Routledge Handbook of International Criminal Law

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Introduction

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The chapter headings of this handbook provide a good indication of the meaning of the term ‘international criminal law’. Nevertheless, it is not a simple matter to furnish a succinct definition. The French language distinguishes between droit international pénal and droit pénal international. The difference between the two terms seems to reside largely in the types of crimes they address. Thus, droit pénal international refers to a body of law governing relationships between states in the suppression of so-called ordinary crimes, such as murder and rape, as well as organized criminal activity when it takes on an international dimension. By contrast, droit international pénal is focused on crimes that are international in nature, generally because of their cross-border or transnational dimensions. Piracy is the classic example.

But when today’s lawyers and specialists talk of ‘international criminal law’, they are rarely talking about piracy. Rather, the focus is on crimes that are also, by and large, gross and systematic violations of human rights: genocide, crimes against humanity and war crimes. The acts underlying these offences, which are said to ‘shock the conscience of humanity’, have been perpetrated since the beginning of human society. However, their codification as international crimes is a recent phenomenon.

The first efforts at defining international war crimes were made at the Paris Peace Conference in 1919. There is a list in the report of the Commission on Responsibilities that includes murders, torture, rape and the murder (but not the taking) of hostages, as well as acts that today would not figure in a list of international crimes, such as destruction of fishing boats and poisoning of wells. The post-world war period was only a foretaste. The first really dynamic period began in the final months of the Second World War. It brought with it a recognition of three new categories of international crime: genocide, crimes against humanity and crimes against peace. The international military tribunals that sat at Nuremberg and Tokyo were the first truly international trials. But in the early 1950s, it all ground to a halt.

International criminal law went through its great renaissance in the 1990s. This exciting period is still continuing, and there is no end in sight. It has brought with it new institutions, most of them temporary, but also a permanent addition: the International Criminal Court. The definitions of crimes have been fine-tuned and refreshed. Moreover, the field has become more complex to the extent that it actively involves national justice systems. It is associated with a concept known as transitional justice, which views criminal accountability for atrocity as...
Introduction

a necessary stage as states recover from conflict, and especially civil wars. The dynamism of international criminal law is in large part associated with growth and excitement in two cognate areas—international human rights law and international humanitarian law (the law of armed conflict).

Eminent scholars in this new discipline have contributed the chapters in this handbook. It is intended to provide readers with an accessible introduction to the field, and a guide to further research. It may serve as both a reference volume and a textbook and is divided into four parts.

Part I sets the scene by presenting past experiences—the Nuremberg and Tokyo Trials and a selection of domestic trials involving crimes committed during the Second World War—as well as contemporary institutions: the permanent International Criminal Court and temporary tribunals, purely international and hybrid. Part II presents the crimes, focusing on the ‘core’ crimes—genocide, crimes against humanity and war crimes—but also dedicating specific chapters to aggression, the crime of terrorism and other crimes such as drug trafficking and money laundering. Part III aims at portraying the practice of international tribunals and covers the issues of jurisdiction, admissibility, procedure and evidence. It also goes into the different modes of participation in crimes, defences and sentencing. Finally, Part IV examines the key issues of state cooperation and transfers. In Part IV, the last of the book, the authors explore a selection of relevant issues in the field of international criminal law and, more largely, post-conflict justice: universal jurisdiction, immunities, truth commissions, state responsibility and international crimes, victims’ rights, amnesties and a chapter on international criminal law and human rights.
The trials of Eichmann, Barbie and Finta

Joseph Powderly

Introduction

Between the immediate post–World War II judgments in Nuremberg and Tokyo and the establishment of the ad hoc International Criminal Tribunals for the former Yugoslavia and Rwanda, there was very little case law providing for the individual criminal responsibility of those accused of committing heinous international crimes. The cases which are discussed in this chapter—the trial of Adolf Eichmann in Israel, Klaus Barbie in France and Imre Finta in Canada—represent three of the most significant efforts by domestic courts to address the crimes committed in World War II. These prosecutions span decades, and the decisions and judgments which they gave rise to are notable for their contribution to the law on genocide, crimes against humanity, war crimes and universal jurisdiction. They have a broader import, however, as examples of the continuing efforts of the international community to bring an end to impunity, and the inextinguishable importance, even decades later, of pursuing criminal justice against those accused of committing international crimes. The discussion of each case will attempt to provide a brief overview of the charges and the most noteworthy judicial holdings which resulted from the legal process, as well as to provide some biographical context for the individuals charged. For reasons of economy, the cases will be examined both in chronological order and in a degree of depth relative to their significance, both domestic and international.

