Draft Statute for an ICC, which produced a text in 1951, revised in 1953. The text was deferred over the next few years on the pretext that the crime of aggression had not been defined. Among the 'stalling' states, the USSR and other Socialist countries were ideologically hostile to 'bourgeois' international justice. The issue was only raised again in 1989, at the end of the Cold War, by Trinidad and Tobago in a Special Session of the General

Assembly, proposing the creation of a specialized ICC for drug-related offences. As requested by the General Assembly in 1990, 1992 and 1993, the ILC prepared a Draft Statute in 1993, revised in 1994.

In December 1995, the General Assembly established a Preparatory Committee, again open to all Member states of the UN and UN agencies (Res. 50/46). The Committee was not only to discuss issues but also to draft texts, with a view to preparing a widely acceptable consolidated text of a convention for an ICC as a next step towards consideration by a conference of plenipotentiaries. The Committee met during March–April and August 1996, February, August and December 1997, and March–April 1998.

In December 1997, the General Assembly decided to convene the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. The Conference was held in Rome from 15 June to 17 July 1998, when the Statute was finally adopted.

France's Initial Ambivalence

France was one of the promoters of the Court. Robert Badinter, Socialist Minister of Justice from 1981 to 1986 during the Mitterand presidency, was one of its supporters. He had been instrumental in obtaining legislative approval of the French law abolishing the death penalty in September 1981. Another supporter was the Ministry of Foreign Affairs, under the direction of its Minister Alain Juppé (Gaullist) from 1993 to 1995, then Prime Minister from 1995 to 1997. President Mitterand, during his terms of office (1981–1995), was in favour of the creation of the Court.

To the surprise or dismay of many delegations at the April and August 1996 sessions of the Preparatory Committee, France's position had changed. It was the only permanent member of the Security Council which demanded that the future Court could only initiate an investigation with the approval of the Council: France could thus veto such an initiative in cases or places of concern to it. This proposal, considered as 'scandalous' by many countries, was later withdrawn by France.

France then requested that the consent of three categories of states should be obtained before the Court could exercise jurisdiction on a case: the states on which territory the crime had been committed, the states of the nationality of the victims, and those of the nationality of the suspects. On 28 August 1996, Lucius Caflisch, the Swiss delegate condemned this position: 'France has abandoned any approach dictated by logic. What is the

point of creating a body if one does everything to prevent it from taking action? Any court with an optional jurisdiction cannot succeed'.[2]

Many delegates accused France of joining the group of opponents to the Court, such as Iraq, Iran, Libya, Myanmar, China, India, Brazil, Indonesia and Singapore. Like France, Japan was opposed to the autonomous right of initiative of the Court, and of issuing an arrest warrant. Delegates of other European countries showed irritation, they felt that France did not want the Court to be created.

The most active promoters of the Court included Canada, Germany, Australia and Switzerland, Argentina, even Russia.

France's position had changed with the election of President Jacques Chirac in 1995, under the pressures of the French military, who feared that the new jurisdiction might indict them for their action in the Former Yugoslavia or during the genocide in Rwanda. The military's fears even extended to older interventions, such as the French war in Indochina, the repression of a revolt in Madagascar, the war in Algeria, although the new court would have no retroactive jurisdiction.

General Olivier Rochereau, Director of general administration at the French Ministry of Defence wrote in the periodical *Défense Relations Internationales* (August 1996, No. 207):

> The creation of an international penal justice is a noble objective. But, in the present situation, present proposals do not appear to be compatible either with the interests of the most active states in the implementation of humanitarian law, or with the legal protection of their citizens, or even with the simple political realism.[3]

In another review, referring to the International Criminal Tribunal for Rwanda, he wrote, also in 1996, that 'the most recent experience shows that international jurisdictions are more often used as media platforms than as bodies in charge of applying the law.'[4] Explaining that criminal justice cannot function without international police to arrest individuals suspected of war crimes, a criminal tribunal, unable to obtain custody of accused, might 'justify its existence' in accusing peacekeeping forces. 'Witnesses might become accomplices.'

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[2] See *Le Monde*, 'A l'ONU, la France s'oppose à la création d'une Cour criminelle internationale', Afsane Bassir Pour, 6 September 1996.

[3] Quoted by François-Xavier Verschave, *La Françafrique, le plus long scandale de la Ràpublique* (Stock, Paris, 1998–1999) p. 34.

[4] *L'armée d'aujourd'hui*, February 1996.

The opposition of the French Army to international justice was based on its 'traumatic' experience with the International Criminal Tribunal for the Former Yugoslavia. The Tribunal had asked to hear as witnesses a number of French generals, former Blue Helmets in UN peacekeeping operations. France, which had an obligation of cooperation with the Tribunal, only allowed a few French officers to testify under limited conditions.

French officers consider that their only allegiance is to their superiors and to their government, and were shocked at being asked to appear before international tribunals, a new 'judiciary species' yet unknown to them, and particularly to be submitted to the 'anglo-saxon' cross-examination process. Besides their unfounded fear that they might become accused, and not only witnesses, their argument is that the possible examination and prosecution by international courts would have the effect of deterring countries from contributing their armed forces to international peacekeeping missions. France and the US had a similar position in this regard, insofar as both countries claimed to have a dominant role in peacekeeping operations, although this was more true for France than for the US. In April 1998, the French delegate said that the Statute to be adopted by the Conference in Rome in June–July 1998 'should have procedural guarantees protecting French soldiers engaged in foreign operations from political attacks of an unjustified judicial guerrilla'. If French soldiers were to commit crimes 'obviously they would be prosecuted before French tribunals. There is no intent to protect French soldiers, the question is to ensure that peacekeeping actions are to be possible'.[5]

The French leaders were in a quandary: France, with other countries, had created the International Criminal Tribunals for the Former Yugoslavia and for Rwanda, and had agreed to cooperate with the Tribunals, but it stalled when it came to satisfying its obligations.

Under Chirac's presidency, his party lost the legislative elections in June 1997, and the Socialist Lionel Jospin set up a new government. He initially made no change in the French policy of obstructionism in the Preparatory Committee for the ICC, decided upon by the President with the support of the Ministers of Foreign Affairs and Defence. However, in September, Elizabeth Guigou, Minister of Justice, wrote to Hubert Védrine, Minister of Foreign Affairs, underlining France's isolation amidst its Western partners, and asking for a review of the French position.[6]

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[5] *Le Monde*, 5 April 1998.

[6] *Le Monde*, 8 November 1997.

At the last session of the Preparatory Committee, from 17 March to 4 April 1998, no agreement on the creation of the ICC was in view. The draft Statute of the Court contained more than 1700 unagreed points in brackets, to be negotiated in the Rome meeting of 16 June to 17 July 1998.

The debate opposed those countries who wanted a really independent court, which might be approved only by a limited number of democratic countries, to those who would agree to the creation of a court subject to a number of political concessions.

The French and American delegations, with the support of Russia and China, wanted the Security Council to have the right to stop an investigation or prosecution started by the Court. The British delegation disagreed. The compromise proposed by Singapore, that the Council may forbid it by a vote, was finally agreed in Article 16 of the Statute.

