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THE KLAUS BARBIE TRIAL AND CRIMES AGAINST HUMANITY

Jean-Olivier Viout*

On July 4, 1987 the Rhône Assize Court in Lyon sentenced Nazi war criminal Klaus Barbie to life imprisonment. This was the first time in its history that French justice meted out punishment in an indictment for crimes against humanity.

The Klaus Barbie proceedings gave rise to three intense judicial debates motivated by three judgments of the Criminal Division of the Supreme Court of Appeals (Cour de Cassation), and I will focus this short article on those judgments.2

Born in 1913, Klaus Barbie joined the Hitlerian Youths at the age of twenty.3 In 1935 he entered the S.S. corps. Between 1940 and 1942 he held a position of responsibility in the Section of Jew-

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ish Affairs located in the Netherlands, first in The Hague and then in Amsterdam.

In November 1942, Barbie was sent to Lyon and was appointed to the head of Section IV of the SIPO and SD which was the Gestapo's Intelligence Service.4

The numerous acts which he either committed personally or ordered earned him the nickname of "The Lyons butcher,"5 and resulted in two kinds of proceedings which took place after the war. Firstly, Barbie was prosecuted for murder, conspiracy to commit murder, and illegal confinement committed in the Jura Department, which is one of the administrative departments of France.6 Secondly, he was prosecuted for similar crimes committed within other administrative departments of France, including the Department of Rhone. Lyon is the capital city of this department.7

Because Barbie had escaped after the war, both trial proceedings were conducted in absentia and resulted in convictions and two death sentences which were ordered by the Permanent Military Tribunal in Lyon on April 29, 1952 and November 25, 1954, respectively.8 Both sentences were subject to the twenty-year statute of limitations, which is the rule in ordinary French criminal procedure.9

On February 1, 1972, France was informed that Barbie had settled in Bolivia under the name of Klaus Altman.10 France officially filed a request of extradition from Bolivia.11 On December 11, 1974 the Supreme Court of Bolivia, relying essentially on the absence of any extradition treaty between France and Bolivia,

4. SIPO= Sicherheitspolizei (security police), SD= Sicherheitsdienst (security service of the SS). Id. at 450.
7. Id.
8. Id.
9. Id.
10. Id.
11. Id.
declared that the request of the French government was inadmissible. Others argued that since the twenty year time limit had passed, rulings were handed down in the Permanent Military Tribunals cases of April 29, 1952 and November 25, 1954, and therefore both sentences against Barbie could no longer be enforced.12

In April 1980, the Public Prosecutor in Lyon ordered the opening of a preliminary police investigation of a series of acts committed by Barbie, mainly in the Lyon area. These acts were not among those included in the indictments which resulted in the 1952 and 1954 sentences against Barbie.13

These new facts led to the opening up of investigations and the commencement of a new judicial proceeding on February 12, 1982.14 In this instance the definition of crimes against humanity was applied, as set forth in Article 6-C of the Statute of the International Military Tribunal of Nuremberg,15 and as defined in the French law of December 26, 1964.16

In 1982 French national law did not provide for any specific indictment of crimes against humanity. Therefore, the French courts turned to international law found in a supranational convention which was promulgated by France in its October 6, 1945 decree.17 This decree is generally referred to as the London Agreement. The London Agreement was signed by the Allied governments on August 8, 1945. The purpose of the London Agreement was to prosecute and punish the great war criminals of the Euro-

12. Kock, supra note 8, at Article 763.
13. [Als a result of intensive investigations, it appeared that Barbie could be charged with crimes that were not part of the proceedings that resulted in the [prior] judgments. See Doman, supra note 3, at 453.
14. On February 12, 1982, the Chief Prosecutor in the French Department of Rhone presented a petition for the indictment of Barbie for crimes against humanity. . . . A warrant for Barbie’s arrest was issued on these charges by the juge d'instruction (indicating magistrate). Id.
15. Prosecution and Punishment of Major War Criminals of European Axis, Charter of the International Military Tribunal, Article 6(e), E.A.S. No. 472, 82 U.N.T.S. 279, 3 Bevans 1238, C.T.I.A. Num. 239.000, 1945 WL 6736, at 3 (TIA), (August 8, 1945) [Hereinafter London Agreement].
16. Law Number 64-1326 contains only one sentence: Crimes against humanity, as defined by the Resolution of the United Nations of February 13, 1946, that took note of the definition of crimes against humanity as set forth in the Charter of the International Tribunal of August 8, 1945, are not subject to any statute of limitations by their nature. Appendix to the Penal Code (War) [C. Pen.] 1123 (85e ed. Dalloz 1987-88). See Doman, supra note 3, at 456.
pean powers of the Axis.\textsuperscript{18} The London Agreement also provided for the establishment of an International Military Tribunal to sit in Nuremberg.\textsuperscript{19} This Nuremberg Tribunal was charged with judging the \textit{war criminals whose offenses have no particular geographic location}.\textsuperscript{20} The Charter of the International Tribunal in Nuremberg was annexed to the London Agreement and provided for three categories of crimes which were defined in the Charter:\textsuperscript{21}

