The United States is generally proud of its leadership role at the Nuremberg trials, making America's current rejection of the precedent they established seem paradoxical. This Article approaches the "Nuremberg Paradox" by examining the French experience with the Nuremberg trials, and comparing France's adoption and internalization of international criminal law to that of its American cousin. The Article concludes that an important reason that the Nuremberg principles never took root in the United States stems from the different legal cultures and traditions of the two countries, particularly as regards the field of international criminal law. Examining the interwar, post-war and modern application of international criminal law in France and the United States, one is struck by the long-standing legal, philosophical and political differences exhibited by the two countries' approaches, and perhaps most starkly, by the differences that appeared during the negotiation, adoption, and ratification of the International Criminal Court Statute in 1998. Indeed, although the French Parliament was willing to ratify the ICC Statute and at the same time adopt a constitutional amendment abrogating the immunities and future amnesties granted to its own members and the President of the French Republic, U.S. opposition to the treaty has been consistent and, at times, overwhelming. In exploring these differences, the Article surveys the interwar scholarship, the post-World War II prosecutions of Vichy collaborators and former Nazis in the Touvier, Barbie, and Papon cases, and France's more recent exercises of universal jurisdiction in the modern period of international crim-
nal law. The implications of the French experience are analyzed in light of Harold Koh's transnational legal process theory, which captures the process by which France internalized the Nuremberg principles, but does not explain why that process took hold in France but not in the United States. The Article's central claim is that deeper historical, cultural and social factors that influenced French legal culture explain the differences between the two countries approaches. Indeed, an examination of the French precedent illuminates our understanding of how and why international criminal law remains only superficially and sporadically enforceable in the United States.

I. INTRODUCTION

The United States of America is generally proud of its leadership in the trial of the major German leaders at the end of World War II at Nuremberg. Indeed, the key role played by Justice Robert Jackson, in particular, has become part of America's national mythology, proving its moral superiority, commitment to the rule of law, and willingness to rely upon principles of law and justice, instead of just power, in assuming the mantle of world leadership. While there was criticism of the trials in the United States, once the decision was made to hold trials rather than executions, Nuremberg became an "American show":

Although the cooperation of other nations was genuine and sincere, there is ample proof to show that Nuremberg was a 100 percent American concern. It was American initiative,

1. Indeed, following the trial, Walter Lippman enthused:

For my own part, I do not think it rash to prophesy that the principles of this trial will come to be regarded as ranking with the Magna Charta, the habeas corpus and the Bill of Rights as landmarks in the development of law. The Nuremberg principle goes deeper into the problem of peace, and its effect may prove to be more far-reaching than anything else that has yet been agreed to by the peoples of the world.


3. HARRIS, supra note 2, at 7-8; BORGWARDT, supra note 1, at 204-12 (2005).
American persistence, and American idealism that produced the final result in the face of serious difficulties.\(^4\)

The drama playing out in the bombed ruins of the city of Nuremberg had its echoes in San Francisco, where the Charter of the United Nations was elaborated, this time on American soil, and again, with American ideas predominating the conversation. It was a heady time, and to many, the Nuremberg trials seemed to lay the foundation for a new post-war world order that would be based upon the rule of law and led by the United States of America. As *The New Yorker* editorialized on September 15, 1945, "[the] Nuremberg trials . . . are exciting because they are the unconscious expression of the universal desire for a broader legal structure, and hence for a higher social structure."\(^5\)

Against this historical framework, America's current approach to the Nuremberg principles appears paradoxical. American "ownership" of the Nuremberg legacy has resulted in only tepid support for the Nuremberg principles by successive U.S. administrations, particularly as regards U.S. conduct. (Indeed, the London Charter establishing the Nuremberg Tribunal was signed on August 8, 1945, just two days after the United States dropped an atomic bomb on Hiroshima and one day before another atomic bomb devastated Nagasaki.)\(^6\) These principles, as articulated by the Judgment of the International Criminal Tribunal at Nuremberg, and subsequently codified by the United Nations, state that international law may criminalize war crimes, crimes against humanity and crimes against peace, and enforce them against persons using an international tribunal to do so; that no individual may commit these crimes with impunity, not even a head of State and; that neither municipal law nor following orders exonerates an individual charged with these crimes from criminal responsibility for them (although the latter may be used to mitigate punishment).\(^7\)
Much has been written about Nuremberg and Vietnam, and this Article will not examine that epoch in U.S. history. Others, including myself, have also noted recent infelicitous departures from the Nuremberg principles in the conduct of the so-called “Global War on Terror,” again a subject not taken up here. America’s rejection of the Nuremberg precedent has been starkest in its sometimes bruising opposition to the International Criminal Court, an opposition that has baffled American allies as well as many U.S. citizens alike.

This Article approaches the “Nuremberg paradox,” as I call it, through a different lens, looking not to U.S. practice to identify why America never embraced the Nuremberg principles after 1946, but, sacre bleu (!), to France. In spite of spats over “freedom fries” and genuine differences regarding foreign policy, particularly as regards the projection of American power, the French Republic and the United States of America have many things in common making such a project useful and instructive—an abiding commitment to human rights and the rule of law, a sense of moral superiority, chauvinism about their language and culture, and a belief in their own importance as civilizing influences. Indeed, in understanding how and why France came to ratify the ICC Treaty with relative ease, we are led to interesting insights as regards the legal obstacles to the ICC’s ratification in the United States.

This study suggests that at least one reason that the Nuremberg principles never took root in American soil lies in the different legal cultures and traditions of the two countries, particularly as regards the field of international criminal law. To put it neatly, French judges seem to have been able to incorporate the Nuremberg principles as a matter of French municipal law in a way that their American counterparts never did. In America, ironically, a nation of lawyers, the Nuremberg principles remain non-justiciable, surviving largely as a symbol of power politics. In France, the Nuremberg principles are, instead, a matter of law. The question of course, which this Article endeavors to answer, is why.


10. This Article will focus on developing the French legal history, with references to the United States as useful and appropriate. Space constraints prohibit a full examination of both countries’ law and history, which is the subject of a forthcoming book.
On July 17, 1998, the Treaty Establishing the International Criminal Court was adopted in Rome with great fanfare. On June 9, 2000, The French Republic became the twelfth State to ratify the treaty. Although there was little doubt that France would join the Court, its support had not been a foregone conclusion during the Treaty's negotiation. France, like the United States, had concerns about the possible constraints the treaty might impose on French military operations, and although the French government had actively participated in the negotiations, it joined the coalition of the States supporting the ICC's establishment (the "Like Minded" group) late and reluctantly. Even after the French government signed on to the treaty the French Constitutional Council (Conseil Constitutionnel) held, on January 22, 1999, that the Statute's ratification required prior amendment of the French Constitution because the Rome Statute impinged upon Presidential and other immunities and the possibility of French amnesty laws.

The response to the Constitutional Council's decision by the French government was straightforward: France amended its Constitution to permit ratification, abolishing Presidential and other immunities (among other things) in order to do so. Parliamentary debates concerning both the ratification of the Treaty and the amendment of France's Constitution were entirely supportive, even passionate, about the need for the French government to put aside narrow concerns of self-interest, and support the International Criminal Court—in the interest of France, and all humanity. Failure to ratify the treaty was never a serious option among members of the Executive and Legislative branches, and although France, like other major powers, had its own foreign policy preoccupations to address during the Treaty's negotiation, including protecting its military personnel, once the Treaty had been adopted, French ratification was completed without controversy or particular fanfare.

12. On the so-called "like minded" group of States, see Leila Nadya Sadat, The International Criminal Court and the Transformation of International Law: Justice for the New Millennium 7 (2002). See also Phillipe Kirsch & John T. Holmes, The Rome Conference on an International Criminal Court: The Negotiating Process, 93 AM. J. INT'L L. 2, 4 (1999). Some writers have suggested that civil society played an important role in shaping French policy, which may be true, and yet it does not explain why civil society failed to promote support for the Court in the United States.
14. Loi constitutionnelle no. 99-568 du 8 juillet 1999 insérant, au titre VI de la Constitution, un article 53-2 et relative à la Cour penal internationale. Article 53-2 provides that: "The Republic may recognize the jurisdiction of the International Criminal Court under the conditions contained in the treaty signed on July 18, 1998."
15. France opted out of the war crimes jurisdiction of the Court for seven years (as the United States could have done), a decision it subsequently revoked. United Nations, Rome Statute of the International Criminal Court: France Ratification, June 21,
Contrast the mood in Washington during the same time period. Even prior to the Treaty’s conclusion, the late Senator Jesse Helms, Chair of the Senate Foreign Relations Committee (the committee that would ultimately take up the Statute’s ratification), announced that the International Criminal Court would be “dead on arrival” if the United States did not have veto power over which cases could be brought.16 Government officials expressed concern over the prospect of an international war crimes court that might investigate the activities of U.S. soldiers, but, unlike their French counterparts, were unwilling to be persuaded that adequate safeguards could ever be put into place that could protect U.S. (and their own) interests.17 The Executive Branch, under President Bill Clinton, expressed support for a Court in vague and general terms, but never in an unqualified manner.18 Indeed, the posture of the U.S. negotiating team at the start of the Conference was defensive, and only hardened as the Diplomatic Conference progressed. This led to a battle of wills between the United States and other nations and finally a humiliating diplomatic American defeat as the Treaty was adopted, over U.S. objections, by

2000, available at http://treaties.un.org/doc/Treaties/1998/11/19981110%2006-38%20RPM/Related%20Documents/CN.404.2000-Eng.pdf; United Nations, Rome Statute of the International Criminal Court: France Withdrawal of Declaration, Aug. 20, 2008, available at http://treaties.un.org/doc/Publication/CN/2008/CN.592.2008-Eng.pdf. Article 124 permits a State to provide that it will not accept the Court’s jurisdiction over war crimes for a seven year period, when a crime is alleged to have been committed by its nationals or on its territory. Rome Statute of the International Criminal Court, art. 124, July 17, 1998, 2187 U.N.T.S. 90. France was one of only two countries to invoke article 124 in ratifying the Statute, and was heavily criticized internationally and internally (especially by many Parliamentarians) for doing so. DOMINIC McGOLDRICK, PETER J. ROWE, & ERIC DONNELLY, THE PERMANENT INTERNATIONAL CRIMINAL COURT: LEGAL POLICY ISSUES, 372-73 (2004). In September 2008 France withdrew its reservation under article 124 (which would have expired on July 1, 2009 in any event), perhaps to signal its support for the Court or perhaps to demonstrate that France would not seek to extend Article 124 (which was labeled a “transitional provision” in the Statute) at the Review Conference in 2010. International Law Reporter, ICC: Withdrawal of French Declaration to Rome Statute, Sept. 24, 2008, available at www.ilreports.blogspot.com/2008/09/icc-withdrawal-of-french-declaration-to.html. Because the United States could have ratified the Statute and invoked article 124, the fact that France did so does not tell us much about the difference between the two countries approaches to the Court.


17. Marc Grossman, Under Secretary for Political Affairs, Remarks to the Center for Strategic and International Studies, Washington, D.C. (May 6, 2002) (prepared remarks available at http://www.state.gov/p/us/rm/9949.htm). Secretary Grossman promised that: Notwithstanding our disagreements with the Rome Treaty, the United States respects the decision of those nations who have chosen to join the ICC; but they in turn must respect our decision not to join the ICC or place our citizens under the jurisdiction of the court.


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an overwhelming vote of 120-7.\textsuperscript{19} Returning to Washington to face the Senate Foreign Relations Committee, the U.S. head of delegation, then Ambassador at Large for War Crimes, David J. Scheffer, was peppered with questions concerning the treaty and its import for U.S. foreign policy. Few members of the Senate expressed support for the Court,\textsuperscript{20} and although President Clinton ultimately signed the Rome Statute on December 31, 2000, it was subsequently "unsigned" by his successor, George W. Bush.\textsuperscript{21} President Bush abandoned the Clintonian approach of cautious (even if unsupportive) engagement with the Court in favor of a policy of outright hostility. So adamant was the Bush administration in its criticism of and disdain for the Court that countries supporting the Court found themselves on the receiving end of punishing treatment from the U.S. government.\textsuperscript{22}

What was it in French history that permitted a Parliament to support a treaty and to adopt a constitutional amendment abrogating the immunities and future amnesties granted to its own members and even the President of the Republic? How is it that France—a nuclear power with an active international military presence\textsuperscript{23}—came


\textsuperscript{22} The Bush administration softened its opposition to the Court in its second term, see, e.g., Speech by Secretary of State Condoleezza Rice, San Juan, Puerto Rico, Mar. 10, 2006, available at http://www.state.gov/secretary/rm/2006/63001.htm. The United States abstained from the Security Council Resolution referring the situation in Darfur to the ICC, http://www.un.org/News/Press/docs/2005/sc8351.doc.htm, and has been supportive of the Prosecutor's decision to indict Sudan's President. However, recent speeches by legal advisor John Bellinger continue to maintain U.S. objections to the Court, raising many of the same arguments proffered by Bolton during President Bush's first term.

to see ratification of the International Criminal Court (ICC) treaty as so important? Why has the French experience with the ICC Treaty and its ratification been so different than the U.S. experience, particularly given the U.S. support for and continued evocation of the Nuremberg trials as a watershed event in world history, and an event in which the United States played the leading role?

The answer to this question is complex, and much could be made of the fact that France, unlike the United States, is now bound up in a supranational regional organization (the European Union) and therefore better adapted to international treaty regimes that require major constitutional and psychological change. Yet that alone does not explain the French perspective, and France has a long history of euroscepticism suggesting that it is perfectly capable of rejecting international cooperation when it feels threatened. DeGaulle’s “empty chair” policy,24 the extraordinarily narrow support for the Treaty on European Union,25 and the recent rejection of the European Constitution by French voters26 suggest that support for international or multinational organizations in France is neither to be always assumed, nor consistently forthcoming.