France, with the support of the US, China, India and Mexico, again demanded the consent of the three categories of states to any investigation or prosecution. However, France's position evolved on the basis of an agreement on the complementary nature of the International Court versus national criminal jurisdictions (Article 1). The jurisdiction of the Court was also limited to crimes committed on the territory of a State Party to the Statute, or of a State who has accepted the jurisdiction of the Court, or for crimes committed by a person who is a national of such a State (Art. 12).

At the beginning of the Rome meeting, France and the USA parted ways. The USA maintained a strong opposition to the Court, while France adopted a more pragmatic approach, after having obtained either satisfaction, or an acceptable compromise, on several important points, such as the primacy of national jurisdiction, and the possibility of intervention by the Security Council to prevent or stop an investigation by the Court. Another safeguard against the possible abusive independence of the Prosecutor, was to make an investigation, and the issue of a warrant of arrest of a person subject to approval by a Pre-Trial Chamber of the Court (Art. 57, 58).

A few democratic countries and a coalition of NGOs considered that the credibility of the Court required its total independence from the power of states. Countries such as Italy and India were challenging the domination by the five permanent members of the Security Council because they wanted to gain the same status. A few developing countries challenged the hegemony of the USA, or the existing world political order.

France and the USA considered that the Court's jurisdiction should be limited to crimes of genocide, crimes against humanity and war crimes. India, Turkey and Sri Lanka wanted to add the crime of terrorism among core crimes, other countries protested against the powers granted to the

Prosecutor (China), or against the non-inclusion of the death penalty (Singapore).

Hubert Védrine, the French Minister of Foreign Affairs, said that war crimes have a 'different nature' than genocide and crimes against humanity, and should be treated differently. In his view, under international humanitarian law, war crimes include isolated actions which do not have the same dimension, nor the systematic and planned character as crimes against humanity. They should be judged by national justice.[7]

At the demand of the French delegation, under pressure by its military, a new Article 124 was included in the draft Statute, which includes a controversial optional provision. A state, on becoming a party to the Statute, may declare that, for a period of seven years after the entry into force of the Statute for the state concerned, it does not accept the jurisdiction of the Court with respect to war crimes when a crime is alleged to have been committed by its nationals or on its territory: an assurance that national justice will do its work (during seven years) or a self-incriminating clause possibly meaning that alleged perpetrators of the concerned state will enjoy impunity for their war crimes for seven years, and only then be subjected to the Court's jurisdiction?

On 17 July 1998, the last day of the Conference, when the draft Statute was about to be adopted, India put forward two amendments. The first was to deprive the Security Council of the power to refer situations to the Court and to request the Court to defer investigation or prosecution. The second was to include the use of nuclear and other weapons of mass destruction in the list of war crimes. The US proposed an amendment which sought to limit the Court's jurisdiction to those cases when only the state of the accused had accepted the jurisdiction of the Court. These amendments were rejected by a 'no action' motion proposed by Norway, thus allowing the adoption of the Statute on the same day.

France signed the Statute in Rome and its Parliament ratified it on 9 June 2000. On 1 July 2002, the Rome Statute entered into force.

The Statute of the Court (A Summary)[8]

The Court is an independent permanent institution with the power to exercise jurisdiction over persons for the most serious crimes of

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[7] *Le Monde*, 19 June 1998.

[8] This is only a short summary of the main elements of the Court's Statute. The text of the Statute is in Lee (Ed.)(see Note 1), and details are given in Beigbeder (2005), Chapter 6.

international concern. It is complementary to national criminal jurisdictions (Art. 1).

The Court is not part of the UN, unlike the International Court of Justice (ICJ) which is a principal organ of the UN, – nor is it a subsidiary organ of the Security Council, as the ICTY and ICTR. However, the new Court has been brought into relationship with the UN through an agreement (Art. 2). There is a direct link between the ICC and the UN Security Council as shown below. Its seat is in The Hague, which is already the seat of the ICJ and of the ICTY (Art. 3).

Established by treaty, and not by a decision of the Security Council as were the ICTY and ICTR, its Statute is not binding on non-ratifying states.

The ICC is composed of the following organs: the Presidency, - an Appeals Division, a Trial Division and a Pre-Trial Division, - the Office of the Prosecutor and the Registry (Art. 34).

Its 18 judges are elected by secret ballot by the Assembly of States Parties for non-renewable terms of nine years. The President and the First and Second Vice-Presidents, constituting the Presidency, are elected by an absolute majority of the judges for a term of three years. They are eligible for re-election once. The Presidency is responsible for the administration of the Court, with the exception of the Office of the Prosecutor (Art. 38).

The Office of the Prosecutor acts independently as a separate organ of the Court. It is responsible for receiving referrals and any substantiated information on crimes, for examining them and for conducting investigations and prosecutions before the Court. The Office is headed by the Prosecutor, assisted by one or more Deputy Prosecutors.

The Registry is responsible for the non-judicial aspects of the administration and servicing of the Court, without prejudice to the functions and powers of the Prosecutor. It is headed by the Registrar, as principal administrative officer of the Court. He exercises his/her functions under the authority of the President of the Court. He is assisted by a Deputy Registrar (Art. 43).

The Assembly of States Parties is the governing body of the Court. Each State Party has one representative to the Assembly who may be accompanied by alternates and advisers.

The ICC's jurisdiction is limited to four crimes: genocide, crimes against humanity, war crimes, and the crime of aggression (Art. 5, 6, 7, 8).

On the latter, Article 5.2 prescribes that 'The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the

conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations'. This task has been entrusted to the Preparatory Commission and is subject to the review and approval of the Assembly of States Parties. At its 'Informal inter-sessional meeting of the Special Working Group on the Crime of Aggression' held at Princeton University (N.J., USA) from 13 to 15 June 2005, the Group did not come to an agreement on the definition of the crime of aggression, nor on the exercise of jurisdiction of the Court over this crime.[9]

The Court has jurisdiction to prosecute individuals when:

- Crimes have been committed in the territory of a state which has ratified the Statute (Art. 12.2 (a));
- Crimes have been committed by a citizen of a state which has ratified the Statute (Art. 12.2 (b));
- A state which has not ratified the Statute has made a declaration accepting the Court's jurisdiction over the crime (Art. 12.3);

The Court's jurisdiction has no retroactive effect. It has jurisdiction only over crimes committed after the Statute entered into force, i.e. as from 1 July 2002 and only with regard to a state's ratification, if it occurred later than 1 July 2002, unless that state has made a declaration under Article 12.3 (Art. 11).