- Crimes Against Peace applies to persons who are responsible for wars of aggression or who are in breach of treaties;\textsuperscript{22}
- War Crimes applies to persons who violate the laws or customs of war;\textsuperscript{23}
- Crimes Against Humanity applies to persons who plan, instigate, order or otherwise aid and abet in the planning, preparation or execution of the murder, extermination, enslavement, deportation and other inhumane acts against civilians or persecutions on political, racial, and religious grounds.\textsuperscript{24}

These indictments also apply to leaders and accomplices in the planning and execution of a deliberate project or plot to commit one of the three above-mentioned categories of crimes. The definition of crimes against peace, war crimes, and crimes against humanity was endorsed by a United Nations resolution on February 13, 1946.\textsuperscript{25}

The Office of the Prosecutor in Lyon\textsuperscript{26} referred to this definition in the Charter of the International Tribunal of Nuremberg in order to commence public prosecution against Barbie who was

\begin{enumerate}
\item \textit{Id.} at Article 1.
\item \textit{Id.} at Article 22.
\item \textit{Id.} at Article 1.
\item \textit{Id.} at Article 6 (a-c).
\item \textit{Id.} at Article 6 (a).
\item \textit{Id.} at Article 6 (b).
\item \textit{Id.} at Article 6 (c).
\end{enumerate}


26. Criminal proceedings are as follows in France: when a case is referred to the court judges, \textit{(le parquet)} they decide either to prosecute or discontinue a case. Once their decision is made, the case is handed over to the investigating judges \textit{(l'instruction)}. Once the investigation is completed, the judges of the parquet intervene once more and act as public prosecutors \textit{(accusation)} during the court proceedings. According to the case, they may be referred to either as \textit{Avocat Général} or \textit{Procureur de la République}. Although their name may change, their function remains the same.
charged with crimes against humanity. This new public prosecution gave rise to three main debates: 1) whether a French law passed on December 26, 1964 on the non-applicability of the statute of limitations to crimes against humanity applies in this case; 2) whether the conditions and circumstances of Barbie's capture by France were legal; and 3) lastly, whether the scope of the definition of crimes against humanity includes civilian individuals who suffered from these crimes but who were not combatants.

A. The debate concerning the retroactivity of criminal law.

In a law enacted on December 26, 1964, the French legislature declared that crimes against humanity, due to the very nature of these crimes, are not subject to the statute of limitations. Barbie's defense counsel tried to use this law to oppose the new prosecution. Defense counsel argued that the 1964 law was enacted after the alleged acts by Barbie were committed. The 1964 law did not include a provision which nullified the fundamental principle of the non-retroactivity of criminal laws. The principle of non-retroactivity of criminal law was established in the European Convention of Human Rights (with respect to acts considered criminal according to the general law principles recognized by civilized nations).

The principle of non-retroactivity of criminal law is set forth in the Declaration of Human Rights and referred to in the preamble of the French Constitution. Since the constitutional norm prevailing in treaties prevents the judge from applying a criminal law retroactively, Barbie should not be prevented from benefitting from the statute of limitations.

In the same argument the defense attorney noted that the Charter of the Nuremberg Tribunal defining crimes against human-

27. Law Number 64-1326, supra note 16.
29. No one shall be held guilty of any criminal offense on account of any act or omission which did not constitute a criminal offense under national or international law at the time when it was committed. Id. at Article 7 (1).
30. No one shall be held guilty of any penal offense on account of any act or omission which did not constitute a penal offense, under national or international law, at the time when it was committed. Universal Declaration of Human Rights, G.A. Res. 217 (III 1948), at Article 11 (2).
31. Kock, supra note 9, at Article 763.
ity did not contain a time limitation for the crime it defined. Absent such a time limitation and relying on the non-retroactivity of French criminal law, the twenty-year statute of limitations should apply to Barbie.