Instead, the central claim of this Article is that the answer to this question lies, at least in part, in French legal culture. This culture is very different from our own, in spite of the many characteristics France and the United States share. More particularly, the answer lies in the legal norms (and culture) concerning the incorporation of international norms—particularly treaties—by their respective domestic legal systems. As Emmanuelle Jouannet recently


26. Following nine Member States’ approval, France was the first member country to reject the European Constitution, which would take effect only with unanimous support. Katrin Bennhold, France Rejects E.U. Constitution, INT’L HERALD TRIB., May 29, 2005, available at http://www.iht.com/articles/2005/05/29/europe/web.0529france.php.
wrote in her excellent study of French and American perspectives on international law, "there does not exist any global or cosmopolitan vision of international law, but, on the contrary, an inevitable multiplicity of particular national, regional, individual, and institutional visions."27 Each country develops its own approach to international law because of the singularities of its legal culture and its legal traditions—a culture shaped by its history, sociology and place in the world.28 France and the United States have developed legal systems stemming from their particular experiences29—France influenced by the Roman law tradition, the French Revolution, and the Napoleonic Code;30 the United States by the common law received from England31—and by the accidents of history that have led (or not) to the acceptance of particular norms and the development of constitutional structures.32

With respect to the Nuremberg principles, there was, unlike the American experience, a long and respected tradition embraced by French academics and politicians supporting not only the international criminal trials after World War I and World War II as potentially applicable to the Germans, but as the building blocks for the establishment of a permanent system of international justice. The writings of prominent academics were particularly important in a system of law that treats those writings (la doctrine) as highly influential and as potential sources of law—much more so than in the United States.33 The influence of these writings can be felt in the

29. In the case of France and the United States, Jouannet argues that the dominant model of French legal culture is "legalistic, positivist, and formal," whereas the U.S. model is "judicial, realist, and pragmatic." Jouannet, supra note 27, at 299. These models are probably correct, but are somewhat unhelpful to the current project. Indeed, the fact that the French courts were so instrumental in incorporating crimes against humanity into French law challenges the traditional notion of civil law courts as restricted to passively applying legislative enactments.
32. GLENN, supra note 28, at 5.
33. WALTER CAIRN & ROBERT McKEON, INTRODUCTION TO FRENCH LAW 19-20 (1995); BELL, ET AL., supra note 30, at 34-36. As Bell notes, it is probably wise not to overstate either the influence of academics and their writings (la doctrine) or exaggerate the differences between the common law world and France. Yet subtle differences do and can exist, which may cumulate in larger trends. See also CHRISTIAN DADOMO & SUSAN FARRAN, THE FRENCH LEGAL SYSTEM 42-44 (1993) (suggesting that la doctrine,
We believe that there can be no lasting peace and no certain progress for humanity, which still today is torn asunder, suffering and anguished, except through the cooperation of all peoples and through the progressive establishment of a really international society.34

None of the other allied powers at Nuremberg so clearly and forcefully argued on behalf of a long-lasting and broad application of the Nuremberg principles; indeed, it seems fairly clear that even the chief advocate of the Nuremberg trials for the United States, Justice Robert Jackson, did not argue the case against Nazis, trying to convincing his audience of the need for a permanent international war crimes tribunal. Rather, for the most part he remained within the context of the guilt (or innocence) of the accused.35

Moreover, as Part II explains, France, unlike the United States, was occupied by the Germans during the war, and had therefore, in reaction, incorporated the Nuremberg charter into French law as a potential basis for future prosecutions. As Gary Bass has written, it may be that a nation is more likely to embrace war crimes trials if its own nationals were victimized during the conflict.36 Yet it was still surprising when, many years after the war, France held crimes against humanity trials in the cases of Paul Touvier, Klaus Barbie, and Maurice Papon. Each of these trials permitted French society to see the Nuremberg principles not just as precepts of international law applicable as a matter of “victor’s justice” (to Germans) but as principles of law directly applicable even to Frenchmen for crimes committed on French soil. The jurisprudence from those cases is rich, and I have written about it extensively elsewhere. What those cases underscore is that France’s monist approach to international law facilitated the incorporation of the Nuremberg charter by French

defined as ‘the body of opinions on legal matters expressed in books and articles, is highly influential in France, even if not a formal source of law due not only to historic reasons but the anonymity of judges and other factors rendering commentators influential and a source of inspiration in the shaping of French law).


36. Victimization is one of several themes Bass analyzed to outline the circumstances under which states support international war crimes tribunals. Gary Bass, Stay the Hand of Vengeance: The Politics of War Crimes Trials 30-31 (2000).
courts in a way that is difficult to imagine in the United States, particularly in a post-Medellin world.

Following these trials, France adopted new laws codifying crimes against humanity, war crimes, and genocide provisions. Part III briefly explores the French Experience with these new laws as a component of a new system of international and transnational criminal justice that began in the 1990s with the establishment of the two ad hoc Tribunals for the Former Yugoslavia and Rwanda, and which was accompanied by a general, perceptible international shift away from impunity for the commission of international crimes towards a regime of accountability therefore. Indeed, requiring accountability for past crimes has been posited as a remedy to impunity, as well as a necessary, if not sufficient, predicate for the re-establishment of peace. Accordingly, the establishment of the International Criminal Tribunals for Rwanda (ICTR) and the Former Yugoslavia (ICTY), the Special Court for Sierra Leone (SCSL), the Special War Crimes Panels for East Timor and, more recently, the Khmer Rouge Tribunal in Cambodia, was conceived of by the international community as a means (although not the means) to reestablish peace and stability,


39. See infra Part III.


foster a transition to democratic principles of government, and establish general principles of international law to deter future atrocities. The negotiation and establishment of the ICC treaty in 1998 drew heavily from this emerging practice, and seemed to offer the imprimatur of permanence to a then-experimental concept. Interestingly, the United States has been a leading proponent of the creation of \textit{ad hoc} Tribunals, reserving its objections to international criminal justice mechanisms for the permanent international criminal court.

The final section of this Article (Part V), considers the implications of the French experience in light of more theoretical questions regarding the relationship between international and domestic norms. Many scholars have studied the incorporation—either as a matter of law or as a question of foreign relations—of international norms by municipal legal orders, noting the existence of transnational legal processes that lead courts, especially, to adopt international norms. The French experience with the Nuremberg principles provides an extraordinary example of this thesis in action—an opportunity to observe first hand the struggle with, and ultimate acceptance of, an international legal norm by a domestic legal order, and not just by courts, but by political elites as well. It provides an opportunity to observe empirically what scholars have postulated as a matter or theory—how and why a nation comes to

42. \textit{See infra} Part III.B. The relative caution exhibited by the French courts as regards the exercise of "pure" universal jurisdiction for crimes committed outside of French territory is perhaps to be contrasted with the recent willingness of the French government to act more decisively if its nationals or some other national interest is involved. This was evidenced by France's willingness to tolerate a rupture of diplomatic relations with Rwanda over terrorism allegations levied by French investigating judge Jean-Louis Bruguière against Rwandans, including Paul Kagame, Rwanda's current president, for the attack that brought down the aircraft carrying the former presidents of Rwanda and Burundi in 1994. For a discussion of the interesting issues raised by the Rwandan genocide and the transnational lawsuits it has spawned, see Leila Nadya Sadat, \textit{Transnational Judicial Dialogue and the Rwandan Genocide: Aspects of Antagonism and Complementarity} 22 \textit{Leiden J. Int'l L.} 543 (2009).

43. U.S. leadership was critical to the establishment of the ICTY and ICTR, the Special Court for Sierra Leone, and even in bringing the Sudan situation to the U.N. Security Council. Warren Hoge, \textit{U.N. will refer Darfur crimes to court in Hague}, \textit{Int'l Her. Trib.}, April 2-3, 2005, at 6.

44. \textit{See, e.g.,} Sadat, \textit{supra} note 21. France has supported both the ICC and the \textit{ad hoc} Tribunals, but has also been inconsistent in its willingness to apply the norm of accountability to its own activities, as evidenced by the refusal to squarely address allegations of atrocities committed by French soldiers during the Algerian war.

adopt and embrace a particular set of international legal rules, even rules that may appear contrary to self interest, at least to some constituencies.

I conclude that while transnational legal process theory captures the process by which France internalized the Nuremberg principles, it cannot explain why that process took place in France. Moreover, I reject the conventional wisdom that the explanation for “American Exceptionalism” is limited to the invocation of America’s superpower status, without more. Instead, I argue that deeper historical, cultural, and social factors that influenced French legal culture can profoundly illuminate our understanding of how and why international criminal law came to deeply penetrate French law while it remains only superficially and sporadically enforceable in the United States. Note that I do not claim that politics play no role in a State’s willingness to embrace accountability measures. Political will is a necessary condition for the application of justice, and France, like the United States, has had its difficulties with questions of accountability, for example, for the Algerian war. What I do suggest, however, is that while political will may be a necessary condition, it is not in and of itself a sufficient one, and that politics and law interact in a mutually reinforcing system that plays out differently in different countries depending upon their legal culture.

Finally, I observe that the international norms embedded in the French legal order have not been stagnant, nor have they been a completely faithful replica of the original Nuremberg principles. Indeed, even in incorporating these principles, the French courts and political elites have modified their provisions to suit the taste and particularities of French political life and foreign policy. The French courts have not been passive recipients of international norms, and their own jurisprudence has been widely cited before the International Criminal Tribunals for the Former Yugoslavia and Rwanda. In this way, the French jurisprudence is, to paraphrase the International Military

46. Indeed, the ICTY recently relied upon the Barbie case in an opinion defining the notion of “civilian” as the victim of a crime against humanity. Prosecutor v. Martic, Case No. IT-95-11-A, Judgment, para. 831, (Oct. 8, 2008); See also in the ICTY, Prosecutor v. Mrkić et al., Case No. IT-95-13/1-T, Judgment (Sept. 27, 2007); Prosecutor v. Plavšić, Case No. IT-00-39 & 40/1-S, Sentencing Judgment (Feb. 27, 2003); Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment (Aug. 2, 2001); Prosecutor v. Blaškić, Case No. IT-95-14-T, Judgment (Mar. 3, 2000); Prosecutor v. Kupreški et al., Case No. IT-95-16-T, Judgment (Jan. 14, 2000); Prosecutor v. Tadić, Case No. IT-94-1-T, Judgment (May 7, 1997); Prosecutor v. Erdemović, Case No. IT-96-22-T, Sentencing Judgment (Nov. 29, 1996). For citations to the French crimes against humanity cases in the ICTR, see, e.g., Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Judgment (Sept. 2, 1998), paras. 565; 567; 569; 571; 572; 575; 576; fn.148 (citing Barbie); paras. 567; 571; 573; 574 (citing Touvier); para. 567 (citing Papon); Prosecutor v. Sylvestre Gacumbitsi, Case No. ICTR-2001-64-A, Judgment, para. 110 (July 6, 2006) (citing Papon); Prosecutor v. Georges Rutaganda, Case No. ICTR-96-3-A, Judgment, para. 64, fn.39 (Dec. 6, 1999) (citing Barbie, Touvier and Papon).
Tribunal at Nuremberg itself, both an expression of and, at the same time, a contribution to international law.\textsuperscript{47}

II. DEVELOPING A FRENCH JURISPRUDENCE OF CRIMES AGAINST HUMANITY

A. Developments Following the First World War

At the end of the First World War, France and the United States parted company as far as the construction of an international system of justice was concerned. While some of this can be accounted for by the many formal differences existent between the approach of continental and U.S. lawyers towards international law,\textsuperscript{48} those differences were exacerbated as a practical matter by the U.S. decision to abandon the League of Nations project. America's failure to enter the League removed American lawyers and academics, for the most part, from the intellectual and political currents that would create a legal culture open to the development of international law and institutions taking root in Europe.\textsuperscript{49}

Woodrow Wilson's "Fourteen Points," including the establishment of the League of Nations,\textsuperscript{50} had initially been embraced by the

\textsuperscript{47} International Military Tribunal (Nuremberg), Judgment and Sentences, Oct. 1, 1946, reprinted in 41 AM. J. INT'L L. 172, 216 (1947). Or, as Melissa Waters puts it, the French and international legal orders are "co-constitutive" of the norms.