The Court may initiate prosecution in the following cases, under the conditions stated above:

1. The Prosecutor may initiate investigations proprio motu on the basis of information on crimes within the jurisdiction of the Court (Art. 15);
2. States which have ratified the Statute may ask the Prosecutor to investigate a situation where one or more of the crimes have been committed within the jurisdiction of the Court, for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes (Art. 14);
3. The UN Security Council, acting under Chapter VII of the UN Charter, can ask the Prosecutor to investigate a situation where one or more crimes appear to have been committed (Art. 13(b)). In such

[9] Doc. ICC-ASP/4/32, Annex II, Special Working Group on the Crime of Aggression, Annex II.A.

a case, the Court will have jurisdiction even if the crimes occurred in the territory of a state which has not ratified the Statute or was committed by the national of such a state.

In all cases, only the Prosecutor, not states or the Security Council, assesses and decides whether to initiate an investigation and, based on its findings, whether to prosecute, subject to a decision by the Pre-Trial Chamber (Art. 15), and subject to the following limitations.

Although the Preamble of the Statute refers to an 'independent' Court, a number of qualifications limits the powers of the Court and in particular those of its Prosecutor, in contrast with the broad autonomy of the Prosecutor of the ICTY and ICTR:

1. The Court determines whether the case is or is not admissible on the grounds of the primacy of national courts and its limitations (Art. 17).
2. The Court may exercise its jurisdiction only for crimes committed on the territory of a State Party to the Statute, or of a State which has accepted the jurisdiction of the Court, or for crimes committed by a person who is a national of such a State (Art. 12).
3. The Prosecutor's investigation has to be authorized by a Pre-Trial Chamber of the Court. The issue of a warrant of arrest of a person, based on the application of the Prosecutor, is also subject to approval by the Pre-Trial Chamber (Art. 57, 58).
4. As another limitation of the Prosecutor's powers, no investigation or prosecution may be commenced or proceeded with for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the UN Charter, has requested the Court to that effect – that request may be renewed by the Council under the same conditions (Art. 16). In this respect, such a resolution will require a majority of nine votes, including the five permanent members of the Council: a single veto would annul such a request.

The Statute then defines the rights of the accused, the rights of victims and witnesses, reparations to victims, penalties (which exclude the death penalty), cooperation with states and financing.

The first session of the Assembly of States Parties approved the Relationship Agreement between the Court and the United Nations, and the Agreement on the Privileges and Immunities of the International Criminal Court. The latter Agreement had 31 ratifications by 19 October 2005.

On 28 October 2005, at a ceremony held at the UN headquarters in New York, Mexico deposited its instrument of ratification of the Rome Statute, bringing the number of States Parties to 100.

In accordance with Article 13(a) of the Statute, three States Parties have so far referred 'situations' (in which one or more crimes under the jurisdiction of the Court appear to have been committed) to the Office of the Prosecutor of the ICC: Uganda in January 2004, the Democratic Republic of Congo in April 2004 and the Central African Republic in January 2005. In March 2005, the UN Security Council has referred one such situation to the Prosecutor in the case of The Darfur, Sudan, in accordance with Article 13(b) of the Statute. The Chief Prosecutor, Luis Moreno-Ocampo has decided, so far, to open investigations into three situations: in June 2004, in the Democratic Republic of the Congo, in July 2004 in Uganda and in June 2005, in The Darfur, Sudan.

On 13 October 2005, Pre-Trial Chamber II unsealed the warrants of arrests for five senior leaders of the Lord's Resistance Army for crimes against humanity and war crimes committed in Uganda since July 2002. These were the first warrants of arrests issued by the Court.

On 17 January 2006, the Pre-Trial Chamber (I) of the ICC issued a decision recognising the right of six victims to participate in proceedings before the Court, including at the stage of the investigation then being conducted in the Democratic Republic of Congo. The International Federation for Human Rights (FIDH) assisted the victims with their applications to the ICC. The decision, affirming the new role of victims in international justice, was an international legal first.[10]

France's Cooperation with the Court

After the adoption of the Statute and the creation of the Court, France's attitude towards the new court became one of genuine cooperation and support, on its own and, again, as a loyal member of the European Union, in the latter's strong support for the ICC. Forgetting its initial obstruction, official France (the Ministry of Foreign Affairs), took pride in the adoption of many French concepts in the Statute of Rome: the creation of a Pre-Trial Chamber, the participation of victims in all stages of the judiciary process,

[10] FIDH *e-newsletter* //53, http://www.fidh.org, 20 January 2006.

and the possibility for the Court to grant reparations. The Ministry justified the insertion of Article 124 (the seven-year delay to apply the Court's jurisdiction to war crimes) at France's insistance, by France's military participation in numerous UN peacekeeping operations, and the need for a 'balanced text' avoiding political prosecutions or the development of a criminal policy in contradiction with that of the Security Council. The Ministry added that, according to the present Statute, the French declaration would lapse in 2009.[11]

Members of the French Parliament have expressed their disagreement with this official position. In a debate at the National Assembly in February 2002 on 'Cooperation with the International Criminal Court', the Rapporteur noted that France was the only country having made a declaration under Article 124, and proposed that France annuled it before the end of the seven-year period. Other parliamentarians were in favour of the abolition of this Article from the Statute. During the same debate, the Minister of Justice praised the work of the 'French Coalition for the ICC', one of the most numerous and active members of the international NGO coalition who played a supportive and decisive role during the negotiations leading to the creation of the Court.[12] The Coalition now promotes the universal ratification of the Rome Statute and monitors ICC activities.[13]

France signed the Statute on 18 July 1998 and was the twelfth state to ratify it, on 9 June 2000, after the unanimous approval given by the French Parliament. The law regarding France's cooperation with the Court and rules of procedures was promulgated on 26 February 2002. France was among the first states to ratify the Agreement on the Privileges and Immunities of the ICC by a law of 31 December 2003. A draft law revising the French Penal Code, in order to adapt it to the principle of complementarity of the Statute, was under consideration in 2005.

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[11] French Ministry of Foreign Affairs, 'Cour Pénale internationale, – De l'influence française dans le statut de la CPI, – L'engagement français en faveur de la CPI', http://www.diplomatie.gouv.fr/fr/actions-france_830/droits-homme . . . updated: 1 June 2005, – In 2004, France had troops in five UN peacekeeping operations, and in 2005, in six: see 'Projet de loi de finances pour 2005: Action extérieure de l'Etat (moyens de l'action internationale), http://senat.fr/rap/a05-102-1/a05-102-14.html accessed on 14 January 2006.

[12] See: http://www.assemblee-nationale.fr/cra/2001-2202/2002021909.asp//. . . , session of 19 February 2002.

[13] In 2005, the NGO Coalition for the International Criminal Court had 2000 NGO members in over 150 countries. It represents, facilitates and coordinates the work of its membership, while serving as the primary information source on the ICC and a liaison between governments, ICC officials, international organizations, academics and civil society members. The Coalition Newspaper is 'The ICC Monitor'.

France was, in 2005, the third contributor to the budget of the ICC of €66.7 million: 12.47 per cent, immediately after the UK, the second largest contributor, and after Germany, the first. French nationals have important positions in the ICC: Claude Jorda was elected on 7 February 2003 to a post of judge for six years and designated as President of one of the Pre-Trial Chambers. Jorda was elected judge at the International Criminal Tribunal for the Former Yugoslavia in 1994, then re-elected in 1997. He was elected President of this Tribunal in November 1999. Bruno Cathala was elected Registrar on 24 June 2003 by an absolute majority of the judges for a five-year term. Prior to joining the ICC, he was Deputy Registrar of the ICTY since May 2001.

