

# Introduction

Yes, the criminal madness of the occupier was seconded by Frenchmen, by the French State. Fifty-three years ago, on 16 July 1942, 450 French policemen and gendarmes, under the authority of their superiors, acceded to the Nazis' requests.

On that day, in the capital and its suburbs, nearly ten thousand Jewish men, women and children were arrested in their homes, in the early hours of the morning, and assembled at police stations. . . .

France, country of Human Rights and Enlightenment, land of refuge and asylum, France, on that day, committed the irremediable. Failing to honour its words, it abandoned its children to their torturers.<sup>1</sup>

In making this speech, 53 years after the infamous *rafle du Vel d'Hiv*, and 50 years after the Second World War had finally come to an end, President Chirac acknowledged the responsibility of the French State in the perpetration of the Nazi genocide. His 1995 speech was the first official French recognition of this responsibility, notwithstanding the trials of Frenchmen before French courts in the direct aftermath of the war, and also earlier in the nineties, when Paul Touvier, an agent of the French *Milice*, was finally brought to justice and made to answer for his wartime crimes. In these instances, the responsibility of Vichy France had never been recognised.<sup>2</sup> Indeed, to the contrary, one of the lower courts in the

<sup>1</sup> J Chirac, 'Allocution, le dimanche 16 juillet 1995, lors des cérémonies commémorant la grande rafle des 16 et 17 juillet 1942' in J Chirac, *Discours et Messages de Jacques Chirac, Maire de Paris, Premier Ministre, Président de la République, En hommage aux Juifs de France victimes de la collaboration de l'Etat français de Vichy avec l'occupant allemand* (Paris, Fédération des Fils et Filles des Déportés Juifs de France, 1998) 22–23. Translation by the author. The original version reads as follows: 'Oui, la folie criminelle de l'occupant a été secondée par des Français, par l'État français. Il y a cinquante-trois ans, le 16 juillet 1942, 450 policiers et gendarmes français, sous l'autorité de leurs chefs, répondaient aux exigences des nazis. Ce jour-là, dans la capitale et en région parisienne, près de dix mille hommes, femmes et enfants juifs furent arrêtés à leur domicile, au petit matin, et rassemblés dans les commissariats de police . . . La France, patrie des Lumières et des Droits de l'Homme, terre d'accueil et d'asile, la France, ce jour-là, accomplissait l'irréparable. Manquant à sa parole, elle livrait ses protégés à leurs bourreaux.'

<sup>2</sup> The interchangeable expressions 'Vichy France' or 'Vichy government' designate the French political regime which actively collaborated with the Axis Powers from 10 July 1940, the date on which, following the French defeat, Maréchal Philippe Pétain was awarded full authority to rule over France, until 20 August 1944. To reinforce its authority and attempt to effectively quash any form of resistance, the Vichy government disposed of its own paramilitary force – known as the French *Milice* – which started operating on the French territory from 30 January 1943, perpetrating summary executions, arbitrary murders and zealously committing torture. See generally J Delperrie de Bayac, *Histoire de la Milice 1918–1945* (Paris, Le Cercle du Nouveau Livre d'Histoire, Arthème Fayard, 1969).

## Introduction

*Touvier* case had justified a dismissal of the charges on the basis that no precise ideology had reigned in Vichy, that Vichy had been ‘a constellation of “good intention and political animosities”’.<sup>3</sup>

While it is correct that ‘a trial is held to try a criminal, not to understand a historical event’,<sup>4</sup> such a finding from the Paris Court of Appeals remains highly illustrative of the judicial reluctance to adjudicate atrocities perpetrated by Frenchmen in the name of the French State. The disinclination of the French courts was all the more disconcerting insofar as it stood in complete contradiction to France’s political attitude and legislative actions, on both the international and the domestic scenes, with respect to the recognition and prosecution of the crimes perpetrated during the Second World War. France was not only among the prosecutors at the Nuremberg trial, it was also one of the first signatory parties to the Genocide Convention.<sup>5</sup> At the domestic level, important legislative steps had been taken to allow for the prosecution of such crimes. In particular, since 1964 France has recognised the non-applicability of statutory limitations to crimes against humanity,<sup>6</sup> and was even a pioneer in enacting a law expressly prohibiting the denial of the crimes as defined in the Nuremberg Charter, the famous *loi Gayssot*.<sup>7</sup> More recently, French legislation caused great controversy – both within and outside its borders – by providing for the recognition and punishment of the Armenian genocide.<sup>8</sup>

<sup>3</sup> Arrêt du 13 avril 1992, Première Chambre d’accusation de la Cour d’appel de Paris, 1992. Translation by the author. The original reads as follows: ‘à Vichy ne régnait pas une idéologie précise’; Vichy was ‘une constellation de “bonnes intentions” et d’animosités politiques’. See A Klarsfeld, *Touvier, Un crime français* (Paris, Fayard, 1994) 31.