\textsuperscript{49} The American Society of International Law continued to advocate for the importance of international law, as well as for public education in the subject. Frederic L. Kirgis, The American Society of International Law's First Century 1906-2006, 55-155 (2006). Many of the Society's founders such as Manley O. Hudson and Elihu Root believed that if the public were educated about international law, governments, and particularly democratic governments would be pressured to obey international law. \textit{Id.} See also Elihu Root, The Need of Popular Understanding of International Law, 1 AM. J. INT'L L. 1, 2-3 (1907). Other notable U.S. participation in the development and codification of international law included the Harvard Research project on International Law codification, which began in 1928, and law related projects supported by the Carnegie Endowment for International Peace. See David Bederman, Appraising a Century of Scholarship in the American Journal of International Law, 100 AM. J. INT'L L. 20, 52 (2006). Yet even individuals passionate about international law in principle were typically mute (or negative) on the subject of its application to individuals. See, e.g., Manley O. Hudson, Editorial Comment: The Proposed International Criminal Court, 32 AM. J. INT'L L. 549 (1938), and when the Society was faced in the 1930s with the specter of another war, it reacted with detachment, due perhaps to a lack of faith in international law given, in particular, the failure of the United States to join the League and the Permanent Court. Kirgis, supra, at 154-55. See also Janis, supra note 28, at 150-54 (on the optimism of Root and others prior to World War I). International law was not taught in many law schools, or taught only sporadically, even at Harvard, and Harvard during this period appeared to set both the structure and the content of the American Law School curriculum. Robert Stevens, Law School: Legal Education in America from the 1850s to the 1980s 39 (1983).

international community as well as by both Republicans and Democrats during the war.\(^{51}\) However, once an armistice was agreed, partisan bickering broke out, Wilson became a divisive figure, and during the elections of November, 1918, the Democrats lost control of both Houses of Congress.\(^{52}\) The Paris Peace Conference ultimately adopted a consensus document calling for the establishment of the League, to come into force later with the drafting of a Covenant and the adoption of the Treaty of Versailles,\(^{53}\) but by the time Wilson had signed the Treaty and returned to the United States he had lost the political support he needed to assure the Covenant’s acceptance by the Senate.\(^{54}\) Ratification failed, some say, due to the Treaty’s supporters who refused to accept the reservations attached by Republican Senator Lodge, the powerful chair of the Senate Foreign Relations Committee; others blame the Treaty’s opponents. Whatever the “truth” of the matter, there is little doubt that stubbornness on both sides destroyed the possibility of compromise that would have permitted the United States to join the League.\(^{55}\)

Likewise, when the Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties proposed the constitution of an international “high tribunal” for the trial of “all enemy persons alleged to have been guilty of offences against the laws and customs of war and the laws of humanity,”\(^{56}\) the American members of the Commission objected. The U.S. delegates, Robert Lansing and James Brown Scott, both prominent members of the American Society of International Law,\(^{57}\) observed that there was no

\(^{51}\) See Thomas J. Knock, To End All Wars: Woodrow Wilson and the Quest for a New World Order 184-89 (1992).


\(^{55}\) On the second vote, there was a majority in favor of ratification 49 for, 35 against; however, 23 of those voting against the Treaty were actually supporters of the League who were opposed to Lodge’s reservations. Id. at 71. See Edward C. Luck, Mixed Messages: American Politics and International Organization 1919-1999 50, 255-56 (1999); Louis Fisher, Presidential War Power 81-84 (2004); Walters, supra note 52, at 71. Zasloff, supra note 52, at 356.

\(^{56}\) Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties: Report presented to the Preliminary Peace Conference, 14 Am. J. Int’l. L. 95, 123 (1920) [hereinafter Commission on Responsibility].

\(^{57}\) Kirgis, supra note 49, at 76. While Hudson was appointed as Bemis Professor of International Law at Harvard Law School in 1923, a position that he held until 1954, Milton Katz, Manley Hudson and the Development of International Legal Studies at Harvard, 74 Harv. L. Rev. 212 (1960), and had developed his interest in international law while serving as technical advisor to the American Commission at the Paris Peace Conference in 1918, he never embraced the notion of individual criminal responsibility under international law in his writings, and there is no evidence
international law to be applied, no international court with jurisdiction, and that the trials would violate State sovereignty, particularly as regards the attempt to impose criminal liability on a head of State.\textsuperscript{58} The trials ultimately held pursuant to the Treaty of Versailles were a fiasco;\textsuperscript{59} and the U.S. abandonment of the League is often pointed to as at least one reason for the League’s demise.\textsuperscript{60}

Yet the notion of international criminal law and accountability were not nearly as dormant as a cursory examination of the Post World War I practice suggests,\textsuperscript{61} particularly if we remove ourselves from American soil.\textsuperscript{62} For beneath the frozen surfaces of formal international institutions was a ferment of activity. Renowned continental scholars of international law—including Hugh Bellot, Henri Donnedieu de Vabres, André Gros, Réné Cassin, Albert de Lapradelle, Vespasian Pella, Jean André Roux, and other distinguished academicians—were writing articles supporting the establishment of international institutions and legal regimes to promote accountability and human rights throughout the 1920s even though the modern day language of international criminal law did not yet really exist.\textsuperscript{63}

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\item \textsuperscript{60} See LUCK, supra note 55, at 23.
\item \textsuperscript{61} Indeed, there is substantial evidence to the contrary. See, e.g., Hudson, supra note 49.
\item \textsuperscript{62} That is not to say that there was no activity in the United States; Ben Ferencz points to an essay written by Columbia University philosopher John Dewey as evidence of intellectual activity in the United States. BEN FERENCZ, AN INTERNATIONAL CRIMINAL COURT: A STEP TOWARD WORLD PEACE – DOCUMENTARY HISTORY AND ANALYSIS 40 (1980). These writings were not particularly influential, however, and unlike Pella and de Vabres’ books and articles, do not appear to have received wide attention.
\item \textsuperscript{63} See, e.g., Hugh H.L. Bellot, La Cour Permanente international criminelle, 3 REV. INTERNATIONALE DE DROIT PENAL 333-37 (1926); M. A. Caloyann, The Permanent International Court of Criminal Justice, 2 REV. INTERNATIONALE DE DROIT PENAL 326-54 (1925); M.A. Caloyann, La Cour criminelle internationale, 5 REV. INTERNATIONALE DE DROIT PENAL 261 (1928); Henri Donnedieu de Vabres, La Cour permanente de Justice internationale et sa vocation en matière criminelle, 1 REV. INTERNATIONALE DE DROIT PENAL 175 (1924); Albert de Lapradelle, Declaration des droits et devoirs des nations, art. 4, in 1925 ANNUAIRE at 238, 239. Albert Lévitt, A Proposed Code of International Criminal Law, 6 REV. INTERNATIONALE DE DROIT PENAL 18 (1929); Vespasian Pella, Rapport sur un projet de statut d’une Cour criminelle internationale présenté au Conseil de direction de l’Association internationale de droit pénal, 5 REVUE INTERNATIONALE DE DROIT PENAL 265 (1928); Lord Phillimore, An International Criminal Court and the Resolutions of the Committee of Jurists, 3 BRITISH Y. BK. INT’L L. 79 (1922-1923) (expressing some scepticism, but concluding that further discussion of the idea was warranted); Jean André Roux, A propos d’une Cour de cessation internationale,
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Baron Descamps, the Belgian President of the International Committee of Jurists that prepared the Statute of the Permanent Court of International Justice, proposed (unsuccessfully) a resolution that would have permitted the Court to "try crimes constituting a breach of international public order or against the universal law of nations."64 Seconding the plan, Donnedieu de Vabres, who would later become the French judge at Nuremberg, wrote in 1924,

In our eyes, the essential role of the Permanent Court, in criminal matters, will be as a regulating Court charged with preparing, through jurisprudential means, an international solution to conflicts within its jurisdiction. So long as . . . this result remains elusive, anarchy will reign in the domain of international criminal law.65

Commenting upon this trend in a brief and unenthusiastic essay on the subject of an international criminal court penned in 1938, the great American international law professor, Manley O. Hudson, referred to this body of scholarship as revealing "the spell which the idea of an international criminal court exercised on many minds."66 (Brierly took a similarly negative view, arguing in 1927 that "the notion that war crimes can be banished from war or even appreciably reduced by the institution of a criminal court is probably a delusion . . . ."67)

Professional associations of lawyers and academics took up the question of an international criminal court in the 1920s. For example, the International Law Association voted in 1922 at its Buenos Aires Conference to support the establishment of an International Criminal Court, and assigned Dr. Hugh Bellot with the task of drafting the

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6 REVUE INTERNATIONALE DE DROIT PÉNAL 12 (1929); J.A. ROUX, L'ENTRAIDE DES ÉTATS DANS LA LUTTE CONTRE LA CRIMINALITÉ, 36 RECUEIL DES COURS 77 (1931); Q. Saldana, LA JUSTICE PÉNALE INTERNATIONALE, 10 RECUEIL DES COURS 223 (1925); E. Vadasz, JURISDICATION CRIMINELLE INTERNATIONALE, 5 REV. DE DROIT INTERNATIONAL, DE SCIENCES DIPLOMATIQUES ET POLITIQUES 274 (1927). See also RENÉ CASSIN, LE CONTENDEUX DES VICTIMES DE LA GUERRE: ÉTUDE DE LA JURISPRUDENCE CONCERNANT LES PENSIONS DE GUERRE ET L'ADOPTION DES PUPILLES (1924-1925); HENRI DONNEDIEU DE VABRES, LA RÉPRESSION INTERNATIONALE DES DELITS DE DROIT DES GENS (1935); HENRI DONNEDIEU DE VABRES, LES PRINCIPES MODERNES DU DROIT PÉNAL INTERNATIONAL (1928); HENRI DONNEDIEU DE VABRES, INTRODUCTION À L'ÉTUDE DU DROIT PÉNAL INTERNATIONAL (1922); ALBERT GEOUFFRE DE LAPPRADELLE, LES PRINCIPES GÉNÉRAUX DU DROIT INTERNATIONAL (1929); BERNARD DE FRANQUEVILLE ET ALBERT GEOUFFRE DE LAPPRADELLE, L'OEUVRE DE LA COUR PERMANENTE DE JUSTICE INTERNATIONALE (1928); VESPASIAN PELLA, LA CRIMINALITÉ COLLECTIVE DES ÉTATS ET LE DROIT PÉNAL DE L'AVENIR 360 (2d ed. 1926); H. VON WEBER, INTERNATIONAL STRAFGERICHTSBARKEIT 176 (1934). But see J.L. BRIERLY, DO WE NEED AN INTERNATIONAL CRIMINAL COURT?, 8 BRITISH Y. BK. INT'L L. 81-88 (1927) (expressing the view that an international criminal court would not be desirable or useful).
64. Phillimore, supra note 63, at 80.
65. Donnedieu de Vabres, supra note 63, at 179.
67. Brierly, supra note 63, at 87.
Court's Statute, which was presented to the Association's membership at the 1924 ILA meeting in Stockholm. (Both U.S. representatives present objected to the notion as well as to the draft statute itself, which was subsequently sent to an ILA committee for further study.) The report was enthusiastically embraced by Romanian scholar Vespasian Pella, who had continually advanced the idea of an international criminal court through his work and professional associations, however, and the ILA ultimately adopted a draft Statute at its meeting in Vienna, in 1926.

Pella was joined in his support for the Court by Swiss law professor Jean Graven, who also called for the establishment of a permanent international criminal court and, incidentally, taught a young Egyptian lawyer, M. Cherif Bassiouni, who was destined to become the Chair of the Drafting Committee of the U.N. Diplomatic Conference that adopted the Court's Statute in 1998. Pella became particularly influential as both the President of the International Association of Penal Law, established in Paris in 1924, and as Romania's minister at the League of Nations. Both the International Association of Penal Law and the Advisory Committee of the League of Nations issued a call for the establishment of an international criminal court in the 1920s.

Even some politicians were prepared to support the notion of an international criminal court, as suggested by the remarks of conservative statesman Raymond Poincaré, who opined, in 1925, that, "A judicial penal organization and the application of sanctions to the crime that may be committed, that is the aim which humanity must

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69. For a brief biography, see generally In memoriam: Vespasian V. Pella, 1897-1952, 46 AM. J. INT'L L. (1952).

70. INTERNATIONAL LAW ASSOCIATION, REPORT OF THE 34TH CONFERENCE, 183 (1926). The Conference Proceedings state that the vote was carried with two or three dissenting votes. Unfortunately, no record is available as to which members objected.


75. Raymond Poincaré served as Prime Minister on five separate occasions and as President of France from 1913 to 1920.
pursue if it desires that its beautiful dream of universal peace become an enduring reality."  

Poincaré’s enthusiasm notwithstanding, it must be admitted that generally speaking, political elites were not yet ready to accept the notion of an international court with jurisdiction over the crimes of individuals. (A treaty to establish an international terrorism court was adopted in 1937; however, no state ratified the text and it never entered into force.) Although these efforts were not politically successful, the extensive and probing legal debates they inspired developed both a cadre of individuals with substantive expertise in international criminal law and adjudication, as well as the development of doctrine ready to be employed once political opportunity arose.

B. The Occupation of France and the Nuremberg Trials

In June, 1940, France was overrun by Hitler’s army and forced into an armistice under which northern France, including Paris, fell under German occupation. On June 14, 1940, the Swastika replaced the Tricolore at the Paris Hôtel de Ville, and on June 22, the French-German armistice was signed in the forest of Compiègne. Until November 1942, the southern portion of France, including the town of Lyon, remained unoccupied by the Germans and was governed by a French administration headed by Marshall Pétain in the spa town of Vichy. A French government in exile, La Comité Français pour la Liberation Nationale, led by General Charles de Gaulle took up residence in London, along with eight other European governments in exile, and DeGaulle and the French resistance in both occupied and unoccupied France took up arms against the Germans.

While DeGaulle joined the allies, the Vichy government collaborated with Berlin, supplying money and material to the German war machine, and, infamously, participating in Hitler’s terrible plan to exterminate the Jews of Europe. Some courageous individuals spoke out against the mistreatment of the Jews of France. Even Pierre Laval, Pétain’s Minister of State who was seen as the architect of Vichy’s collaboration with the Nazis, allegedly did not know the fi-

76. Cited in Ferencz, supra note 62, at 24-25.
78. Taylor, supra note 1, at 23. See also Ted Morgan, An Uncertain Hour 54 (1990).
81. Morgan, supra note 78, at 84-89.
82. Id. at 99.
nal fate of those deported until 1943, and took some steps to protect French (but not foreign) Jews, thereby mitigating the slaughter.\textsuperscript{83} Other French men and women, including prominent clergymen, risked their lives to hide or otherwise protect their friends or compatriots. Yet there is little doubt of Vichy's active collaboration with the déportation, which resulted in the transfer of more than 140,000 persons from France, an estimated 75,000 of whom were Jewish, to Nazi death camps.\textsuperscript{84}

Meanwhile, as the war raged, the allies determined that the perpetrators would be punished, issuing declarations to that effect and creating a "United Nations War Crimes Commission" to identify war crimes suspects and to collect and organize evidence of and about war crimes, as well as to establish "some machinery . . . for dealing with atrocities committed on racial, political or religious grounds."\textsuperscript{85} On November 1, 1943, the Allies gathered in Moscow and formally declared their intention to prosecute German war criminals, thereby setting the stage for the adoption of the Charter of the International Military Tribunal at Nuremberg.\textsuperscript{86} Following Germany's unconditional surrender on May 8, 1945,\textsuperscript{87} on June 26, 1945, the International Conference on Military Trials was convened at London to determine how such a trial could be accomplished.