On 12 September 2003, the Assembly of States Parties unanimously elected Simone Veil, a former Minister of Health of France and former President of the European Parliament, as one of the five members of the Board of Directors of the Victims Trust Fund. She represented the Western European and Others Group. The other members were Archbishop Desmond Tutu, former Chairman of the Truth and Reconciliation Commission of South Africa representing Africa, - Queen Rania of Jordan, for Asia, Tadeusz Mazowiecki, former Prime Minister of Poland, for Eastern Europe, – Oscar Arias Sanchez, former President of Costa Rica, for Latin America. In April 2004, Simone Veil was elected President of the Board by the other members.[14] Elected for a term of three years, renewable once, members serve in an individual capacity on a *pro bono* basis.

France maintains a permanent dialogue with the senior members of the Court. For instance, the ICC judges were invited on 18 June 2004 in Paris at the invitation of the French Court of Cassation, and Michel Barnier, then Minister of Foreign Affairs, visited the Court on 19 April 2005. France also provides technical assistance to states which consider ratifying the Statute and to those wishing to adapt their national legislation to the requirements of the Statute.

The Union adopted a Common Position on the ICC on 11 June 2001, which promotes the coordination of EU activities for the implementation of the Statute, the ratification and implementation of the Statute in third countries, and the effective establishment and good functioning of the Court.[15]

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[14] Doc. ICC-ASP/3/14, 29 July 2004.

[15] 'EU 'Action plan to follow-up on the common position on the international criminal court', http://europa.eu.int/comm/external_relations/human_rights_rights/doc/icc. 15 May 2002.

France has played an active role in the definition of the European Union's policy in support of the Court, and in particular in the drafting and implementation of the EU 'Action plan to follow up on the common position on the International Criminal Court', adopted by the European Parliament on 28 February 2002. On 16 June 2003, the EU Council affirmed that the principles of the Rome Statute are fully in line with the principles and objectives of the Union and that the serious crimes within the jurisdiction of the Court are of concern to all Member States, which are determined to cooperate for the prevention of those crimes, and for putting an end to the impunity of their perpetrators. The Union is convinced that universal accession of the Rome Statute is essential for the full effectiveness of the Court. It considers as 'eminently important' that the integrity of the Rome Statute be preserved. It noted that all the (then) Member States of the Union had ratified the Rome Statute. It updated the 2001 Common Position and set out Common Guidelines. The objective of the Common Position is to support the effective functioning of the Court and to advance universal support for it by promoting the widest possible participation in the Rome Statute.

France is a member of the 'Friends of the Court' group, which includes friendly states, the UN, regional and other groups of states, parliamentary groups, and NGOs.

In March 2005, France sponsored a draft resolution referring the Darfur situation to the ICC. However, Britain replaced France as the sponsor of the final resolution in order to secure US agreement not to cast a veto. The original French draft exempted persons from countries that have not signed the Statute from investigation or prosecution by the Court. But the US wanted stronger guarantees. The key concession to the US was a clause giving exclusive jurisdiction over 'nationals, current or former officials or personnel from a contributing state outside Sudan which is not a party to the Rome Statute . . . .' for 'all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing state'. The resolution, 1593 (2005) was adopted on 31 March 2005 by 11 votes in favour to none against, with four abstentions (Algeria, Brazil, China and the US).

The resolution set a precedent as it was the first time that the Security Council referred a case to the ICC under Article 13 (b) of the Statute, acting under Chapter VII of the UN Charter. Human Rights Watch (HRW) said that this represented a 'historic step towards justice for the massive

human rights violations committed in Darfur', sending a strong message that those most responsible for serious crimes would be held accountable.[16] It signified 'an important milestone for the ICC, demonstrating that the Court is a crucial mechanism to ensure accountability for serious crimes. It also creates opportunities for increased engagement between the Security Council and the ICC, which can help to enhance the legitimacy of the Court'. However, HRW opposed the exemption included in the resolution, deemed to be a violation of the ICC Treaty.

The French delegate, Jean-Marc de la Sablière recalled that the International Commission of Inquiry on violations of international humanitarian law and human rights in Darfur had recommended the referral of the situation in Darfur to the ICC. Referring the issue to the ICC was the only solution: 'That was why France had been the initiator of this resolution and voted in its favour.' The French delegation had been ready to acknowledge immunity from the ICC for nationals from States not party to the Rome Statute. He reaffirmed his confidence in the ICC and hoped that those clauses concerning immunity from the Court would be dropped very soon.

The US delegate, Anne Woods Patterson, said, in part, that, although her delegation had abstained, it had not dropped, and indeed continued to maintain, its 'long-standing and firm objections and concerns regarding the Court'. For the US, 'The Rome Statute was flawed and did not have sufficient protection from the possibility of politicized prosecutions'.[17]

The US Position

In contrast with the French, who were finally satisfied with amendments made to the draft Statute and signed it, the Americans obtained a few changes but remained opposed to the Court. After Clinton's signature of the Treaty was 'undone', the Bush administration maintained that the Statute was 'deeply flawed', and started a world-wide campaign of blunt

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[16] 'Council Makes Historic Referral on Darfur to ICC', Elise Keppler amd Yolanda J. Revilla, in *The International Criminal Court MONITOR, the Newspaper of the NGO Coalition for the International Criminal Court,* Issue 29 – April 2005.

[17] UN *Press Release* SC/8351, 31 March 2005, 'Security Council refers situation in Darfur, Sudan, to Prosecutor of International Criminal Court. See also: *The New York Times*, Warren Hoge, 'UN Votes to Send Any Sudan War Crime Suspects to World Court', 1 April 2005. On the US position, see Beigbeder (2005), pp. 191–202.

security and financial threats and pressures intended not only to 'protect' its military personnel from an 'international kangaroo court', but to destroy the Court, or at least, to limit its legitimacy and potential impact. One such tool is the pressure on foreign governments to sign bilateral agreements with the US preventing any surrender of US nationals to the ICC. The US has traditionally been strongly opposed to any international justice which could potentially assert jurisdiction over US nationals for war crimes, crimes against humanity, or torture, as defined by international conventions, allegedly committed by US forces. The allegations that US forces may have committed war crimes and/or torture in Iraq, Afghanistan and Guantanamo, have re-inforced the US determination to stay aloof from any international court. The US rationale is that any such alleged crime would be judged by American civil or military tribunals: the complementarity clause in the Rome Statute giving primacy to national courts has not affected the US position.

Hence the importance of the Darfur resolution in spite of US exceptions and denials: for the first time, the US has allowed the Security Council to adopt a resolution referring a situation to the Prosecutor of the ICC and requesting the Government of Sudan and all other parties to the conflict to cooperate with and give assistance to the Court. 'While recognizing that States not party to the Rome Statute have no obligation under the Statute, [the Security Council] urges all States and concerned regional and international organizations to cooperate fully'.