On October 28, 1983 there was a ruling on appeal by Barbie against a judgment of the Grand Jury in Lyon. The objection of a statute of limitations bar raised by the Defense was dismissed. In a judgment dated January 26, 1984, the Criminal Division of the Court of Appeals upheld the views of the courts below.

Thus, the Lyon Court confirmed the jurisprudential views which were adopted in 1976 when the French military officer Paul Touvier was prosecuted. The Lyon Court concluded that the decision is final as to the debate that crimes against humanity are not subject to the statute of limitations. Thus, the public prosecution could proceed.

In its January 26, 1984 judgment The Supreme Court of Appeals based its decision on four main statements:

Statement 1: By expressly referring to the Charter of the International Military Tribunal of Nuremberg, which was annexed to the London Agreement, and which is itself integrated into the French national legal system, the 1964 French law necessarily proceeds from this Charter, especially with regard to its scope.

Statement 2: The London Agreement and its annex have a broad scope and are binding on legal authorities. With regard to the statute of limitations for crimes against humanity the only principle that may be deduced from these texts is that the statute of limitations does not apply in the case of crimes against humanity.

Statement 3: According to Article 60 of the European Convention of Human Rights and Fundamental Freedoms, the right to benefi-
efit from the statute of limitations does not constitute a human right or a fundamental freedom.\textsuperscript{40}

Statement 4: By stating that the statute of limitations does not apply in the case of crimes against humanity, the January 26, 1964 law confirmed that crimes against humanity and the inapplicability of the statute of limitations to this category of crime were already part of French national law. The international agreements to which France was a party made this decision possible.\textsuperscript{41}

Therefore, without running the risk of error, one can conclude that the principles advanced to support the Barbie judgment concerning the non-applicability of the statute of limitations with respect to crimes against humanity, no matter when they were committed, is now part of French source law.

\textbf{B. The debate concerning the circumstances of the capture of \textit{Klaus Barbie}.}

The second legal debate involved the conditions in which the French authorities managed to get hold of the accused.\textsuperscript{42} This debate was procedural in nature and was generated by the proceedings commenced against Barbie in France.\textsuperscript{43}

The State of Bolivia, where Barbie had taken refuge after the war, raised an objection to the admissibility of an extradition request by France. France made the request for extradition in order to enforce sentences imposed against Barbie in the 1952 and 1954 trials. In response to that objection, the investigating judge of Lyon issued an international warrant of arrest on November 3, 1982.\textsuperscript{44} However, it was impossible to circulate this warrant of arrest for Barbie through Interpol because Article 3 of the Statutes of Interpol provides that it can offer assistance only for crimes involving a breach of general, ordinary, criminal law. In view of these circumstances, the range of circulation of the investigating judge's warrant of arrest was limited to France and to its overseas territories. But on the night of February 6, 1986, the new Bolivian

\begin{footnotes}
\item[40.] \textit{Id.} at 335.
\item[41.] \textit{Id.} at 336-7.
\item[42.] For a full discussion of how the French authorities finally arrested Barbie, see Doman, \textit{supra} note 3, at 452-4.
\item[43.] \textit{Id.} at 454. Wexler, \textit{supra} note 2, at 331-6.
\item[44.] Wexler, \textit{supra} note 2, at 333.
\end{footnotes}
government, which was created as a result of a change in the political majority three months earlier, decided to expel Barbie and to place him on board a plane flying to Cayenne (Guyana). As soon as Barbie landed on the French territory of Guyana, he was served with a warrant of arrest and flown to France that very day. Barbie's counsel immediately referred the case to the Grand Jury in Lyon, arguing that his client's detention was illegal and that his arrest was made possible only by a disguised extradition that had taken place in breach of the legal conditions allowing it.