As one of the major allied powers, France took an active part in drafting the "Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis," (the "London Accord") and the Charter of the International Military Tribunal (IMT Charter) annexed thereto.\textsuperscript{88} The French, advised by distinguished professors André Gros and René Cassin, pointed to many of the legal difficulties involved in attempting to try the Germans for crimes committed


\textsuperscript{85} \textit{Reprinted in Roger Clark, Crimes Against Humanity, in the Nuremberg Trial and International Law} 177-78 (Ginsburgs & Kudriavtsev, eds., 1990).

\textsuperscript{86} Declaration of German Atrocities, Nov. 1, 1943, 3 Bevans 816, 834 \textit{Dep't. St. Bull.} (Nov. 6, 1943). France supported but did not sign the Moscow Declaration, although General de Gaulle had signed the St. James Declaration, issued to the same effect one year earlier. \textit{Note, Pour le Comité Français de la Liberation Nationale}, August 18, 1943.

\textsuperscript{87} \textit{William L. Shirer, The Rise and Fall of the Third Reich: A History of Nazi Germany} 1037-38 (1960).

\textsuperscript{88} London Agreement. \textit{See also M. Cherif Bassiouini, "Crimes Against Humanity": The Need for a Specialized Convention}, 31 \textit{Colum. J. Trans. L.} 457 (1994); Schwelb, supra note 58, at 178, 179-180. For a general history of the historical legal foundations of Article 6(c), \textit{see M. Cherif Bassiouini, Crimes Against Humanity in International Law} 1, 562 (2d ed., 1999) [hereinafter Bassiouini, \textit{Crimes Against Humanity}].
abroad, in particular the absence of an international criminal code. Nonetheless, records of the French negotiators and advisors of the time suggest that the French government was largely favorable to the establishment of an international tribunal, and the trial of German war criminals before it. As René Cassin wrote at the time,

The French National Liberation Committee . . . must, as the representative of the oppressed French nation, solemnly affirm its determination to punish effectively and by way of example—and to the extent possible—to prevent war crimes of which France, French citizens and her subjects or those under her protection, and more generally innocent human beings who are being or have been victimized.

The negotiations at London were protracted and difficult; indeed, former Nuremberg prosecutor Telford Taylor writes that the project almost failed due to the difficulties Robert Jackson, America’s lead negotiator, experienced with the Russian and French delegations, both of which, according to Taylor, were apparently doubtful about the legitimacy of an “aggressive war” charge, and who hailed from criminal justice systems that varied greatly from the procedures Jackson and his British counterparts were accustomed to.

France also participated in prosecuting the major war criminals at Nuremberg, and by agreement, had principal responsibility for presenting the evidence concerning war crimes and crimes against humanity allegedly committed by the defendants in the countries of Western Europe. With respect to crimes against humanity, Article 6

89. Two Memoranda (Notes) dated October 7, 1943, and March 21, 1943, prepared in London by Professor André Gros, to The French Ambassador, Concerning the Question of War Crimes and Practical Solutions to their Punishment; Punishment and Prevention of Enemy War Crimes, Second Report by Professor René Cassin, Délégué de la France à la Commission d’Enquête des Nations Unies sur les Crimes de Guerre, prepared in Algiers, on May 9, 1944. (Author’s notes, author’s translation.)

90. Cassin Report, supra note 89.

91. Id. at 56. The Report makes references to avoiding “la comédie qui a rendu vaines les dispositions du traité de Versailles” (the farce of Versailles). Id.

92. It is not clear that Taylor is correct on this point, although it may have been Jackson’s perception or the position of the French government in 1945. In a memorandum written to the UN War Crimes Commission on September 27th, 1944, Dr. B. Echter argued that the waging of an aggressive war should be considered as crimes being within the scope of the UN War Crimes Commission, citing an earlier memorandum by the French members of Commission II of the London International Assembly, that had been presented to the Commission in 1942 and took the view that the war was a crime in the legal sense of the word. Minority Report by Dr. B.Echter.

93. Taylor, supra note 1, at 75-77.

94. Although the French only had one of the twenty-two defendants eventually brought to trial at Nuremberg in their possession, they took an active role in the prosecution. Court of Cassation Judge Robert Falco was their representative to the international conference on drafting, and Donnedieu de Vabres was the French member of the Tribunal (Judge Falco was the alternate). Taylor, supra note 1, at 59. See generally Donnedieu de Vabres, Le Procès de Nuremberg, Cours de Doctorat (Montchrestien 1946).
of the Nuremberg Charter provided that the International Military Tribunal had the power to try and punish persons who, acting in the interests of the European Axis countries, committed crimes against humanity:

(c) [N]amely, 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.95

Relying upon this provision in his opening address, French Chief Prosecutor François de Menthon96 argued that crimes against humanity were "crimes against the spirit," and opened the French case with a dramatic appeal to the tribunal:

France, which was systematically plundered and ruined; France, so many of whose sons were tortured and murdered in the jails of the Gestapo or in concentration camps; France . . . asks of you, above all in the name of the heroic martyrs of the Resistance, who are among the greatest heroes of our national legend, that justice be done.

France, so often in history the spokesman and the champion of human liberty, of human values, of human progress, through my voice today becomes also the interpreter of the martyred peoples of Western Europe, Norway, Denmark, the Netherlands, Belgium, Luxembourg, peoples more than all others devoted to peace . . . peoples who have shared our sufferings and have refused, like us, to . . . sacrifice their souls . . . . . . . France here becomes their interpreter to demand that justice be done. The tortured people's craving for justice is the basic foundation of France's appearance before your High Tribunal . . . More than toward the past, our eyes are turned toward the future.97

The French prosecution often suffered from a lack of resources (France was still recovering from the occupation), and according to former Nuremberg Prosecutor Drexel Sprecher, the French prosecutorial team had some difficulty adapting to the adversarial procedures of the trial.98 Nonetheless, the French contribution was an important element of the trial, particularly as regards the presen-

95. London Agreement, supra note 88.
97. De Menthon, supra note 34, at 89.
98. Sprecher, supra note 96, at 550.
tation of the crimes against humanity charges. The trial opened on November 20, 1945, and ended on October 1, 1946. The judgment, while disappointing some who thought that the Tribunal should have elaborated broader, more universal principles than it did, nonetheless came to stand, broadly, for the idea that grave and massive violations of human rights are the concern of the international community, not just of nation states, and that aggressive war, which the tribunal referred to as the “supreme international crime,”99 is morally, legally, and politically wrong.

III. BRINGING THE NUREMBERG PRINCIPLES HOME: THE BARBIE, TOUVIER, AND PAPON TRIALS

Following their liberation by allied forces, the French engaged in a rudimentary form of what we would now call “transitional justice.” This period was marked by violent purges of French collaborators (l’épuration), including summary executions of as many as 10,000 (or more) French men and women, and trials of both French collaborators and German agents captured in France.100 Frenchmen were punished for “collaboration” or treason.101 Non-Frenchmen were punished for war crimes.102 Both were tried under French laws that either implemented the laws of war or specifically sanctioned the crime of collaboration. None of the accused, however, was punished by a French court for something called a “crime against humanity.”103 Indeed, most probably, “crimes against humanity” did not exist in French law prior to 1964.104

After the initial spate of prosecutions and the purge, amnesty laws were adopted that prevented the punishment of individuals for crimes committed during the occupation period, thereby attempting to bring “closure” to the tragedy of Vichy. Nevertheless, in France the Nuremberg trials were, though finished, not forgotten. Donnedieu de Vabres continued to write and publish on the subject,105 and France

99. IMT Judgment, supra note 47, at 186; HARRIS, supra note 2, at 568.
100. Professor Sweets estimates the purge at probably some 10,000 Frenchmen, executed at the hands of other Frenchmen without a proper trial, although others have put the number as high as 40,000. See JOHN F. SWEETS, THE POLITICS OF RESISTANCE IN FRANCE, 1940-1944, 213, 216-17 (1976). See also Jean-Pierre Maunoir, La répression des crimes de guerre devant les tribunaux français et alliés, 39 (1956) (Thèse No. 517, Université de Genève, Faculté de Droit); HERBERT R. LOTTMAN, THE PURGE 22 (1986).
102. See Sadat, supra note 37, at 317-18.
105. See, e.g., HENRI DONNEDIEU DE VABRES, TRAÎTÉ DE DROIT CRIMINEL ET DE LÉGISLATION PÉNALE COMPARÉE (1947); HENRI DONNEDIEU DE VABRES, LES PRINCIPAUX ASPECTS DE LA POLITIQUE CRIMINELLE MODERNE (1960); Henri Donnedieu de Vabres,
participated, along with other members of the new United Nations
including the United States, in the elaboration of the Genocide
Indeed, two primary architects of the Universal Declaration, Eleanor
Roosevelt and René Cassin, were American and French, respec-


107. CYRIL EDWIN BLACK ET AL., REBIRTH: A POLITICAL HISTORY OF EUROPE SINCE
WORLD WAR II, 114 (2000).

108. However, France did not ratify the treaty until May 3, 1974. Minnesota
Human Rights Library, Ratification of International Human Rights Treaties –
html.

109. In this regard, it is worth noting the extraordinary contributions of the Amer-
ican Former Nuremberg prosecutors, in particular, to the development of the law in
this area, and in keeping interest in the Nuremberg legacy alive. See, e.g., FERENCZ,
supra note 62; HARRIS, supra note 2; ROBERT S. JACKSON, REPORT TO THE INTERNA-
TIONAL CONFERENCE ON MILITARY TRIALS, LONDON 1945 (1945); SPRECHER, supra note
96; TAYLOR, supra note 1.

110. BORGWARDT, supra note 1, at 236-37.

111. United Nations Treaty Collection: Convention on the Prevention and Punish-
asp?src=UNTSONLINE&Tabid=2&id=318&chapter=4&lang=en#Participants.

On the other side of the Atlantic, the legal picture could not be
more different. Other than the writings of former Nuremberg prose-
cutors, many of which did not appear until considerably after the end
of the war, and which were written against a background of tre-
mendous skepticism, the Nuremberg trials seem to have had little
impact upon American law and U.S. policy immediately following the
war. Historian Elizabeth Borgwardt refers to the Nuremberg Charter
as an example of the “multi-lateralist sensibility that briefly gripped
the United States” at the end of World War II, but also notes that
there were probably more critics than enthusiasts of the trials.110
America’s lackluster support for the Nuremberg legacy can be seen in
its reluctance to ratify international criminal law conventions as
well. Whereas France ratified the 1948 genocide convention on Oc-
tober 14, 1950, the United States took forty years to do so, ratifying it
only on November 25, 1988.111 Of course, the United States was pre-
occupied with the Cold War—the threat of communism and nuclear

Le Procès de Nuremberg Devant les Principles Modernes du Droit Pénal International,
I RECEUIL DES COURS 6 (1947).


107. CYRIL EDWIN BLACK ET AL., REBIRTH: A POLITICAL HISTORY OF EUROPE SINCE
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96; TAYLOR, supra note 1.

110. BORGWARDT, supra note 1, at 236-37.

111. United Nations Treaty Collection: Convention on the Prevention and Punish-
asp?src=UNTSONLINE&Tabid=2&id=318&chapter=4&lang=en#Participants.
annihilation were much more present on American minds than the need to build upon the Nuremberg legacy. Still, the United States did assume a leading role in the negotiation of the four Geneva Conventions of 1949, which included the possibility of criminal sanctions for "grave breaches" of the Conventions,112 building directly upon the Nuremberg legacy. Finally, although emigré scholars like Hans Kelsen brought to the United States their ideas about restraints upon the use of force and the superiority of international law, their influence quickly waned with the rise of the legal realist school championed by Hans Morgenthau,113 and of the policy-oriented approach towards international law emerging at Yale (unsurprisingly referred to as "the New Haven school"), dominated by Yale professors Harold Laswell and Myres McDougal.114 In contrast, a "liberal internationalism" was espoused by scholars like Louis Henkin and Oscar Schachter at Columbia, who argued that international law was not dependent upon the existence of sanctions to qualify as law, and who challenged the pre-war positivists and the realists by arguing that international law was accepted and generally complied with by most states because it offers substantial practical advantages to states (and policy makers) that do so.115 Yet, as David Kennedy writes,

As the liberal consensus on American internationalism dissipated, the field [of international law] became increasingly marginal, isolated from both the cosmopolitanism of Republican free traders and the increasingly interventionist cold


The central project common to the new mainstream [international lawyer] is an urgent effort to permit international lawyers to return to a position of authority within the American political establishment they have not had in almost a century.116

Returning to the situation in France, the country had suffered terribly during the German occupation and had its own complicity to reckon with in the Nazi's nearly successful efforts to exterminate European Jewry, as well as its own accounts to settle with former Nazis. In 1964, the French legislature incorporated crimes against humanity into French municipal law. The law was largely motivated by rumors that Hitler was still alive and by concern that he and other Nazis who had not yet been brought to justice would escape prosecution because the German Statute of Limitations was about to expire. This was a real possibility given that, at the time, Germany had a twenty-year statute of limitations for murder, and ten- and fifteen-year prescriptive periods for lesser crimes.117 Many former Nazis had not yet been tried in Germany, and similar prescriptive periods existed in other countries where war criminals were thought to be hiding. The Nuremberg Charter was silent on the question of a statute of limitations118 and all the laws adopted by the Allies followed suit, with the exception of article Article II, para. 5 of Control Council Law No. 10, which provide that persons accused of one of the crimes therein could not benefit from "any statute of limitation in respect of the period from 30 January 1933 to 1 July 1945."119