Even with US abstention and the insertion of exclusion measures, the legitimacy and essential international judiciary role of the Court in relation with individual violations of humanitarian and human rights law has been acknowledged.

Conclusion

The French and the American objections to having their military personnel subjected to international courts were similar: the French and American governments have provided military forces to international peacekeeping operations, and while their own military or civilian courts will examine and punish alleged crimes committed by their officers and soldiers, if so proved, they refuse to be 'punished' for their role in international missions by having their military personnel (or even possibly their civilian, political leaders) suspected of crimes by international courts, called as witnesses or accused by these courts.

The French political authorities, under pressure by the military, have opposed requests for the hearing of French military officers by the International Criminal Tribunals for the Former Yugoslavia and for Rwanda, in violation of their obligation to cooperate with these Tribunals. The slow creation of the International Criminal Court, the difficult negotiations, have raised similar problems for the French authorities: The conflict was and is, on the one hand, between the declarations that France is a major supporter of international law and human rights, that it fights against the impunity of those violating international humanitarian law abroad, that it has approved the creation and work of the Nuremberg, Yugoslavia and Rwanda tribunals, but, on the other hand, that French governments become wary, or even hostile, when international justice approaches French citizens.

During the negotiations leading to the Rome Statute, the French have obtained a number of guarantees aimed at protecting all accused, but essentially their nationals, from the Court's investigations and prosecution: among others, the primacy of national justice, statutory limits to the independence of the Prosecutor, the Pre-Trial Chamber, the right of the Security Council to prevent or stop an investigation or prosecution for a renewable period of twelve months. Besides unspoken political considerations, these guarantees have given enough satisfaction to the French authorities that they stopped stalling and signed the Treaty. Thereafter, France has been carrying a constructive cooperation with the Court.

It is unfortunate that these guarantees have not (yet?) convinced the US government that their 'crusade' against the Court is misplaced, unnecessary and counterproductive: it allies the US, as France before it changed its stance, with such 'rogue' states as Cuba, North Korea, China, Sudan, Egypt, Saudi Arabia and other countries with a poor record on the protection of human rights.

In its efforts to protect its own nationals, and its attacks against the ICC, the US, like France before it changed its position, may be accused of supporting the impunity of the world's major tyrants.

Chapter 13

Conclusion

France, after centuries of monarchies, two Empires and many revolutions, emerged as a durable democracy after the 1870 military defeat and the demise of the 2nd Empire. The Third Republic, with all its defects, instituted a representative parliamentary regime, it progressively established basic freedoms and civil and political rights: the right to freedom of thought, conscience and religion, freedom of association, including the right to form and join trade unions, equality before the law, free and periodical elections. It developed free education, provided health protection. There was a free press, and other media – radio, television – were freed from state control in the 1980s.

Democracy survived over the long and exhausting First World War, which bled and almost ruined France although it ended with the Allies' victory.

The Third Republic dissolved itself as a result of the unexpected and sudden defeat of June 1940. It was replaced by an authoritarian regime headed by Marshall Philippe Pétain, with the approval of the Parliament and the initial assent of the French population. A semi-fascist regime was installed, where all powers – constitutional, executive, legislative and administrative – were given to the Head of State. All functionaires swore allegiance to Pétain, including the strictly-controlled judges.

Convinced that Hitler would win the war, French leaders offered to collaborate with the Nazis, and freely adopted, without initial pressure by the

German occupiers, anti-semitic laws of exclusion, which led to the internment of foreign and French Jews, and, as from 1942, their transfer to French transit camps en route to German extermination camps. With a long tradition of submission to the executive, French judges duly applied Vichy's laws without questioning their conformity with French human rights standards, with the proclaimed equality of all French citizens, nor with 'fraternity' or basic humanity. Summary justice was applied by French judges to political opponents, 'terrorists', resistants and Communists.

After France's Liberation from German occupation by the Allies, De Gaulle re-established democratic institutions and tried to channel feelings of revenge against the 'collaborationists' through organized justice. The first trials, those of Pétain and Laval among others, were however tainted with haste and bias. The 'épuration', the cleaning operation of dismissal, shaming and punishment of political, police, economic leaders and artists, followed with a decreasing intensity over the years.

Still shocked by the defeat of 1940 and humiliated by the German occupation of their country, divided between the few resistants, the collaborationists and those who just waited out the war, the French found succour in the Gaullist myth of a strong, victorious France, at the head of a large colonial Empire. The French people were convinced that they had exercised a benign and positive domination over the 'natives', to the latter's benefit.

Neither the French leaders nor the population was prepared for the world movement of decolonization which spread among all European-held colonies.

Rebellions followed by repression triggered a vicious circle which only strengthened the local populations' will for independence. Colonial 'justice', separate from and alien to justice standards applied in France itself, was applied to the rebels, while a few trials of pro-independence French individuals took place in France itself.

French colonies became independent one after the other, with or without armed rebellion and repression. During the Algerian war, atrocities were committed by the rebels and war crimes and torture were committed by the French army: the latter were never submitted to justice. After the independence of Algeria, it was expected that France, freed of colonial links, would again develop into a stable and fair 'Republic', with a clear separation of powers between the executive, the legislative and the judiciary, allowing the judiciary to act as a legitimate counter-power to the first two.

However, De Gaulle's Fifth Republic, adopted in 1958, gave more powers to the executive to the detriment of the legislative, in an effort to prevent the excessive turnover of governments during the Third and Fourth

Republics, and their apparent weakness. The executive maintained an undue influence on judges. As shown in Chapter 1, this imbalance allowed uncontrolled abuses, arbitrary and, at times illegal, decisions in both the domestic and foreign domains, which the judges were unable to fully investigate, and prevented to prosecute and punish all the well-known perpetrators, particularly at high levels of the executive.

Hence, there is still an unfulfilled need to create effective counter-powers at the national level, by strengthening both the legislative and the judiciary.

Healthy relations between the leaders and the populations require trust and truth. Truth applies also to the past: The French people are entitled to know the realities of their history, its high and low aspects. They must be given a realistic view of the past, freed of all myths and distortions.

However, memories of the dark years of the Occupation remained hidden from public disclosure for decades after the Liberation. Similarly, the impact of France's colonization on the local populations was only openly questioned in 2005.

Vichy's Memories

It took almost thirty years (from 1945 to the 1970s) for the French to be openly faced with their Vichy past. The first and only Vichy high-level French functionary to be judged for complicity with crimes against humanity, Maurice Papon, was sentenced to ten years' imprisonment in 1998: he was immediately freed on medical grounds. In spite of the many obstacles raised by governments, judges and the senior levels of administration to judge their peers for complicity with the Nazis in the Holocaust, the trials of Barbie, Touvier and Papon were useful in raising the awareness of the French to what happened during these four dark years, and the responsibility of the French political, military and administrative elite in their too close collaboration with the Germans, and in their own prejudices. These several trials, the work done by American and French historians, the discovery that President Mitterand had been a Vichy functionary, a long-kept secret, and that he had kept René Bousquet as a friend during his presidency, raised intense debates and controversies among historians, political leaders and the general public. The painful process has resulted in positive results: the public acknowledgement of historical facts of that period, the recognition by President Chirac, on 16 July 1995, that France had committed 'the irreparable' and that it owed the victims a debt without statute of limitations.