<sup>4</sup> J Sémelin, *Purifier et Détruire – Usages politiques des massacres et génocides* (Paris, Editions du Seuil, 2005) 383. Translation by the author. The original version reads as follows: ‘un procès est fait pour juger un criminel, non pour comprendre un événement historique’.

<sup>5</sup> France signed the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) on 11 December 1948 – that is, only two days after its adoption by the General Assembly of the United Nations. It subsequently ratified the Convention on 14 October 1950.

<sup>6</sup> *Loi n° 64-1326 tendant à constater l’imprescriptibilité des crimes contre l’humanité* (26 December 1964).

<sup>7</sup> *Loi n° 90-615 tendant à réprimer tout acte raciste, antisémite ou xénophobe dite Gayssot* (13 July 1990): ‘Il est ainsi inséré, après l’article 24 de la *Loi du 29 juillet 1881 sur la liberté de la presse*, un article 24bis ainsi rédigé : Art. 24bis. – Seront punis des peines prévues par le sixième alinéa de l’article 24 ceux qui auront contesté, par un des moyens énoncés à l’article 23, l’existence d’un ou plusieurs crimes contre l’humanité tels qu’ils sont définis par l’article 6 du Statut du tribunal militaire international annexé à l’accord de Londres du 8 août 1945 et qui ont été commis soit par les membres d’une organisation déclarée criminelle en application de l’article 9 dudit statut, soit par une personne reconnue coupable de tels crimes par une juridiction française ou internationale.’ The official bulletin of the Justice Ministry specified that only those crimes against humanity perpetrated during the Second World War were the subject of the *loi Gayssot*. Bulletin Officiel du Ministère de la Justice N° 39 (30 September 1990) Circulaire CRIM 90-09 F1 (27 August 1990) ‘Application de la *Loi n°90-615 du 13 juillet 1990 tendant à réprimer tout acte raciste, antisémite ou xénophobe*’.

<sup>8</sup> *Loi n° 2001-70 relative à la reconnaissance du génocide arménien de 1915* (29 January 1990). This law, which contains only one article, is phrased straightforwardly in the following terms: ‘la France reconnaît publiquement le génocide arménien de 1915’ [‘France publicly recognises the 1915 Armenian genocide’]. This law was interpreted by the Tribunal de Grande Instance de Paris as prohibiting the denial of this genocide. See *Cdca et autres v Editions Robert Laffont, Encyclopédies Quid*, Tribunal de Grande Instance de Paris, 17<sup>e</sup> chambre civile, Jugement, 6 July 2005. More recently however, a law expressly prohibiting the denial of all the instances of genocide as defined by the New Penal Code and

## Introduction

Why then this judicial reluctance? Was it due to a judicial concern that recognition of the crimes perpetrated by French agents of the Vichy regime might turn into a trial of Vichy France's policy as a whole? It is very true that, in such cases as crimes against humanity and genocide, there is a risk of confusing between the criminal responsibility of the individual sitting in the dock, and that of the state, which more often than not supported, if not initiated, the crimes. It is also true that courts are not here to try history, and such considerations on the part of the French courts could be understandable. Yet, while this argument is tempting, it fails to convince. First, because French courts had no such *états d'âme* when they tried German-born Klaus Barbie for the crimes he had perpetrated in the name of Nazi Germany, qualified by the French Cour de cassation as 'a state practising a policy of ideological supremacy'.<sup>9</sup> Second, because French courts have constantly shown their willingness and ability to punish genocide denial without trying to impose a particular version of the historical truth.<sup>10</sup> And third, because courts were never asked to try the Vichy regime as a whole: they were requested to adjudicate acts which particular criminal nature ignores the passage of time.<sup>11</sup> In the words of Annette Wieviorka,

History is the study of specificities – and thus of the specificity of genocide. In this it differs both from the political sciences' approach which aims at establishing models and from the legal perspective which deals with issues of qualification *to make individuals accountable for their crimes but not to account for history*.<sup>12</sup>

After years of ongoing judicial proceedings and vicissitudes, accompanied by unjustifiable modifications of the definition of crimes against humanity, French courts finally undertook to simply fulfil their role and 'to make the individuals accountable for their crimes', not without committing errors on the way. One

recognised as such under French law – see Proposition de loi visant à réprimer la contestation de l'existence des génocides reconnus par la loi, texte adopté n° 813, Assemblée nationale (22 December 2011) and texte adopté n° 52, Sénat (23 January 2012) – was deemed unconstitutional by the Conseil Constitutionnel. See Decision n° 2012-647 DC (28 February 2012).