The French 1964 law provided:

118. Which was probably an oversight. Levasseur, supra note 103, at 265 & n.22.
119. Control Council Law No. 10 provided for the trial of minor war criminals in Germany on December 20, 1945. The purpose was to "give effect to the terms of the Moscow Declaration ... and the London Agreement of August 8, 1945 ... in order to establish a uniform legal basis in Germany for the prosecution of war criminals and other similar offenders, other than those dealt with by the International Military Tribunals." Official Gazette of the Control Council for Germany, no. 3, 22; Journal Officiel du Commandement en Chef Français en Allemagne, no. 12 of 11 January 1946. Allied Control Council Law No. 10 is reprinted in BASSIOUNI, CRIMES AGAINST HUMANITY, supra note 88, at 592. See also Jacques-Bernard Herzog, Étude des lois concernant la prescription des crimes contre l'humanité, 1965 REVUE DE SCIENCE CRIMINELLE ET DE DROIT PÉNAL COMPARÉ [REV. SCI. CRIM. & DR. PÉN.] 337, 338.
Law No. 64-1326 declaring the imprescriptibility of crimes against humanity. "Sole article. Crimes against humanity, as defined in the United Nations' Resolution of February 13, 1946 taking account of the definition of crimes against humanity figuring in the Charter of the International Tribunal of August 8, 1945, are imprescriptible by their nature."\(^{120}\)

By this law, the French legislature apparently intended both for crimes against humanity (as defined in the IMT Charter) to become an indictable offense under French municipal law and to abolish the defense of prescription.\(^{121}\) Note that this provision merely incorporates the Nuremberg Charter by reference—it would seemingly be unthinkable for an American prosecutor to bring an indictment under a similar provision in U.S. law today, although there is precedent in early American cases for using international law to complete laconic Congressional statutes.\(^{122}\) However, Article 55 of the French Constitution of 1958 provides:

Treaties or agreements duly ratified or approved shall, upon their publication, have an authority superior to that of laws, subject, for each agreement or treaty, to its application by the other party.\(^{123}\)

While it was not always clear that this provision implied the superiority of international law in all cases,\(^{124}\) as the Court of Cassation subsequently found in the Touvier case, discussed below (following the report of President Mongin), the London Accord of August 8, 1945, had "in conformity with the constitutional tradition of

\(^{120}\) Journal Officiel de la République Française [J.O.] Dec. 29, 1964. This law was adopted unanimously by the French Legislature with the intention that any remaining Nazis would be punished, no matter when or where they were found. To meet the objections of those who felt that eliminating the prescriptive period for one category of crimes would deprive criminal defendants of a right to which they were fundamentally entitled, the Report presented to the French National Assembly by Paul Coste-Floret responded that extinctive criminal prescription was a relatively new right, unknown at first to Roman law, and known only exceptionally at common law. Additionally, the Reporter noted that the justifications for the doctrine of prescription, the disappearance of evidence and the principle of "forgive and forget," did not apply, for evidence had become more—not less—abundant in the twenty years since the liberation, and the crimes committed were of a particularly serious nature, not to be pardoned or forgotten—"le temps n'a pas de prise sur eux." See Sadat, supra note 37, at 320-21.

\(^{121}\) Extinctive criminal prescription bars the prosecution of a defendant by the State (l'action publique) or the imposition of the punishment (la peine), if either has not been brought or carried out prior to a certain, statutorily-established, period of time. See Martin Weston, An English Reader's Guide to the French Legal System 30 (1991).


\(^{123}\) 1958 Const. art. 55 (Fr.).

\(^{124}\) See infra notes 225-230 and accompanying text.
our country, an authority superior to that of the law.’ Confirming this jurisprudence in the "Barbie Case," the French courts held that the London Charter and Accord were part of French law, and indeed had an authority "superior to [domestic law] by virtue of Article 55 of the Constitution," requiring their direct application by the French courts. This allowed them to elaborate upon and define the scope and application of the 1964 law as well as to determine the meaning of Article 6(c) within the context of the three French prosecutions brought under the 1964 law, the Barbie, Touvier, and Papon case.

The Touvier Case

Paul Touvier's case was the first to be brought under the 1964 law. Although a relatively minor figure in the Vichy hierarchy, Touvier used his position as Lyon's head of information services in the Milice to harm opponents of the Vichy regime, particularly Jews. On June 27, 1973, a survivor of his anti-Semitic activities, Rosa Eisner Vogel, filed a complaint with the public prosecutor's office in Lyon accusing Touvier of directing a grenade attack against the Synagogue at Quai Tilsitt, Lyon, during World War II. Shortly thereafter, another survivor, Georges Glaeser brought an action implicating Touvier in the massacre of seven Jews (including his father).
by the Milice, at Rillieux-la-Pape. They both individuals brought the action as civil parties. Around the same time, other individuals filed charges against Touvier with the prosecutor’s office at Chambéry. They alleged that Touvier had tortured Robert Nant, a leader of the Resistance, and had arrested and deported other members of the Resistance, some of whom died as a result. All three complainants—Vogel, Glaeser, and Nant—asserted that Paul Touvier had committed crimes against humanity.

For three years, the case against Touvier navigated the French judicial system. It was dismissed and appealed twice. Overall, the case presented the French courts with several significant issues, including whether the 1964 law could apply to crimes committed prior to its passage; whether it could apply to Frenchmen (as Article 6 of the IMT charter referred only to “Axis” war criminals); and whether the acts alleged were crimes against humanity within the meaning of the IMT charter. The Criminal Chamber of the Court of Cassation never reached the issues presented, however. Instead, the Court referred the case to the Minister of Foreign Affairs for a ministerial interpretative response on the application of the treaties to Touvier’s case.

On July 15, 1979, the Minister of Foreign Affairs rendered the long-awaited interpretation of the Nuremberg Charter in the Touvier case, holding that “the only principle in matters of the prescription of

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133. These were filed on Mar. 27, 1974. Touvier II, supra note 125 (Report of Counselor Mongin).

134. Id.

135. For a more detailed account of the legal proceedings against Touvier, see generally Sadat, supra note 37; Sadat, Reflections, supra note 126.


137. This question posed a significant hurdle for the Court due to the insistence of French law on the non-retroactivity of penal laws.

138. Touvier II, supra note 125. For commentary on this opinion, see Sadat, supra note 37, at 330-31. The French Court of Cassation has traditionally limited the power of the courts within its jurisdiction to interpret treaties, preoccupied with the possibility that judicial interpretation could disturb the smooth functioning of French diplomacy or cause the French State to be liable. The responses of the Minister of July 15 (Touvier) and July 19 (Leguay), 1979, were very long in coming. When they finally appeared, they were unpublished and sent only to the court and the parties. Judgment of January 26, 1984, Cass. crim., 1984 J.C.P. II G, No. 20,197 (Note Ruzié), J.D.I. 308 (1984) [hereinafter Barbie II] (unless otherwise specified, all cites to the Barbie II decision are to the version published in the J.C.F.).
crimes against humanity that one may derive from the IMT Charter is the principle of imprescriptibility.”¹³⁹ This decision allowed both the Touvier and Barbie cases to proceed.

The Prosecution of Klaus Barbie: 1983-1988

It was easier for the French to accept a case against Klaus Barbie than Paul Touvier, of course. Barbie was a German national who was known as “the butcher of Lyon” for his role in destroying the French Resistance that had come to use Lyon as a base of operations during Lyon’s time as part of Free France.¹⁴⁰ Freed of many of the difficulties that had troubled the Touvier prosecution, including the still unanswered question whether Frenchmen and not just Germans could be prosecuted under the 1964 law, and armed with the response of the Ministry of Foreign Affairs as to the problem of prescription, the Court of Cassation had no trouble this time in addressing the thornier issues of what constitutes a crime against humanity in French (international) criminal law. This the Court did through a series of opinions that I have addressed extensively in other writings.¹⁴¹ There are, however two particularly significant decisions that are worth noting here.

First, in an opinion rendered on January 26, 1984, the Court of Cassation rejected the argument that the crimes had prescribed.¹⁴² Following the interpretation of the Ministry of Foreign Affairs,¹⁴³ the Court held that Barbie, charged with crimes against humanity, could


¹⁴³. Once given, the opinion of the Minister of Foreign Affairs, even though unpublished, is valid for future cases, at least where the opinion is general and not tied to particular facts. Id. (Note Ruzié).
not benefit from the prescription of the public action,\footnote{144} no matter when the crimes had been committed.\footnote{145} According to the Rapporteur for the case (Christian Le Gunehec), this required the Court to accept the role that the legislature had apparently ordained for it—to sit as an “international tribunal” and to apply the Nuremberg Charter as a matter of French international criminal law.\footnote{146} Thus, almost twenty years after the adoption of the 1964 law, and more than ten years subsequent to the filing of the complaints in the Touvier case, the Court of Cassation finally ruled that the 1964 law meant what it said: crimes against humanity could be prosecuted in France whatever the date and place of their commission.\footnote{147}

Second, the Court interpreted Article 6(c) in order to permit Barbie’s trial in France, while at the same time limiting the Nuremberg Charter’s application to any crimes outside the World War II context. Expanding upon the Statute’s application, the Court held that members of the Resistance could be considered “civilians” for the purposes of applying provisions regarding crimes against humanity, even though the members of the French Resistance had taken up arms against the Germans.\footnote{148} However, the Court restricted the application of Article 6 (c) by requiring that the perpetrator have an additional intent to carry out his crime on behalf of a “State practicing a hegemonic political ideology.” Under this definition, any State (or any group) not practicing a hegemonic political ideology cannot ever, as a matter of law, commit a crime against humanity. The Court of Cassation thus shielded France (and any other democratic state) from criminal liability.\footnote{149} This was not required by either the Nuremberg Charter or by the Judgment of the IMT; rather, it was an effort by French judges to cabin the application of the 1964 law so that it applied only to individuals accused of committing crimes under German influence or direction during the Second World War. It was vigorously critiqued as explicitly shielding the Fifth Republic from allegations of war crimes or crimes against humanity committed in Indochina or Algeria.\footnote{150} Nonetheless, after a sensational trial that was widely covered by both the French and international press, Barbie was convicted on July 4, 1987, of crimes against humanity and sentenced to life imprisonment. He died of leukemia, in prison, on September 25, 1991.\footnote{151}
The Resumption of the Touvier case

Following Barbie's trial, Touvier was arrested, and an Investigating Magistrate, Judge Getti, held that he could be indicted on five of the eleven charges then lodged against him, including the massacre at Rillieux-la-Pape. On review, in an astounding 215-page decision, the Indicting Chamber of the Paris Court of Appeals threw out the case, finding that the evidence with respect to ten of the eleven counts was insufficient to proceed against Touvier. With respect to the one crime for which Touvier's involvement was undeniable (the massacre at Rillieux), the Appeals Chamber found that the prosecution had not proven that the accused had intended to systematically commit inhumane acts and illegal persecutions in the name of a State practicing a hegemonic political ideology, because Vichy France, unlike Nazi Germany, was not a hegemonic state. The court also found that Touvier could not be guilty as an accomplice of the Gestapo, finding that Touvier was not carrying out any German plan at Rillieux—it was entirely "une affaire entre Français" (a French affair).

The decision of the Paris court provoked a public outcry and was widely criticized. The historical record showed that the Milice targeted Jews for abuse, and Touvier himself admitted that the

152. Touvier III, supra note 132, at 20; see also Nouvelle plainte à Lyon contre l'ancien milicien Paul Touvier, LE MONDE, Mar. 21, 1983.
153. The charges are discussed in detail in Sadat, supra note 37, at 347-48 and notes cited.
154. French court decisions are generally noted for their cryptic brevity, making the 215-page decision of the Paris Court of Appeals particularly remarkable.
155. There is no accepted definition of what a "hegemonic" state is, or what the French courts intended by the use of this term. For an analysis of the decisions in the Barbie and Touvier cases discussing this criterion, see Sadat, supra note 37, at 359-61.
156. Touvier III, supra note 132, at 206. For example, the court opined that none of Maréchal Petain's speeches contained anti-semitic remarks.
157. Touvier III, supra note 132, at 209.
159. See Marrus & Paxton, supra note 84, at 3-5, 12 (Vichy passed laws on the Jews ("le statut des juifs") prior to any German dictate on the subject, and in fact "Vichy mounted a competitive or rival antisemitism rather than a tandem one": Vichy wanted to keep Jews out and the Germans to dump them in the occupied zone). See also generally Klarsfeld, supra note 84, and Weisberg, supra note 84, at 1375-77.
*Milice* carried out the Rillieux massacre under German orders. Indeed, this was his principal defense. Touvier is convicted.

On November 27, 1992, the Court of Cassation reversed the Paris Court of Appeals, in part, and found that because the criminal acts committed at Rillieux had been accomplished at the instigation of the Gestapo, Touvier could be convicted under Article 6 of the Nuremberg Charter, as he had acted “in the interests of the European Axis countries.” Thus the Court was able to avoid holding that the 1964 law was only applicable to Germans, without simultaneously calling into question the Vichy regime and its responsibility for crimes committed during the war. The case was remanded, Touvier was indicted for the massacre at Rillieux, and on April 20, 1994, after a sensational, month-long trial, Touvier was convicted of “complicity to commit crimes against humanity.”

**The Prosecution of Maurice Papon**

If Touvier’s case tested the capacity of the French courts to apply the Nuremberg principles to their own citizens, the Papon case proved even more difficult. On October 20, 1942, four armed law enforcement officers, two French and two Germans, had arrived at the home of the Slitinsky family in Bordeaux, France. They had come to arrest the Slitinskys as part of a larger operation in which the Jews of the Bordeaux region were to be arrested, interned, and their property confiscated. Michel Slitinsky, then seventeen years old, escaped. His father, Abraham, and sister, Alice, were less fortunate.