Colonialism and Neo-Colonialism

Most of the French population still believe that French colonization has been of great benefit to the colonized peoples. As noted in Chapter 5, a law adopted by the National Assembly on 23 February 2005 on the 'Gratefulness of the nation and national contribution in favour of repatriated French persons' contains an Article 4 requiring that 'school programmes "recognize the positive role of French presence overseas, mainly in North Africa . . ."'

This has caused a vehement controversy both in France itself and in some of the former French colonies, which extended from the abuses of colonialism to slavery.

On 7 June, the Algerian Front of National Liberation condemned 'with the greatest firmness' a law which attempts to justify the barbary of colonialism in erasing the most odious acts'. In December, leftist parliamentarians, most of whom had voted the law, changed their mind and demanded the abrogation of the law. In January 2006, President Chirac, who had promulgated the law, decided to submit Article 4 to the Constitutional Court, which will eventually result in its annulment.

In the 1980s, associations of children of North-Africans who had immigrated to France, who were French citizens, fought to obtain the acknowledgement of the bloody repression of the public illegal march in Paris of Algerian nationalists by the French police of Prefect Papon, on 17 October 1961. With the support of university professors and NGOs, they also demanded recognition of the participation of colonial troops in the Liberation of France.

In January 2005, a provocative appeal of the 'Republic's natives' (*Les indigènes de la République*) was issued by almost 4000 persons, mainly French nationals of North-African origin, and a few members from the left and extreme-left. The appeal was made in the name of 'descendants of African slaves and deportees, daughters and sons of colonised persons and immigrants' and 'activists committed to the fight against the oppression and discriminations produced by the post-colonial Republic'.

Unrelated to this appeal, riots erupted in the suburbs of Paris and other French cities (except Marseilles) between 27 October and 17 November 2005.[1]

[1] 'France PM: Curfews to stem riots', http://cnn.com/2005/WORLD/europe/11/07/France.riots, 7 November 2005, – Jonathan Laurence, Justin Vaisse, 'Understanding Urban Riots in France', *New Europe Review,* 1 December 2005.

There were violent clashes between gangs of youths of mainly North-African origin with the police. According to the official count, 8 973 vehicles were torched during the riots, with 2 888 arrests and 126 police injured. Other targets were police stations, buses, churches, schools and social centers. The cost of damaged property was estimated at €200 million.

The riots were triggered by the deaths of two teenagers in Clichy-sous-Bois, an eastern suburb of Paris. They were electrocuted when they hid in an electric power station, believing that they were being chased by the police. During the same period, minor riots took place in Belgium, Denmark, Germany, Greece, the Netherlands and Spain.

These serious incidents were first denounced as a failure of the French 'republican' integration model. In fact, it was the failure of the authorities and of the French people to make it a reality. The main reasons for the riots were high unemployment (40 per cent in the immigrant housing projects), little hope of upward social mobility, idleness and boredom. Besides a slow growth rate, the young French residents of North African and African origin faced racism and discrimination in their search for jobs, lodging and in social life. They live in poor, ill-kept, suburban ghettos, and are exposed to police violence and racial profiling.

The de Villepin government responded by firmness: A temporary curfew was ordered to stem the riots. However, the government did not take any immediate substantive measures in response to the riots. Calls by Nicolas Sarkosy for an affirmative action programme based on the US or British model were ignored or rejected as incompatible with the French 'social model' or as unfair or ineffective. The social shock created by the riots did not elicit a focused government reaction. However, the unresolved 'suburban problem' (*le problème des banlieues*) will continue to have effects at political and social levels.

On 26 November 2005, the Representative Council of black associations (*Conseil représentatif des associations noires, CRAN*) was created in France, as a federation of African and West Indian associations. Its aim is to express the need for recognition and memory related to the history of slavery and colonialism, and to fight against ethnic-racial discriminations. The Council wants to recreate a French identity based on diversity and pluralism, in direct opposition to the French dogma of equality of all citizens, the rejection of ethnic communities, the legal prohibition of identifying and counting nationals by their origin or race.

While the Vichy trauma seems to be close to extinction thanks to exposure to long-hidden facts, the long-ignored colonial 'fracture' is now a major

issue which the French government and the population are at pains to deal with.

At a recent public television programme,[2] the theme was: Should France be ashamed of its colonial past?' The general answer was: neither shame nor pride, leave history to historians. Colonial Empires are dead, and other imperial countries have not implemented decolonization better than France. Among generalities on the 'equality' of all French citizens and the affirmation that France was not racist, there was a painful recognition that principles had to be applied and that in fact, there was discrimination in France: indeed racist discrimination for education, jobs and lodgings is a major obstacle to 'equal rights'.

A participant said that she had had enough of 'repentance' and that France's national identity is fragile. She usefully proposed that France set up a 'Truth and Reconciliation Commission' based on the South African model, in order to examine French colonial past.

On slavery, President Chirac took a welcome initiative. On 30 January 2006, he declared the tenth of May a national day of commemoration of the abolition of slavery. As noted in Chapter 2, slavery was first abolished by the First Republic in the French colonies in 1794, re-established by the Consulate led by Napoleon Bonaparte in 1802, it was finally abolished by the Second Republic on 27 April 1848, at the initiative of Victor Schoelcher. On 10 May 2001, the French parliament adopted the Taubira law which acknowledged that slave-trade and slavery were crimes against humanity.

In a speech given on the 30 January 2006, Chirac said that, in the history of mankind, slavery was a wound and a tragedy in all contiments. Most of the European powers, including France, carried out slave-trade in inhumane conditions. He said that slavery 'fed' racism, a crime against heart and spirit. A national center on slave-trade, slavery and its abolition will be created, and slavery will have its proper place in school programmes.[3]

The long and painful process of increased awareness of the past wounds of slavery and colonialism is, at last, starting in France. It will take steady and serious efforts by the political leaders and the leaders of civil society, the media, to help the French population acknowledge and understand the past, and accept that France is now a diverse, multicultural society. This also

[2] On France 2 state television channel, 26 January 2006.

[3] *Le Monde*, 31 January 2006.

requires a temporary affirmative action programme to help young people from African, North African, or Asian origin, to gain access to education, jobs, lodging and a decent social life: the present discrimination practices will not disappear without a strong political and judiciary effort.