<sup>9</sup> *Fédération Nationale des Déportés et Internés Résistants et Patriotes et Autres c Klaus Barbie*, cass. crim., 20 December 1985. Reprinted in (1986) RGDIP 90, 1024 and in (1986) ILR 78, 125.

<sup>10</sup> A close reading of the rulings issued by French courts regarding genocide denial indeed reveals that, far from being willing to impose a form of historical truth, French courts merely sanction the confusion between historical knowledge and a messianic, propagandist discourse. In other words, French courts do not impose a particular vision of history, but rather 'obligations of prudence, objective caution and intellectual neutrality' on historians. *Affaire Faurisson, Ligue internationale contre le racisme et l'antisémitisme et autres c R Faurisson*, Tribunal de Grande Instance de Paris, 8 July 1981. Incidentally, it is worth noting that the judiciary, proving proactive, did not wait for the loi Gaysot to be enacted to punish Holocaust denial. See D Salas, 'Le droit peut-il contribuer au travail de mémoire?' in Association française pour l'histoire de la Justice, Commission nationale consultative des droits de l'homme, Ecole nationale de la magistrature, *Colloque La lutte contre le négationnisme Bilan et perspectives de la loi du 13 juillet 1990 tendant à réprimer tout acte raciste, antisémite ou xénophobe* (Paris, La Documentation française, 2003) 36, 41.

<sup>11</sup> See M Zaoui, *Mémoires de justice – Barbie, Touvier, Papon* (Paris, Editions du Seuil, 2009) 19.

<sup>12</sup> Interview with the author. Translation by the author: 'l'Histoire est l'étude des spécificités – et donc de la spécificité du génocide – contrairement à l'approche politiste qui correspond à une recherche de modèles et à l'approche juridique qui s'occupe de la qualification *pour rendre justice mais non pour rendre compte de l'histoire*' (emphasis added).

## Introduction

such mistake, and not the least, was the qualification of the acts perpetrated against the Jews as crimes against humanity, and not as genocide.

Klaus Barbie, chief of the Gestapo in Lyon, and Aloïs Brunner, Adolf Eichmann's assistant, were both tried and convicted of crimes against humanity, while the French Paul Touvier, member of the French *Milice*, and Maurice Papon, a high-ranking civil servant in charge of the Jewish section of the *préfecture de Gironde* during the war, who subsequently remained in charge of some of the country's most important functions, including those of Préfet de Police from 1958 to 1967 and Budget Minister from 1978 to 1981, were found guilty of complicity in crimes against humanity. Why this choice of characterisation of the crimes, to the detriment of the qualification of genocide?

To attempt to answer this question, the following study will first analyse the different French courts' decisions in these four cases; decisions which simultaneously reveal an impeccable command by the French judiciary of the law of crimes against humanity – the *Barbie* and *Touvier* findings still have, decades later, an impact on the case law of the ad hoc international criminal tribunals – as well as a visible willingness to minimise the responsibility of Vichy France and of its agents, as exemplified by clever twists in the interpretation of the definition of the crimes. If French courts have shown an expert understanding in their apprehension of the law of crimes against humanity, they however have failed to even consider the law of genocide in instances where precisely all the accused were brought to justice to answer for crimes perpetrated in the context of the Shoah. Voluntary omission? Ignorance of the law? The answer can only be tentative; what remains certain however is that the law of genocide would have been applicable to all these instances – as the second part of this research will demonstrate.

Just as the regrettable current tendency to use 'the magic word, genocide . . . to spice up the charges',<sup>13</sup> the 'g-word' having undoubtedly acquired an unfortunate 'rhetorical power',<sup>14</sup> only empties the crime of its meaning and specificity, failing to qualify the real crime of genocide as genocide similarly deprives it of its essence and uniqueness. By not qualifying the respective crimes perpetrated by Klaus Barbie, Paul Touvier, Maurice Papon and Aloïs Brunner against the Jews as genocide, French courts ultimately misinterpreted the facts and misread the law.