160. Judgment of Nov. 27, 1992, Cass. crim., 1993 J.C.P. II G, No. 21, 977 [hereinafter *Touvier IV*]. Subsequent citations are to the entire unpublished decision as filed with the clerk of the court, which is on file with the author.

161. *Id.* at 47. Of course, the Court of Appeals really did not say this—it, in fact, argued that it was a “French affair.”

162. Judgment of June 2, 1993, Cour d'appel de Versailles, Première chambre d'accusation 31 [hereinafter *Touvier V*]. For an analysis of the June 2 indictment, see Sadat, supra note 37, at 351-53. Interestingly, the court referred to “governmental or state policy of exterminations and persecution” (emphasis added). Query whether this choice of words was deliberate, representing a disagreement with the Court of Cassation, or whether it was unintentional. Because the Court found that Touvier was an accomplice of the Gestapo, it did not address the question whether the Milice and the Vichy Government could also be so considered. *Touvier V,* at 34.


164. Ultimately, the Jews of Bordeaux captured by French or German authorities would, for the most part, be sent by train from the Mérignac prison camp in the south of France to a larger prison camp Drancy, in the north, and finally to Auschwitz where they would be exterminated.
They were arrested and Abraham was sent to Auschwitz where he died.\textsuperscript{165}

Nearly forty years later, archives were discovered that revealed the role of Maurice Papon, a high ranking civil servant who was the General Secretary for the Gironde Prefect, in the arrest of the Slitinskys. Indeed, the twenty-six volumes of evidence collected by the investigating judges implicated Papon in the deportation of almost 1,600 Jews from Bordeaux. Although not a policy-maker himself, Papon was apparently a highly efficient bureaucrat with authority over “Jewish questions” in the Gironde. He supervised the compilation and maintenance of lists of Jews (which were periodically forwarded to the Germans), organized roundups of Jews, and procured transportation and police surveillance for the convoys.

Numerous victims of the mistreatment, or their surviving relations, filed criminal charges against Papon and others alleging that he had committed a crime against humanity under the 1964 law. After the tortured road traveled by the\textit{Barbie} and\textit{Touvier} cases, many feared that the\textit{Papon} case would never be heard. Although the documentary evidence against him was damning, as a white collar defendant Papon’s case seemed more difficult than Touvier’s both from a legal (given the earlier case law) and a political perspective.\textsuperscript{166} For one thing, after the war Papon’s public image was (unlike Touvier’s) completely rehabilitated. Indeed, while Touvier went into hiding, Papon’s career flourished. Called by de Gaulle to public service based on his resistance credentials (the\textit{bona fides} of which were hotly contested during his trial), he rose through the civil service ranks to become Prefect of Police for the city of Paris in 1958, a member of Parliament in 1968, and Budget Minister in the government of Raymond Barre in 1978. For another, Papon does not, unlike

\textsuperscript{165} Information regarding the Slitinsky case as well as the other cases involved in the Papon case can be found in the opinion of the Court of Appeals of Bordeaux, Indicting Chamber, Decision of Sept. 18, 1996. \textit{See Papon I, infra} note 166. \textit{See also} MICHEL SLITINSKY, L’\textit{AFFAIRE PAPON} (1989).

Touvier, appear to have been explicitly anti-semitic; rather, the anti-semitism of Papon was manifested by his apparent indifference to the fate of those whose deportation orders he signed.

In a 170-page decision (**arrêt de renvoi**)**167** confirmed by the Court of Cassation on January 23, 1997,**168** the Indicating Chamber of the Bordeaux Court of Appeals indicted Papon for complicity in crimes against humanity. Remarkably, the opinion condemned not just Papon, but the entire bureaucratic apparatus used in the "administrative massacre"**169** of the Jews of France. The opinion is also interesting in its response to Papon's defenses. Papon's primary contention was that he was just doing his job and that he did not know what would happen to the deportees. The court forcefully rejected this argument. According to the court's opinion, "everyone knew" what was happening (and particularly someone as well-educated and well-placed as Papon) given the news reports at the time and the personal accounts of Jews who had escaped from the East, and who had sought refuge in France. Reviewing the available evidence, the court ultimately concluded that:

Maurice Papon . . . had, even prior to taking office, a clear, reasoned, detailed, and continuous knowledge of the Nazi's 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.**170**

The indicting chamber also rejected any defense of duress, finding that the pressures brought to bear upon civil servants were not of an intensity that would have negated Papon's free will. The defense's reliance on claims of superior orders and subordinate responsibility were equally unfruitful. As the court notes, the orders given were manifestly illegal.**171** Indeed, the court suggested more than once that the appropriate response of Papon to Nazi (or Vichy) pressure should have been to resign.

The trial of Maurice Papon defeated all expectations. After the **arrêt de renvoi**, the trial's outcome seemed like a foregone conclusion:

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167. The **arrêt de renvoi** is the functional equivalent of an indictment in a common law system, and is also known by the term "**acte d'accusation**."

168. **Papon II**, supra note 166.


170. **Papon I**, supra note 166, at 140.

171. The court also noted that the order given from London on January 8, 1942, which told French civil servants to remain at their posts but to impede insofar as possible the orders of the German occupants, did not exonerate Papon, for this "**ordre de mobilisation**" could not serve to justify operations resulting in deportations. The Court of Cassation confirmed this holding in its opinion of January 23, 1997. See Leila Nadya Sadat, *The Legal Legacy of Maurice Papon*, in *THE PAPON AFFAIR* (Richard J. Golsan ed., 2000).
it would have to be life imprisonment. That was the sentence Paul Touvier received for ordering the murder of seven men at Rillieux; surely the deportation and ultimate death of more than one thousand souls warranted the same. But from the outset, the trial surprised. From the opening day of October 8, 1997, Papon ably defended himself, and his lawyer proved more than capable of the same. In contrast, the lawyers for the civil parties were often in disarray. Papon requested, and received, his liberty for the duration of the trial.\textsuperscript{172} His illness caused the trial to be recessed several times.\textsuperscript{173}

Finally, after more than six months had elapsed, the trial concluded with a demand for twenty years imprisonment from the Prosecutor.\textsuperscript{174} On April 2, 1998, after nineteen hours of deliberation, the jury rendered its verdict: ten years imprisonment.\textsuperscript{175} Conviction on the charges of complicity with respect to the arrests and detentions of some of the victims; acquittal on all the charges of murder. Although the court's reasoning is unclear, it essentially held that although the accused could be said to have known of the cruel fate (even death) that awaited the deportees, his knowledge did not rise to the level of premeditation. With respect to the arrests and detentions, however, these could be qualified as crimes against humanity because they were being carried out as an integral part of a Nazi plan of which he had knowledge. In other words, the judgment was a compromise.\textsuperscript{176}

In September 2002, after he requested and was denied a Presidential pardon,\textsuperscript{177} Papon was released from prison on medical grounds, just three years into his ten-year sentence.\textsuperscript{178} Although the ruling by the appeals court ordering Papon's release did not reverse his conviction, it came as a shock to some of the victims and their families: "It was like a second death for our dead," said Juliette

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\item \textsuperscript{173} Conan, supra note 158, at 317-20.
\item \textsuperscript{175} Craig R. Whitney, \textit{10-Year Term Ordered for War Crimes}, \textit{Int'l Herald Trib.}, Apr. 3, 1998, at 1.
\item \textsuperscript{177} Emmanuelle Réju, \textit{Jacques Chirac refuse la grâce de Maurice Papon}, \textit{La Croix}, Oct. 8, 2001.
\item \textsuperscript{178} An appeals court freed Papon, then ninety-two years old, in consideration of Papon's advanced age and ill-health, basing its decision on a March 2002 law allowing for the early release of sick and aged prisoners. Elaine Ganley, \textit{Vichy-Era Convict is Freed, and French Complicity Revisited}, \textit{St. Louis Post-Dispatch}, Sept. 29, 2002, at A15.
\end{itemize}
Benzazon, who lost fourteen relatives (including her parents), some of whom were shipped to extermination camps on orders signed by Papon. On June 11, 2004, more than six years after the original verdict, the Court of Cassation rejected a final appeal by Papon. In its decision, the Court of Cassation ruled that a retrial was not warranted, ending the last appeal that Papon had in the case. Papon died on February 17, 2007, his death as controversial as his life had been. In the words of Dominque Moïsi, commenting upon Papon’s death in the *International Herald Tribune*, Papon, was the “anti-Schindler,” Vichy’s faithful servant, who was “judged and condemned by the court of history and the court of men.”

IV. A NEW ERA OF ACCOUNTABILITY

A. Crimes Against Humanity and Genocide in the Courts after 1992

The French experience following World War II suggests the difficulties faced by municipal courts in applying international law as a matter of course. Both national politics and inexperience get in the way. Indeed, it is particularly difficult for national courts to punish wrongdoers from their own government for war time atrocities and politics was evident in the decisions involving Touvier, Papon, and Barbie. At the same time, the French courts established a sophisticated and well-developed jurisprudence in this difficult area of the law. The convictions of Touvier and Papon were deeply significant to French society, both to the victims of their crimes and as symbols of hope to victims of such crimes elsewhere. As Henri Glaeser, the son of one of Touvier’s victims, stated to the jury during Touvier’s trial:

> Remember the last photograph [of my father], taken at Rillieux, his mouth wide open . . . . For years and years, I had the impression that someone wanted to pour concrete in there, to stop him from speaking, to stop me as well. Now I am happy to find myself in front of a court that is democratic, engaged in an adversarial debate where everyone can


180. *Nazi collaborator’s final appeal denied*, *Chicago Tribune*, June 13, 2004, at 9. The case had earlier been heard by the European Court of Human Rights which ruled in favor of Papon on certain procedural points, but did not ultimately affect the outcome.

181. Papon was stripped of his decorations as a result of his conviction, including the *Legion d’Honneur*. He remained ever-defiant, however, and was fined in 2004 for wearing it during an interview with *Le Point*. His lawyers argued that he was entitled to be buried with his decorations, *Maurice Papon, Obituary*, *The Times*, Feb. 19, 2007, creating consternation among victims groups.

Moving beyond the atrocities of World War II, France faced additional legal and political questions and issues as it began to address international crimes in a broader, global context. If the immediate post-World War II cases were uniquely French both in jurisprudential style and impact, the cases decided in the 1990s under more recent French legislation have been occurring elsewhere as well, as many countries have been domesticating international criminal law (such as the Pinochet litigation in England and Spain). Moreover, the establishment of two functioning international criminal tribunals in the mid 1990s, the ICTY and the ICTR, situated the French courts within a global system of international justice containing both national and international components. These more recent cases indicate the important role France has increasingly accepted in enforcing international criminal law. Yet, there is no doubt that politics has played a role in edging out law on more than one occasion, particularly as regards the increasingly contentious issue of French liability for acts in the Algerian war, and the realpolitik of French diplomacy, whereby individuals accused of war crimes, torture, and crimes against humanity have been shielded by the French government from prosecution before French courts.

The 1992 Law

The French legislature adopted a new “crimes against humanity” law in 1992, which abandoned the “hegemonic state” requirement. Additionally, the law provides that members of a resistance movement, as well as civilians targeted on the basis of their religion or some other feature, may be the victims of a crime against humanity, codifying the Court of Cassation’s jurisprudence in the Barbie case.

184. BEIGBEDER, supra note 150, at 26-29 (describing French efforts to shield General Khaled Nezzar of Algeria and Denis Sassou Nguesso, Congo’s President, for his role in the Brazzaville massacre (Congo)).
186. Grave breaches (war crimes) are apparently not punishable as crimes against humanity, however, under the new law. Élisabeth Zoller, La définition des crimes contre l’humanité, 1993 J.D.I. 549, 567.
The French Prosecution of International Crimes in Recent Years

Following the adoption of the 1992 law, several interesting cases brought before French courts have demonstrated the challenges facing the exercise of universal jurisdiction over international crimes by French courts. In particular, limitations regarding the presence of the accused on French territory as well as the recognition of immunities granted by international law reflect France's seeming reluctance to extend its judicial control in such cases despite its desire to prosecute grave human rights abuses and violations of international humanitarian law.187

There is now a rich jurisprudence in this area which cannot be explored in the short space of this Article. Instead, I will examine only the cases that have shaped the French approach to the exercise of universal jurisdiction over war criminals. In the Javor case, Bosnian citizens who were refugees residing in France filed a complaint against non-disclosed parties for crimes of torture, genocide, and crimes against humanity.188 The plaintiffs claimed to be victims of crimes committed by Serb forces as part of the policy of ethnic cleansing taking place in the town of Kozarac and surrounding villages as well as in the detention camps of Omarska, Trnopolje, and Keraterm.189 At the time of the complaint, there was no indication that the alleged perpetrators of these acts were present in France. Nonetheless, the investigating magistrate (Judge Getti), ruled that there was jurisdiction over the case under the Torture Convention and the Geneva Conventions of 1949 for war crimes.190 (Recall that Judge Getti was also responsible for bringing the original indictment against Paul Touvier in 1991.) Judge Getti essentially interpreted the scope of judicial powers implied by universal jurisdiction broadly

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187. Article 689 provides that "the authors or accomplices of offenses committed outside the territory of the Republic can be sued in the French courts and be judged by them . . . whenever an international convention grants jurisdiction to the French courts." [English translation available in Stern, infra note 190, at 528.]