On appeal from the Grand Jury, the Supreme Court of Appeals dismissed this argument. The reasoning of the Supreme Court of Appeals rested on a point of international law. The Court first recalled that extradition proceedings were not even initiated for this new prosecution. Thus, the warrant of arrest on French national territory was served upon a person who had formerly taken refuge in a foreign country. The warrant of arrest did not depend either on the individual's voluntary return to France or on the implementation of extradition proceedings. Moreover, the Supreme Court of Appeals insisted on a point of international law which is sometimes forgotten. This point of law is to be found in the already quoted United Nations Resolution of February 13, 1946 which takes formal note of the definition of crimes against peace, war crimes, and crimes against humanity, as stated in the London Agreement of August 8, 1945. This Resolution, adopted by all the members of the United Nations Organization including Bolivia, recommended that each nation take all measures necessary to punish the crimes specified in the text, and that each nation make sure that the individuals thought to be responsible for such crimes be expelled to the countries where the crimes were perpetrated.

45. After a change of regime, Barbie was finally expelled from Bolivia, placed on an airplane, and flown to Cayenne-Rochambeau. The Bolivians claimed, at the time, that France was the only country willing to accept Barbie. LADISLAS DE HOYOS, KLAUS BARBIE, 243-51 (Nicholas Courtin trans., 1985). See also Wexler, supra note 2, at 333 and FN 201.
46. He was arrested [in Cayenne] pursuant to [the international warrant of arrest], by a juge d'instruction, Christian Riss. He was subsequently transferred to Metropolitan France, and brought, that evening, before Magistrate Riss. Wexler, supra note 2, at 333.
in order that the individuals be judged and punished in accordance with the laws of such countries.\textsuperscript{50}

The December 26, 1964 law referred not only to the August 8, 1945 United Nations Charter but also, and expressly, to the 1946 Resolution by the United Nations.\textsuperscript{51} Thus, it was by no means an unfair or expansive interpretation of law to hold that the mandate given by this Resolution to send back the perpetrators of crimes against humanity during the war to the countries where they had committed them remained an obligation for each of the Member States of the United Nations Organization. The Resolution also stated that since such crimes were not subject to the statute of limitations, they could still be punished.\textsuperscript{52}

Barbie never ceased protesting against this line of reasoning. On the basis of his claim that his arrest and his confinement by France were illegal, he refused to attend his trial . . . at least the part of the trial which did not concern his personality. He did attend the part of the trial concerning the facts he was called upon to account for.

\textbf{C. The debate concerning the indictment of crimes against humanity.}

The third debate which the Barbie proceedings gave rise to deals with the scope of the definition concerning the victims of crimes against humanity. The issue is whether this specific crime can be applied to any individual victim, or is it reserved only for those victims who were not fighting in the war.\textsuperscript{53}

The victims of Barbie's orders fell into two groups: those who belonged to the Jewish community and those who fought in the ranks of the French Resistance. Could both categories of victims be treated alike when it came to the incrimination of crimes against humanity?\textsuperscript{54} The investigating judge and the Grand Jury of the

\textsuperscript{50} Extradition and Punishment of War Criminals, supra note 25.
\textsuperscript{51} Doman, supra note 3, at 456.
\textsuperscript{52} Id.
\textsuperscript{53} The Court did not have as its task to articulate a definitive and timeless (or universal) definition of crimes against humanity, but rather, in deciding the case before it, to interpret Article 6(c) to determine whether Barbie's crimes against members of the Resistance were included in its scope. Barbie III, supra note 2, P65 (Report of Counselor Le Gueheec). Wexler, supra note 2, at FN 235.
\textsuperscript{54} Id.
Appeals Court in Lyon held that these two categories of victims could not be treated alike since crimes against humanity involved an international element and required that such crimes be committed on victims selected precisely because they belonged to a race or selected specifically because of their religious and political opinions.\(^{55}\)

As far as the Lyon judges were concerned, while Barbie was clearly guilty of having committed arrests, tortures, and deportations of civilians, these crimes could not be considered crimes against humanity because the victims were members of the Resistance.\(^ {56}\) The Resistance was an organization which could be equated to a combat unit subject to the rules and customs of war (and accordingly subject to the statute of limitations of war crimes).