More Independent Judges

In recent years, activist judges have adopted a more independent stance, in efforts to overcome the long immunity of high-level political leaders and the senior managers of large national and multinational enterprises. As also noted in Chapter 1, investigating judges started the prosecution of senior political leaders in the 1990s. Crusading magistrates brought a number of political associates of the late President Mitterand to trial, including Dominique Strauss-Kahn, Finance Minister, and Bernard Tapie, former Minister of the 'City' (*Ville*) and businessman, and others. The illicit funding of political parties was prosecuted and punished in the late 1990s and early 2000s, reaching senior political leaders in parties of the right and of the left, except Jacques Chirac, protected by his presidential immunity. The judges have also investigated major government-controlled companies such as Elf, Total, Thomson CSF, now Thalès, for corruption or other illegal practices, which have involved senior French government officials, and for some, foreign governments.

As an extraordinary advance, in October 2005, even a military prosecutor has been allowed to investigate the charge of 'voluntary homicide' of an Ivory Coast national, Firmin Mahé, by French military forces serving in the *Licorne* operation in Ivory Coast. The French general in charge of the operation and a colonel were suspended from their functions, for having covered up the alleged murder. Following an inquiry, the case will be judged by a military tribunal in Paris. This is the first known and public case, after the post-Liberation trials, of a high-level military officer to be prosecuted for his responsibility for criminal actions allegedly committed by men under his command.[4]

[4] The French *Opération Licorne* was sent to Ivory Coast in September 2002 at the request of President Laurent Gbagbo, initially to protect international nationals in the country. Security Council resolution 1479 of 13 May 2003 established the UN Mission in Ivory Coast (MINURCI), which became the UN Operation in Ivory Coast (UNOCI) by resolution 1528 of 27 February 2004. In 2005–2006, there were in Ivory Coast 4000 French soldiers of Licorne operation which support UNOCI's 6500 Blue Helmets of other nationalities.

French judges have also shown more independence from the French government's concerns for its relationships with other countries in trials involving cases of foreign military or political officials.

On 3 July 2002, the Appeals Court of Paris dismissed a complaint by the Presidents of Chad, Idriss Déby, Congo, Denis Sassou Nguesso, and Gabon, Omar Bongo for 'offences versus a foreign head of state' allegedly contained in a book published in April 2000 in Paris, written by François-Xavier Verschave and published by Laurent Beccaria. This offence was introduced in France by article 36 of the law of 29 July 1881. The book had given evidence of specific charges against the three Presidents of either being dictators, and/or having committed crimes against humanity, and/or of corruption and others. The Court based itself on the 'good faith' of the accused. However, the Appeals Court did not agree with the judgment of the first Court which affirmed that the particular protection granted by France to foreign leaders, in the name of its 'good diplomatic relationships' was incompatible with Article 10.1 of the 1950 European Convention for the Protection of Human Rights, which states:

> Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers . . .

Article 10.2 subjects the exercise of these freedoms to specific conditions.

A few days earlier, on 25 June 2002, the European Court of Human Rights, in the case of *Colombani and Others v. France* (application no. 51279/99) had held unanimously that there had been a violation of Article 10 in a case involving the King of Morocco. The King had instituted criminal proceedings against the newspaper *Le Monde* for insulting a foreign head of state. The Paris Appeals Court had condemned the journalists to a fine and to the publication of the conviction. The French Court of Cassation dismissed their further appeal, after finding that their comments had been offensive and maliciously aimed at drawing the reader's attention to the King personally.

The European Court disagreed. It reaffirmed the importance played by the press in a democratic society and noted that the allegations could be regarded as credible. It also noted that the application of the law of 1881 was liable to confer on heads of state a special status that derogated from the general law and could not be reconciled with modern practice and political conceptions, since its effect was to afford them immunity from criticism solely because of their function or status, irrespective of whether the criticism

was justified. In the Court's view, that privilege went beyond what was necessary to achieve the objective.

Article 36 of the law of 1881 has been challenged by several parliamentarians. On 12 March 2001, a Senator introduced a law proposal for the suppression of Article 36 in the Senate. On 24 April 2001, five members of the National Assembly submitted a similar proposal to the Assembly. Both proposals are under review by the respective parliamentary commissions.[5]

On 1 July 2005, after six years of judiciary proceedings, the Appeals Court of Nimes (South of France) has condemned Mauritanian captain Ely Ould Dah, *in absentia*, to ten years' imprisonment for having committed directly, ordered and organized acts of torture against Mauritanian citizens between 1990 and 1991 in the death camp of Jreïda. It was the first time the concept of 'universal jurisdiction' was applied in France, concept which allows a court to try a foreign national for crimes of torture committed against foreign victims in a foreign country. Victims or survivors were assisted by the French-based *Fédération Internationale des Ligues des Droits de l'Homme* (FIDH) in initiating and carrying out the long processes which led to the final appeal trial.[6]

The Fragility of Democracies

As Kofi Annan said of United Nations reform, democracy is a process, not an event. Countries may progress on the road to democracy, or they may turn back, some may stay authoritarian. The upwards process may take decades, not just years.

There is no sign of political liberalism in Myanmar (the former Burma) in spite of pressures by the USA, the European Union and NGOs. In North Africa, the road taken by two former French possessions, Morocco and Tunisia, is different: Tunisia remains under the autocratic rule of President Ben Ali, while King Mohammed VI allows some democratic progress in incremental steps. Russia, coming from centuries of autocracy, then under the hard rule of Stalin, was seen as moving into a more liberal country with Gorbachev and Yeltsin. In the second presidential term of Vladimir Putin,

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[5] *Proposition de loi No 234* submitted by M. M. Dreyfus-Schmidt, Senator, recorded on 12 March 2001, – *Proposition de loi No. 3013* submitted by Mme M.-H. Aubert, Mssrs. N. Mamère, A. Aschieri, Y. Cochet, J.-M. Marchand, recorded on 24 April 2001.

[6] Sidiki Kaba, *Le Lettre de la FIDH*, No. 76, June–July 2005.

the trend was reversed: political power was re-centralized, independent media were suppressed, NGO work held under strict supervision. Russian war crimes continue unpunished in Chechnya.

Even the US democracy is at risk. As an over-reaction to the drama of 11 September 2001, the Bush administration took a number of decisions to combat terrorism which restricted the individual freedom of US nationals, and created Guantanamo, a US detention center in Cuba where 'enemy combatants' are held and interrogated without judicial protection, in a legal limbo outside both US and international law. It has allowed its military personnel to torture detainees in Iraq and in Afghanistan, and sent alleged enemy combatant detainees to countries which allowed torture – the extraordinary renditions, which have triggered protests by human rights NGOs and inquiries by European governments and intergovernmental organizations. The Pentagon inquiry into torture in Abu Ghraib has exonerated all senior officers, except for one general. The investigations have not reached the senior members of the Bush administration who allowed or legitimized these violations of US laws and international humanitarian law.

On 28 June 2004, the US Supreme Court gave three decisions which were steps towards restoring the rule of law in the USA, but not a total reversal of the government's legal positions taken after 9/11. One of the decisions was to affirm that 'aliens held at the [Guantanamo] base, no less than American citizens, are entitled to invoke the [US] federal courts' authority' to hear applications for *habeas corpus* by any person who claims to be held 'in custody in violation of the Constitution or laws or treaties of the US'.[7]

The subsequent developments by courts, the government and the military have however been slow and hesitant.