189. Rafaëlle Maison, Les premiers cas d'application des dispositions pénales des Conventions de Genève par les juridictions internes, 6 EUR. J. INT'L L. 260, 261 (1995); and Trial Watch, Affaire Elvir Javor, supra note 188.

so as to permit preliminary acts of inquiry\textsuperscript{191} even without prior confirmation of the presence of the accused on French territory.\textsuperscript{192}

In two decisions vociferously criticized by human rights groups and some scholars, both the Court of Appeals and later the Court of Cassation rejected this interpretation in favor of a narrower construction of French judicial power.\textsuperscript{193} Both higher courts held that under Articles 689-1 and 689-2 of the French code of criminal procedure, French jurisdiction could not attach without the presence of the alleged perpetrators on French territory when the case is filed.\textsuperscript{194} Because there was no evidence that the alleged perpetrators had been present on French territory at the outset of the case,\textsuperscript{195} both the Court of Appeals and the Court of Cassation held that the case could not be heard.\textsuperscript{196}

In contrast to \textit{Javor}, French courts upheld the exercise of universal jurisdiction in the case against Wenceslas Munyeshyaka, an individual accused of crimes committed during the Rwandan genocide, because he was found in France when the initial complaint was filed. The plaintiffs in this case alleged that between April and May 1994, Munyeshyaka, while acting as priest at the church of The Holy Family in Kigali, contributed to the genocide by the Hutu militias and members of the Rwandan armed forces against the Tutsi by depriving Tutsi refugees of food and water, surrendering the refugees to the Hutu militia, participating in the selection of Tutsi refugees to be murdered, and coercing women into having sex with him in exchange for saving their lives.\textsuperscript{197} On July 25, 1995, an investigation was opened against Munyeshyaka for genocide, crimes against humanity.\textsuperscript{198} The Tribunal held that it had universal jurisdiction under the \textit{Torture Convention},\textsuperscript{199} but the Court of Appeals of Nîmes reversed.\textsuperscript{200} The Court of Appeals concluded that jurisdiction must be established only on the basis of the "highest" (most serious) offense,
which in this case was genocide. Because in its view, the French courts had no universal jurisdiction over the crime of genocide, the French courts had no jurisdiction to adjudicate regarding events that had taken place in Rwanda. Two days later on May 22, 1996, a new law (Law No. 96-432) was adopted to adapt French law to Security Council Resolution 955 creating the International Criminal Tribunal for Rwanda. This new law provided for universal jurisdiction over genocide, and jurisdiction over the Munyeshyaka case was affirmed by the Court of Cassation in 1998. On June 21, 2007, the ICTR published an arrest warrant for Munyeshyaka as well as a warrant for Laurent Bucyibaruta, who was also residing in France and already under formal investigation by French authorities for alleged crimes committed during the Rwandan genocide. Indeed, on November 20, 2007, the ICTR referred both cases to French judicial authorities. On February 20, 2008, the French judiciary accepted the referral, thus clearing the way for the eventual trials of Munyeshyaka and Bucyibaruta.

The imposition of the presence limitation on the exercise of universal jurisdiction is problematic to the extent that it prevents prosecutors or investigating judges even from investigating crimes abroad unless, as illustrated in Munyeshyaka, the suspect is present.


204. Id.


upon French territory and readily identifiable.\textsuperscript{207} Yet France is far from unique in its squeamishness as regards cases of "pure" universal jurisdiction. Note also that under French law, trials in absentia are possible (raising other concerns), meaning that even if a defendant subsequently flees French territory, a criminal action may proceed in his absence.\textsuperscript{208}

Another limitation placed upon France's exercise of universal jurisdiction results from France's application of immunity for persons acting in their official capacity, as illustrated by the 

\textit{Kadhafi} affair. Plaintiffs Béatrice de Boëry and a victim's organization known as S.O.S. \textit{Attentats} implicated Colonel Muammar Kadhafi in the 1989 attack on a UTA DC 10 aircraft which blew up over the Teneré dessert, causing the death of 156 passengers and 14 crew members.\textsuperscript{209} A formal investigation into the attack began September 23, 1989.\textsuperscript{210} In 1999, six Libyan citizens\textsuperscript{211} were convicted and sentenced in absentia to life imprisonment for their role in the attack.\textsuperscript{212} The investigating magistrate ruled that there were sufficient grounds to investigate the complaint filed against Kadhafi, a ruling that was subsequently af-

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\item \textsuperscript{207} Amnesty International, infra note 208, at 87. According to Professor Brigitte Stern, the Court of Cassation "could have relied on Article 689 and considered that the Geneva Conventions are precisely the type of convention referred to by this article, as they provide directly for universal jurisdiction." Stern, \textit{Grave Breaches}, supra note 190, at 529.
\item \textsuperscript{208} This occurred in \textit{Ould Dah}, a case involving an intelligence officer of the Mauritanian army who had allegedly ordered acts of torture to be carried out against two black Mauritanian soldiers and participated in these acts. The two victims, who had since become political refugees in France, filed a complaint against Dah, with the support of the Federation internationale des droits de l'homme (FIDH) and the Ligue des droits de l'homme (LDH) and further supported by the Human Rights Association of Mauritania and the Association of Mauritanian Victims. On July 2, 1999, Dah was arrested in Montpellier, France while attending a training program at a military school. However, on April 5, 2000, Dah escaped and fled to Mauritania; on May 25, 2001, the French investigating magistrate ordered that Dah be sent before the Court of Assizes to be tried despite his physical absence. Dah was tried in absentia, and on July 1, 2005, the Court of Assizes found Dah guilty of torture committed directly, ordered or organized by him at the Jreida death camp. He was sentenced to ten years in prison, the maximum term. See Trial Watch, Ely Ould Dah, available at http://www.trial-ch.org/fr/trial-watch/profile/db/facts/ely_ould-dah_266.html. See also Amnesty International, "Investigation of Mauritanian army officer accused of torture—a step towards truth and justice," AI Index: AFR 38/03/99, 5 July 1999 [hereinafter Amnesty International, \textit{Investigation}].
\item \textsuperscript{209} Among the victims was Laurence Penon, sister of civil plaintiff Béatrice de Boëry. Cour d'appel Paris, Oct. 20, 2000, available at https://www.asser.nl [hereinafter \textit{Kadhafi I}].
\item \textsuperscript{210} Id.
\item \textsuperscript{211} The individuals prosecuted for the attack included Abdallah Senoussi, Colonel Kadhafi's brother-in-law and a highly-placed official in the Libyan secret service; Ibrahim Naeli, Arbas Musbah, Abdelsalam Issa Shibani, Abdelsalam Hammouda, all four of whom are officers of that service; and Ahmed Abdallah Elazragh, a Foreign Affairs Department employee, working at the Libyan embassy in Brazzaville.
\item \textsuperscript{212} The defendants were tried and convicted of the charge of "murder and destruction of property by an explosive substance causing death, in connection with a terrorist enterprise." \textit{Kadhafi I}, supra note 209.
\end{itemize}
\end{footnotesize}
ferred by the Court of Appeals on October 20, 2000,213 referring to the judgments of other courts in the Pinochet and Noriega cases, in a striking example of transjudicial dialogue.214 Nonetheless, invoking head-of-state immunity, the Court of Cassation reversed.215 Following the Kadhafi affair, France has consistently upheld the principle of immunity for persons acting in their official capacity who are charged with serious offenses including torture and crimes against humanity.216 Yet as noted by the Court of Appeals in Kadhafi, although there is a tradition of recognizing such immunities, recent actions and judgments in the international community suggest that adherence to diplomatic customs increasingly cannot or will not take precedence over the prosecution of grave violations of international law. Certainly with regard to international crimes, amnesties have, at least in international and transnational prosecutions, been substantially eroded, although the picture is much more complex as regards immunities.217

B. France's Ratification of the International Criminal Court Treaty

France was the twelfth State to ratify the Rome Statute of the International Criminal Court. The negotiation and adoption of the International Criminal Court treaty was one of the most extraordinary juridical events of the twentieth century,218 and has given rise to both extraordinary optimism and controversy. The establishment of the Court would not have been possible without a remarkable change in the political climate and the successful establishment of the ICTY and ICTR. The rise of an international NGO movement

213. Kadhafi I, supra note 209.
214. Id. (referring to the decision of the House of Lords in the extradition proceedings against General Pinochet, and the prosecution of General Noriega, an acting head of State, by the United States for drug trafficking).
216. A complaint was filed against Jean Francois Ndengue, chief of the National Police of the Republic of Congo for crimes against humanity, enforced disappearances, and torture led to an indictment and preliminary arrest of Ndengue in April 2004. The Court of Appeals ultimately held that Ndengue was entitled to immunity because he held a valid diplomatic passport and was on an official visit to France. In February 2003, a Paris magistrate issued a warrant for the arrest of Zimbabwean President Robert Mugabe on charges of torture when Mugabe was visiting France for a Franco-African summit. However, a French court ruled that Mugabe was entitled to immunity as a sitting head of state. Several additional cases are summarized in Human Rights Watch, Universal Jurisdiction in Europe: The State of the Art, vol. 18, no. 5(D) (June 2006): 57.
able to observe and influence the treaty process using instantaneous electronic communications was no doubt another factor, and many have pointed to civil society as a key factor in pushing France, as well as other countries, towards supporting the ICC. Yet in examining French support for the Court, it is undeniable that decades of intellectual preparation and years of experience with prosecutions of crimes against humanity have influenced the outcome. Although there was little doubt that France would ratify the Statute, its support for the Court had not been a foregone conclusion during the Treaty's negotiation. But it is perhaps the reaction to the decision of the French Constitutional Council (Conseil Constitutionnel) that will most astonish, especially U.S. observers.

Recall that the Constitutional Council held that the Statute's ratification required prior amendment of the French Constitution.\(^{219}\) The Constitutional Council found that Article 27 of the Rome Statute, which abrogates head of state and other official immunities, was inconsistent with the legal regime set forth in Articles 68, 68-1 and 26 of the French Constitution. These provisions contain various immunities for the French President, members of Parliament, and other members of the French Cabinet (gouvernement) from criminal prosecution, and it set forth specific conditions under which such prosecutions may be brought (such as restricting them to certain courts). Additionally, the Council found that because the ICC could be properly seized of a case in which a domestic amnesty had been proclaimed by France or in which a French statute of limitations would have otherwise applied, ratification of the ICC statute would infringe upon important elements of national sovereignty. Finally, the Council stated that a constitutional revision was required because the ICC Prosecutor could, under certain circumstances, conduct investigations without the consent of the interested state.

In response, France amended its Constitution on July 8, 1999 to permit ratification of the ICC treaty.\(^{220}\) The Parliamentary debates concerning both the ratification of the Treaty and the amendment of France's Constitution evince a certain preoccupation with the extraordinary steps required; but they were virtually unanimous and entirely supportive, even passionate, about the need to put aside narrow concerns of self-interest and support the International Criminal Court—in the interest of France, and all humanity. Indeed, French parliamentarians, meeting in a joint session as a "Congress" adopted the constitutional amendment permitting ratification by an overwhelming vote of 848 to 6. Likewise, when France's highest

\(^{219}\) CC decision no. 98-408DC, January 22, 1999, J.O. 1317.

\(^{220}\) Loi constitutionnelle no. 99-568 du 8 juillet 1999 insérant, au titre VI de la Constitution, un article 53-2 et relative à la Cour penal internationale. Article 53-2 provides that "The Republic may recognize the jurisdiction of the International Criminal Court under the conditions contained in the treaty signed on July 18, 1998."
administrative court, the venerable Conseil d'État was asked to consider the question of ratification, the response was similar. Indeed, there was no serious question raised either by the rapporteur assigned to study the question, Mme. Sophie-Caroline de Margerie, or by other Counselors of State, as to either the wisdom or the practicability of the Treaty’s adoption by the Fifth Republic, particularly given the unqualified support of both Ministries of Justice and Defense. When the ratification law reached the floor of the French Senate, virtually all those who spoke argued passionately for the Treaty’s ratification and of France’s pride in being one of the first countries to ratify the treaty. Senator André Dulait, rapporteur for the Senate Committee on Foreign Affairs, Defense and Armed Forces, rejecting criticism that the Treaty was flawed (boiteux), retorted that even a lame individual can be moved forward. Like the constitutional amendment, the adoption of the ratification law was effectively unanimous.

V. THE FRENCH EXPERIENCE AS TRANSNATIONAL LEGAL PROCESS

I have described the evolution of France’s approach to international criminal law and the International Criminal Court as developing in three stages, each one, perhaps causing it to take a path distinct from its American cousin. Stage I represents the early experience with negotiating and participating in the Treaty system that evolved after the First World War. Not only did France, unlike the United States, join the League of Nations, but French jurists, and many Continental Europeans whose work was well known in France, were advocates of the League and of the establishment of an international criminal code and court. This established a vibrant epistemic community whose members wrote about and discussed international criminal law as an active discipline, and an important component of world order. Their advocacy did not translate immediately into political reality, but it nevertheless established deep doctrinal foundations when the Nuremberg trials took place that gave the conception of international criminal law a place within formal French legal theory.