French courts ignored the distinction between crimes against humanity and genocide, and operated a merging of the two notions; a confusion which was to stay in French law insofar as, while it recognises genocide as a self-standing incrimination, the French New Penal Code still includes it under the heading of crimes against humanity.<sup>15</sup> If this amalgam is to remain, French law and case law would not only deviate problematically from international criminal law norms, but would also persistently fail at grasping the specificity of the crime of genocide.

<sup>13</sup> W Schabas, *Unimaginable Atrocities – Justice, Politics, and Rights at the War Crimes Tribunals* (Oxford, Oxford University Press, 2012) 100.

<sup>14</sup> *ibid* 103.

<sup>15</sup> See art 211–1 of the New Penal Code (France).

## Introduction

There is absolutely no intention here to devalue the seriousness of crimes against humanity, to depreciate the utmost gravity of such crimes. To the contrary, it is only precisely when the qualifications of crimes against humanity and genocide are used adequately that the extreme horror of the acts can be properly recognised and reflected in the judgments. Genocide and crimes against humanity do not stand in competition or in opposition; they are simply different crimes. When a group is targeted for destruction, when whole families are destined for annihilation because they belong to this group, when children are sent to their deaths with their parents, genocide is occurring, and nothing else.

By not using the qualification of genocide when they could – and should – have done so, by persistently refusing to assert the responsibility of Vichy France in the destruction of the Jews, by even going as far as to rule that Maurice Papon, one of Vichy's high civil servants who signed and authorised the deportations, was unaware of the Nazi genocidal plan, French courts not only erred in law, they also issued judgments in bad faith. If Papon admittedly could not have conceived the unimaginable horror of the Nazi concentration and extermination camps, he simply cannot not have known of the despicable conditions of detention in the French transit camps, which alone proved fatal for thousands of victims, he simply cannot not have guessed the fate that was awaiting those being put in these trains under *his* authorisation. The victims themselves were not so naïve. On their respective cards, thrown from the deportation wagons, 10-year-old Marcel Rozenbaum, arrested with his mother, had written to the rest of his family: 'We are in the train and glad that you are not with us',<sup>16</sup> while nine-year-old Jeannette Gryf, arrested with her mother and her three brothers, wrote to her aunt:

If you get a letter from Papa, tell him of our unhappiness, and I don't know if we'll see each other again. Aunt dear, it would be very kind of you to send this letter to Papa.

Papa, we say hello to you for always, a hello from us all and thank you for everything.<sup>17</sup>

Marcel Rozenbaum and Jeannette Gryf did not come back.<sup>18</sup>

<sup>16</sup> Marcel was deported on 9 September 1942. Translation available at [www.holocaust-history.org/klarsfeld/French%20Children/html&graphics/T1164.shtml](http://www.holocaust-history.org/klarsfeld/French%20Children/html&graphics/T1164.shtml). The original version reads: 'Nous sommes dans le train et contents que vous ne soyez pas avec nous.' S Klarsfeld, *Adieu les enfants (1942–1944)* (Paris, Mille et une nuits, 2005) 105.

<sup>17</sup> Maurice was 7 years old, Simon was 5 years old and Léon just one year old. After their arrest, they were transferred from Bordeaux to the camp of Drancy and deported on 7 September 1942. Translation available at [www.holocaust-history.org/klarsfeld/French%20Children/html&graphics/T0760.shtml](http://www.holocaust-history.org/klarsfeld/French%20Children/html&graphics/T0760.shtml). The original version reads: 'Si tu reçois une lettre de papa, dis-lui le malheur de nous. Papa on te dit bonjour pour toujours. Un bonjour de nous tous et merci pour tout.' Klarsfeld, *Adieu les enfants (1942–1944)* (2005) 106. See also A Klarsfeld, *La Cour, Les Nains et Le Bouffon* (Paris, Editions Robert Laffont, 1998) 146.

<sup>18</sup> On the murder of the children, see generally the work of Serge Klarsfeld and, in particular; S Klarsfeld, *Les enfants d'Izieu, une tragédie juive* (Paris, AZ Repro, 1984); S Klarsfeld, *La Shoah en France – Le mémorial des enfants juifs déportés de France* (Paris, Librairie Arthème Fayard, 2001).