On 30 December 2005, after months of resistance and veto threats, the US President signed the so-called 'torture amendment' promoted by Senator John McCain which bans all ' cruel, inhuman and degrading' treatment of US military detainees. However, the President added a 'signing statement' stating that 'The executive branch shall construe Title X in Division A of the Act, relating to detainees, in a manner consistent with the constitutional authority of the president to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power'. This statement was interpreted by some

[7] See Beigbeder (2005), pp. 32–35.

political leaders and observers as a deliberate intent by the executive to ignore the law if felt justified by the 'war against terror'.

While British repression of terrorism has not always remained within the UK tradition of due process, the Law Lords, Britain's highest court, declared on 8 December 2005 that evidence obtained under torture was not admissible in British courts.

The Governance of France

All democracies need effective checks and balances. The French '*République*' needs to strengthen its internal governance mechanisms by reinforcing the powers of the Parliament and ensuring the independence of the judiciary.

In 2005, a Socialist parliamentarian, Arnaud Montebourg and a political scientist, Bastien François, have made detailed proposals to create a 'Sixth Republic' in order to democratize and correct some of the anomalies of the Fifth Republic.[8] Some of these are given hereunder, even if they are still only proposals, and have not been supported by any French political party.

One proposal is to make the government inform the Parliament immediately of any external military operation decided by the Prime Minister. The Parliament would advise on the prolongation of these operations within thirty days. Defence and military agreements concluded by France would be transmitted to the Parliament for information. In view of the problems created by French military operations in Bosnia, Rwanda, and Ivory Coast, these modalities are essential in order for the Parliament to be properly informed of military defence agreements and military operations, and to exercise a degree of supervision over these.

Another useful proposal is to allow one tenth of citizens on electoral lists to submit a law proposal to the National Assembly or to the Senate. This right of initiative would be added to the existing ones owned by the Prime Minister and members of Parliament.

The authors want to change the Constitutional Council which has the important charge of controlling the comformity of laws with the Constitution, into a Constitutional Court. Its nine members are now

[8] Arnaud Montebourg, Bastien François, *La Constitution de la 6e République, Réconcilier les Français avec la démocratie* (Odile Jacob, Paris, 2005).

appointed, three each, by the President of the Republic, the President of the National Assembly and the President of the Senate. The new proposal is that they should be appointed by a two-third majority of the National Assembly, upon proposal by the President of the Republic. In order to ensure the respect of the independence of judges, a High Council of Justice would replace the *Conseil supérieur de la magistrature*, composed only of magistrates. The new Council would be composed of half of magistrates, and half of members appointed by the National Assembly and the Senate. It would have new powers of investigation and would issue public advices.

The Parliamentary Information Missions for Rwanda and for Srebrenica have been a considerable innovation.[9] The authors propose to reinforce their role, as either 'control' or 'inquiry' Commissions: they could be created at the initiative of sixty members of either the National Assembly or the Senate, their reports could include dissident opinions, and reports would be discussed during a debate at the Parliament in the presence of the government.

Other counter-powers

The United Nations and the European Committees against Torture, the European Court of Human Rights serve also as public supervisory and controlling mechanisms over governments' behaviour in these areas.

As a member of the Council of Europe and a signatory of the European Convention on Human Rights, France has been condemned several times by the European Court of Human Rights for violations of the Convention (see Chapter 1). As noted above, the Court held, in June 2002, that France had violated Article 10 of the Convention (freedom of expression) in its application of a law of 1881. In September 2005, the Court condemned France for the excessive duration of preventive imprisonment imposed on Patrick Gossein – three years, six months and sixteen days – for violation of Article 5 of the Convention.[10]

The international criminal tribunals for the Former Yugoslavia and for Rwanda have played an indirect role in exposing some of the weaknesses or

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[9] As a counter example, the Commission of foreign affairs of the French National Assembly rejected, on 18 January 2005, the request of the Socialist group to create an Inquiry Commission on the situation in the Ivory Coast, in view of the presence of French troops under *Opération Licorne,* the death of nine French soldiers in an air raid by government forces, and the destruction of the country's air fleet by the French: *Le Monde*, 20 January 2005.

[10] 'Arrêt Selmouni, *Le Monde*, 30 July 1999, – Arrêt Gossein, *Le Monde,* 15 September 2005.

deviations of French policies and practices in these areas: France's reluctance to allow French political or military leaders to be witnesses at these Tribunals has shown an intention to hide actions which could have been a discredit to the country. Obfuscation, as in other areas, only increases doubts and stimulates founded or unfounded accusations. When events are unexplained, or misrepresented, public trust in the leaders and in democratic institutions is diminished.

The International Criminal Court is to be a permanent watchdog for violations of human rights and humanitarian law, for France and other States Parties to the Rome Statute, subject to the limitation that the Court's jurisdiction only applies to the 'most serious crimes of concern to the international community as a whole'. National legislation and military codes and regulations, the training of the military in human rights and humanitarian law, the procedures of national criminal and military courts, should be reviewed by States parties, and, as required, strengthened.

The role of national and international human rights NGOs is well-known: they carry out inquiries, publicize and assess governments' actions, they praise and, more often, condemn violations and abuses. In democratic countries, other elements of civil society, such as churches and associations, also review and assess government policies and practices and guide public opinion.

National and international media play another esssential role in making public what governments try to hide. Their reporting and investigations are an important counter-power to governments' real power.

Conclusion

The general theme of this book is that democracies like France (or the USA) who claim the high moral posture as the homeland of human rights, the country of asylum, should align their actions with their words, or reduce such claims to those of a 'normal', necessarily imperfect, democracy, which is doing its best to respect democratic and human rights standards, without claiming to be a 'beacon' for all nations and all peoples.

For its citizens, France should be the best nation, without blemish. This is however neither true nor possible, so that a political, social and historical adjustment is needed.

France should be satisfied to be a middle-size country, not a 'great nation', with good but mixed democratic credentials.

The record of the past should not be obfuscated. French and foreign historians have now done a considerable work on the real role of the Vichy government. They are doing more research on French colonialism. History findings should progressively correct or replace biased assumptions or hidden or wrong facts, not as a result of laws – like the 2005 law on the positive role of French colonialism in North Africa – but by measured and wise decisions of publishers of school manuals under the scrutiny of historians, the media, NGOs and civil society.

In his statement of 30 January 2006 , President Chirac said, in part:

> A country's grandeur is to assume all its history. With its glorious pages but also with its part of darkness. Our history is that of a great nation. Let us look at it with pride. Let us look at it as it has been. This is how a people is brought together, that it becomes more united and stronger.

Leaving aside the gaullist 'grandeur' part, the message is clear and reasonable.

The French are now eager to know their past history and ready to accept its good and bad sides, its glorious episodes, its humanitarian action (for instance, Médecins sans frontières), and to acknowledge that abuses and crimes were committed.

There is no need for a constant repentance, nor should patriotic values be demeaned: patriotism should be based on reality, knowledge of the past, better leadership, new projects and a constructive future – not on lies.

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