The importance of this development is, of course, difficult to gauge. Critics of modern international criminal law often bemoan its "undertheorized" nature, to the distress of their more practically

221. Interview with the Rapporteur, May 23, 2006 (author's notes).
222. See letter dated Nov. 26, 1999, from Marc Guillaume on behalf of the Ministre de la Défense to the Ministre des affaires étrangères, confirming the agreement of the Ministre of Defense to the ratification of the International Criminal Court Treaty; Letter dated Dec. 2, 1999, from Olivier de Baynast of the Minister of Justice, to the Ministre des affaires étrangères, confirming the Justice ministries support for the ratification of the Treaty.
223. Literally "lame," but probably better translated as "flawed" for the time being.
minded brethren. But it is certain that the Nuremberg trials were viewed differently in France than in the United States for political, legal, and cultural reasons. France's largely monist legal system,\(^{225}\) providing that international treaties are constitutionally superior to domestic law where the two conflict,\(^{226}\) also meant that the London Accord and Charter had a different significance in French law than they ever did in the United States, and that the French Parliament was able to transpose the Nuremberg Charter's crimes against humanity provision into French municipal criminal law with relative ease, leaning both on public international law principles and theories of *droit international privé*—that assign formal status to international law within the French legal system. That is not to say that French courts do not, "like their American counterparts, struggle with the appropriate way to give effect to the international legal obligations of their nation,"\(^{227}\) for they do. It is also true that ambiguity in Article 55 of the French Constitution meant that French courts did not always interpret international treaties as having direct effect in the French legal system, and the *Conseil d'Etat* initially took the position that it could not examine an act of Parliament enacted subsequent to an international obligation for its consistency with international law. Yet, since the decision in the *Nicolo* case in 1989, reversing this position, it seems fairly clear that the French courts have moved increasingly towards effectively incorporating treaties and international agreements into its domestic legal order, and in adapting French law to the decisions of international tribunals.\(^{228}\) It is probably fair to say that during the same time period, the United States legal system was being pulled in the opposite direction.\(^{229}\) (Moreover, with respect to the incorporation of the Nuremberg Charter, the French Courts decided even as early as the 1970s, given the superiority of the provisions against crimes against humanity, that they would prevail over domestic laws to the contrary.)\(^{230}\) Thus it is perhaps unsurprising that American support for the Nuremberg trials did not translate into support for the Nuremberg *principles qua principles* of American law. Rather, they seemed to stand separate


\(^{226}\) 1958 Const. art. 55. (Fr.)


\(^{228}\) Id. at 469.


\(^{230}\) See supra note 124 and accompanying text.
and apart from U.S. law, being norms applied to foreigners accused of grievous injury to the United States and her allies.

But it was not until the second phase—when France actually used the 1964 law to prosecute not only Nazis left over from the war but also Frenchmen for crimes committed on French soil—that the incorporation of the Nuremberg principles “grew legs.” The trials of Paul Touvier and Maurice Papon exposed deep divisions within French society, divisions that had been papered over by a culture that wanted the trauma of the German occupation and Vichy’s collaboration gone and forgotten. The deportations of the Jews of France, the struggle to resist the Nazi occupation, a struggle that was often carried out by too few members of society—these were wounds that were deep, and it was feared that public trials of two prominent collaborators would exacerbate them. Indeed, François Mitterand famously opined that the Touvier trial would “destroy civil peace,”231 evoking exactly the kind of “justice vs. peace” argument so common in the current discourse about the utility and benefit of international (or domestic) criminal prosecutions as measures of accountability for the commission of atrocities during wartime.

The fact that the trials were largely viewed as both successful and cathartic—releasing and relieving old tensions and poisons rather than exacerbating them232—was probably very important in building a French “anti-impunity” culture that would see the ICC as a necessary measure for good world governance, rather than an insurmountable threat to French foreign policy. Finally, it should be noted that while the French courts, in this second phase of our story, were indeed the medium through which international norms of accountability articulated at Nuremberg entered the French legal system,233 they were not really engaged in much transnational judicial dialogue at all, still, they certainly did see themselves as sitting as members of international society. Counselor Christian LeGunehec’s brilliant report in the Barbie case makes that explicit—rather like federal courts sitting as state courts in diversity cases, the French courts seemed quite consciously aware of their role in internalizing and incorporating international law norms and of doing so in a manner faithful to the international origin of the applicable law. It is thus unsurprising that a 1993 resolution of the French Institute of International Law calls upon national courts to become independent

actors in the international arena, and to apply international norms impartially without deference to their governments.\(^{234}\)

In the third phase of our survey, the French courts and French political elites have clearly been influenced by the establishment of the ad hoc war crimes tribunals, the resurrection of the international criminal court project (which began in 1989), and national legislation of other countries as well as other court decisions in elaborating a "French" position on universal jurisdiction, immunities under international law, and the propriety of bringing international criminal prosecutions in French domestic courts. That is most evident in the indictments issued by Judge Getti in the Javor case and the Court of Appeals decisions in the Kaddafi affair (which were overruled by higher courts). Perhaps, eager to take their places in the anti-impu- nity transnational legal culture emerging in the 1990s, those lower court judges went further than politics would allow and were checked by the Court of Cassation which was not particularly keen to be out in front of where it perceived international law to be (or perhaps the French approach to international law as the court perceived it). The French law of 1992 was the basis for those actions; and that law was generated as much by the French experience with the law of 1964 as by international norm entrepreneurs such as human rights groups and victims associations encouraging states to criminalize the *jus cogens* crimes of genocide, crimes against humanity, and grave breaches of the Geneva Conventions. It was also no doubt influenced by what Anne-Marie Slaughter and William Burke-White refer to as the "European way of law,"\(^{235}\) that is, the far-reaching ability of European Union law (and by extension international law) to transform domestic law and politics.

Thinking about the French case in terms of Koh's transnational legal process theory provides an extraordinary opportunity to test this theory and its application in a real situation. It also tests the theory's applicability in the comparative context of a norm that is extraordinary difficult to enforce: a norm that mandates the punishment of a country's leaders, even of a head of state, if they are accused of atrocity crimes. Koh argues that transnational legal process describes the way in which international law rules are "interpreted through the interaction of transnational actors in a variety of law-declaring fora, then internalized into a nation's domestic legal system."\(^{236}\) He describes a three-part process of interaction, in-

\(^{234}\) See *id.*, at 1104 (citing Eyal Benvisti, *Judges and Foreign Affairs: A Comment on the Institut de Droit International's Resolution on the 'Activities of National Courts and the International Relations of their States,'* 5 EUR. J. INT'L L. 423 (1994)).


interpretation, and internalization whereby “international legal rules become integrated into national law” and take on the status of binding rules of domestic law.\textsuperscript{237} Certainly, Koh’s analysis fits the French cases described above. The Nuremberg principles were articulated by an international tribunal and adopted by the United Nations; they subsequently interacted with the French legal system in a fascinating interplay between the courts, the legislature, and what we would now call French civil society; and they were ultimately internalized in a manner that can only be described as extraordinary, giving rise to the prosecution of high ranking French individuals for crimes against humanity, and to the abrogation of head of state immunity for the French President in cases that could one day be brought before the International Criminal Court. Indeed, the French ICC ratification debates suggest not only legal internalization, but political and social internalization as well.\textsuperscript{238} The Parliament, the ministries of defense and justice, and civil society clearly saw Nuremburg’s chief premise as both a legal and moral obligation: that no individual is above the law and that committing international crimes subjected all perpetrators to prosecution under international law. At the same time, the trial of Maurice Papon, in particular, exposed the strain of prosecuting one’s own nationals for such activities and it suggests that political resistance to future prosecutions might be very strong, regardless of the state of the law.

Koh’s theory also suggests some reasons why, conversely, the Nuremberg principles were never adopted in the United States, even though the United States was the leading proponent of the Nuremberg trials. Although it could be argued that there was interaction of transnational actors in the guise of the former Nuremberg Prosecutors themselves and the work of the United Nations, there was very little, if any, activity in the guise of interpretation by either the courts or other legal actors, and internalization, therefore, took place to a much lesser degree if it took place at all. Indeed, the legal situation in the United States is in direct contrast to the extensive judicial activity in France during this period. While the United States ultimately ratified the Genocide Convention (in 1988!), adopted implementing legislation,\textsuperscript{239} and adopted federal legislation criminalizing grave breaches of the Geneva Conventions in the guise of the War Crimes Act of 1996,\textsuperscript{240} these laws post-date the French implementation of the Nuremberg principles by more than two decades. Moreover, the United States has never adopted a crimes against hu-

\textsuperscript{237} Id.
\textsuperscript{238} Id. at 642.
manity statute, and the Genocide Implementation Act initially provided for jurisdiction only if the crime takes place in the United States or a U.S. person is the perpetrator. This law, adopted by the Senate in 1986 with a vote of 83 ayes to 11 noes, remained controversial during the negotiations with Senators arguing that extensive reservations to the treaty were necessary so as "not [to] compromise our constitutional form of government in the process."  

While Koh’s theory beautifully illuminates, then, the reason for the dismal compliance of the United States with the Nuremberg principles, it does not provide evidence of causation. That is, transnational legal process theory can demonstrate why the United States now seems to be behind its European cousin in the implementation and application of international criminal law; but it cannot provide us with the underlying explanation of the reasons that is the case. For that answer, we must explore, among other things, the "deep structure" of U.S. law to understand why America, unlike France, appeared unable to adopt mechanisms to interpret these principles and, ultimately, to internalize them. This, of course, is where legal culture fits in. For as this survey has shown, and as Part VI, below, explains further, while the United States and France share many common values with respect to the interpretation, application, and internationalization of international law, they are, literally, oceans apart.

VI. CONCLUSION: THE NUREMBERG PARADOX

This Article has explored some of the many reasons why France and the United States diverge so sharply with regard to their positions on the International Criminal Court Treaty. Some are clearly extrinsic to the discussion in this Article. They include the fact that France has assumed numerous international obligations over and above those it shares with the United States—it is a member of the European Union, which subjects it to the jurisdiction of the European Court of Justice; of the Council of Europe and the European Convention on Human Rights and Fundamental Freedoms, which subjects it


243. This is also true as regards international law teaching, as a lively debate about the relative differences between teaching international law in France and the United States held under the aegis of the American Society of International Law suggests.
THE NUREMBERG PARADOX


248. Rogoff, supra note 227, at 413.
on the United States. Moreover, there was no real parallel to the French crimes against humanity cases in the United States. America was never occupied, and although there were efforts to deport Nazis that had come to the United States under false pretenses, the Nuremberg Charter was never incorporated as a matter of domestic law, and the U.S. statutes criminalizing war crimes and genocide that were initially adopted, applied only insofar as they affect the United States or U.S. nationals.

At the same time, there were a handful of sophisticated uses of international criminal law and international human rights law by American courts, such as the *Filartiga* and *Yunis* cases. Yet, none of the opinions involved the commission of international crimes by U.S. nationals. *Filartiga* was a civil case involving torture committed by Paraguayans against Paraguayans, and *Yunis* involved the commission of terrorist acts against Americans by foreign nationals. In both cases the lower courts treated the international norms as directly enforceable within the American legal system—the customary international law against torture in the *Filartiga* case and various anti-terror treaties that had been codified as federal crimes in *Yunis*—but these cases posed no real political difficulties for Americans at the time. (*Filartiga* and the human rights litigation it spawned subsequently came under attack by conservative scholars and has now been cabinéd, although not overruled, by the Supreme Court in *Sosa v. Alvarez Machain*.) Against the *Filartiga* and *Yunis* cases, however, stand several U.S. Supreme Court decisions denying international law direct effect in the U.S. legal system, most recently the Court's opinion in *Medellín*.

Indeed, it seems undeniable that in spite of the elegant simplicity of the Supremacy Clause's provision that "all Treaties made . . . under the Authority of the United States, shall be the supreme Law of the Land," many treaties, if they are not "self-executing" as that term must now be understood, lack domestic legal force.

American proponents of the International Criminal Court may take solace in one expert's observation that in spite of the clear differ-

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254. *Medellin v. Texas*, 552 U.S. ——, 128 S. Ct. 1346 (2008) (holding that while a treaty may represent an international commitment it is not binding U.S. law unless Congress has implemented it or the treaty is self-executing).
255. U.S. Const. art. VI, cl. 2.
ences between the United States and France, there are extraordinary similarities, including a sense of commitment to the rule of law, democracy and benign government, and human rights. These values are no doubt what led the United States to refrain from vetoing the Security Council Resolution authorizing the referral of the situation in Darfur to the International Criminal Court, even if the Bush administration had no appetite to support the referral either financially or with the promise of military assistance to bring suspected génocidaires to book. The United States delegation at Rome contributed enormously to both the substantive law and procedural protections for the accused that are currently found in the International Criminal Court Statute, and the former U.S. head of delegation, David Scheffer, is now one of the Court's most fervent supporters. Moreover, the United States has shown signs of incrementally moving towards the notion of prosecuting individuals accused of genocide or certain war crimes such as the use of child soldiers, with its recent adoption of the Genocide Accountability and Child Soldiers Accountability Acts of 2008. But these small steps forward have been taken against the backdrop of a legal culture that has steadfastly resisted the internalization of international norms, often on constitutional grounds, and it has failed to take either the moral or the legal legacy of Nuremberg seriously as a matter of U.S. foreign policy.

The United States may very well come around to ratifying the ICC Statute; but it seems clear from this study that it will have a great deal of difficulty doing so. It is not just a question of politics or superpower status, but a way of perceiving international laws as lois d'exceptions, as foreign to the domestic legal order, that has made it difficult even for some liberal internationalists to come right out in favor of the ICC. In the United States, international law is seen as exceptional, even aberrant, whereas in France it is simply another source of law to be applied. That does not mean that politics never influences law in France—it does. Nor does it mean that American liberal internationalists or transnationalists, as they are sometimes called, do not command a significant following—they do. Yet, as this

257. Rogoff, supra note 227, at 408.
258. The Resolution specifically requires that the prosecution be paid for by the Court, not the United Nations, and, of course, the United States has been unwilling to put much "muscle" behind its pleas for peace in Sudan, although it has been prominent in calling the atrocities "genocidal" in character.
260. Relatively little scholarship appeared on the Rome Conference or the ICC in the United States (as opposed to Europe), and neither Hillary Clinton nor Barack Obama supported ratification of the ICC Statute during the 2008 Presidential Campaign. John McCain initially did, although it is unclear if that would have been his view upon becoming President.
Article has demonstrated, legal culture matters with respect to political decision making; and with respect to potentially controversial decisions, such as the decision to ratify a major treaty requiring the application of international legal principles to individuals holding great power, it may matter to a very significant degree indeed.