The complainants—Associations of Veterans and of former Concentration Camps Prisoners—opposed various arguments proposed during the proceedings against Barbie to limit the prosecution only to Jewish victims. Their common argument was as follows:

- crimes against humanity are different from war crimes in that they are particularly inhumane in nature;\(^ {57}\)
- There is no need to make a distinction between those crimes committed against the civilian populations and those crimes committed against combatants, since it is the intention of the perpetrator of the crimes and not the quality or motives of the victims that determine the nature of the persecution committed.\(^ {58}\)

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\(^{55}\) The Court, not surprisingly, held that war crimes could not be assimilated to the status of crimes against humanity for the purpose of prescription. Thus, they would prescribe as determined by French municipal law. Wexler, \textit{supra} note 2, at 341-2. See \textit{Barbie III, supra} note 2, J.D.I., at 128-29.

\(^{56}\) On appeal, the Cour de Cassation quashed and annulled the judgment in part, holding that members of the Resistance could be victims of crimes against humanity as long as the necessary intent for Crimes Against Humanity was present. International Criminal Tribunal for the Former Yugoslavia (discussing the Barbie cases), 36 I.L.M. 908, at 940 (1997).

\(^{57}\) The Court has thus given crimes against humanity an autonomous place among French crimes, as crimes that are, above all, characterized by the intent of the perpetrator to deny the humanity of his victim. Wexler, \textit{supra} note 2, at 343. See \textit{Barbie III, supra} note 2, J.D.I., at 148 (Note Edelman).

\(^{58}\) Thus, the perpetrator wishes to injure the group to which the victim belongs by attacking the victim as an individual "\textit{de faire une victime collective à travers la victime individuelle}" (to victimize a group by victimizing an individual). Wexler, \textit{supra} note 2, at 343. See \textit{Barbie III, supra} note 2, J.D.I., at 148 (Note Edelman) (quoting Graven, \textit{Les crimes contre l'humanité}, Cours la Haye, at 547 (1950)). Wexler, \textit{supra} note 2, FN#241.
The Statute of August 8, 1945 clearly defined two categories of crimes against humanity: firstly, murders, extermination, and torture committed . . . against civilian populations; secondly, persecutions committed on political, racial or religious grounds. Therefore, crimes against humanity cannot be limited solely to crimes committed against victims due to their religious background or political opinions.

The Criminal Division of the French Supreme Court (Cour de Cassation) agreed with these arguments and held, by a judgment rendered on December 20, 1985, that neither the victims' motives nor their classification as combatants could exclude the guilty intent giving rise to crimes against humanity which shall be prosecuted.

In the course of its analysis, the French Supreme Court stated that crimes against humanity include inhumane acts and persecutions committed in a systematic manner against people belonging to a particular race or religious community in the name of a State which is carrying out its policy of ideological hegemony. It also includes inhumane acts and persecutions committed against adversaries of this policy, no matter what form this opposition may take. These crimes against humanity are not applicable to the statute of limitation's as set forth in the Charter of the International Tribunal of Nuremberg—even though these crimes would equally be qualified as war crimes according to that text.

The general acceptance of crimes against humanity for the individuals who were victims of such crimes was adopted by the editors of the French Penal Code, enacted on March 1, 1994. Articles 212-1 and 212-2 of the French Penal Code incriminate and suppress inhumane acts committed for political, philosophical, racial, or religious reasons and organized in order to carry out a detailed plan aimed at either a group of the civil population or, in war time, aimed at those who fight the very ideological system for which these acts are committed.

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60. Barbie III, supra note 2.
61. [T]he Court required the perpetrator to have a second intent: he must carry out his crime on behalf of a State practicing hegemonic political ideology. Wexler, supra note 2, at 343.
62. Wexler, supra note 2, at 380, Annex IV. Other crimes against humanity.
63. Wexler, supra note 2, at 380, Annex IV. Other crimes against humanity. Deportation enslavement, or the practice of massive and systematic summary executions, the abduction of
D. Conclusion

The Klaus Barbie trial goes beyond being a great history lesson or a great moment in our collective memory. The Barbie trial was conducted to deepen our understanding of the law and our understanding of the nature and scope of crimes against humanity. On September 8, 1942 before the Chamber of Commons, Winston Churchill expressed his wish that a new understanding of crimes against humanity constitute an indelible warning for times to come.

persons followed by their disappearance, torture or other inhumane acts, inspired by political, philosophical, racial or religious motives and organized in carrying out a common plan against a civil population group are punishable by life imprisonment. Article 212-1.

When committed in wartime in carrying out a common plan against those fighting the ideological system in the name of which the crimes against humanity are being perpetuated, the acts listed in article 212-1 are punishable by life imprisonment. Article 212-2.