The trial of Adolf Eichmann

Men still ask themselves, and they will certainly continue to ask in days to come: How could it have happened? How was it possible in the middle of the twentieth century? The judges at the Nuremberg Trials also asked themselves this question, examined its various aspects and arrived at interesting formulations; yet it would be difficult to claim that a full or satisfactory answer was given. I doubt whether in this trial we on our part will succeed in laying bare the roots of the evil. This task must remain the concern of historians, sociologists, authors and psychologists, who will try to explain to the world what happened to it. But we shall nevertheless endeavour, however briefly, to describe the background, in an attempt to explain what is perhaps altogether inexplicable by the standards of ordinary reason.1
While the hardly quantifiable crimes perpetrated in pursuit of the ‘Final Solution’ were a key component of numerous post–World War II criminal prosecutions arising in a variety of jurisdictional fora, they were rarely (if ever) the sole, explicit focus of proceedings. The Trial of the Major War Criminals at Nuremberg is naturally the most obvious example, with the Judgment of the Tribunal as well as a significant proportion of the documentary record consisting of an extensive examination of the machinery of the Holocaust. The evidence adduced in this respect was not limited to the elaborate bureaucratic paper trails that dominated the proceedings—reducing the courtroom to ‘a citadel of boredom’—but rather included the screening of the now iconic Signal Corps documentary, Nazi Concentration Camps. The film, which consisted of just over one hour of edited footage compiled by Allied military photographers documenting the liberation of a number of camps, had a profound impact on the tenor of the proceedings, bringing to the fore that which literally could not be expressed in words. While of limited (if practically irrefutable) evidentiary value, the film presented to the court on the afternoon of 29 November 1945 powerfully reminded all those present of the import and full potential horror of the evidentiary record that was unfolding before them. Explaining the context of the film, executive counsel to the American prosecutorial team Thomas Dodd stated:

This is by no means the entire proof which the prosecution will offer with respect to the subject of concentration camps, but this film which we offer represents in a brief and unforgettable form an explanation of what the words ‘concentration camp’ imply . . . . We intend to prove that each and every one of these defendants knew of the existence of these concentration camps; that fear and terror and nameless horror of the concentration camps were instruments by which the defendants retained power and suppressed opposition to any of their policies.5

Having been screened in the Palace of Justice, Nazi Concentration Camps would not be readmitted into the evidentiary record of a case of truly international legal significance until the commencement of proceedings against Adolf Eichmann in April 1961. The true historical significance of the Eichmann prosecution, perhaps, lies in the fact that his trial ‘was to be the first and, in certain respects, only trial of international significance that explicitly focused on the crimes of the Holocaust’. As was dramatically—and, in the view of Lawrence Douglas, hyperbolically—expressed by the Attorney-General of Israel, Gideon Hausner, in his opening statement before the District Court of Jerusalem, ‘there was only one man who had been concerned almost entirely with the Jews, whose business had been their destruction, whose place in the establishment of the iniquitous regime had been limited to them. That was Adolf Eichmann’.8

Unsurprisingly, in the years since the final judgment of the Supreme Court of Israel (sitting as the Court of Criminal Appeal), there has been a wealth of literature focusing on the manifold, multidisciplinary issues contained in the proceedings and which continue to resonate today. The modest objective of this contribution is to highlight the issues arising from the case which are of ongoing relevance to the pursuit of international criminal justice.

The accused—biography, entry into custody and charges

At the conclusion of hostilities in Europe in May 1945, Eichmann held the rank of Lieutenant-Colonel or Obersturmbannführer in the Gestapo (Geheime Staatspolizei) or Secret State Police of the Third Reich. As such, his activities, or responsibilities if they can be so termed, were subsumed and directed under the auspices of the Reich Main Security Office (Reichssicherheitshauptamt) or RSHA, which was primarily concerned with the realization of the Final Solution.9
Between 1942 and 1945 Eichmann directed Section IV B(4) of the RSHA, the division responsible for ‘Evacuations and Jews’, a somewhat euphemistic departmental heading which failed to fully express the fact that Eichmann was an important component in the Nazi infrastructure for the transportation of millions of European Jews to concentration/death camps in Eastern Europe. However, that being said, as a Lieutenant-Colonel he was not considered of sufficient seniority to warrant inclusion in either the indictment of the International Military Tribunal (IMT) at Nuremberg or any subsequent indictment under Control Council Law No. 10.

While Eichmann evaded prosecution under the Nuremberg process, the IMT was far from silent with respect to his involvement in the machinery of the Holocaust. In fact, Eichmann appears on several occasions in the transcripts of the main proceedings and is mentioned on three occasions in the IMT Final Judgment. A number of witnesses testified as to his involvement in the destruction of European Jewry, most notably Captain (Hauptsturmführer) Dieter Wisliceny, who testified before the Tribunal on 3 January 1946. As the quoted passage below illustrates, Wisliceny’s testimony was both incriminating and shocking:

Lt. Col. Brookhart: When did you last see Eichmann?
Wisliceny: I last saw Eichmann towards the end of February 1945 in Berlin. At that time he said that if the war were lost he would commit suicide.

Lt. Col. Brookhart: Did he say anything at that time as to the number of Jews that had been killed?
Wisliceny: Yes, he expressed this in a particularly cynical manner. He said he would leap laughing into the grave because the feeling that he had 5 million people on his conscience would be for him a source of extraordinary satisfaction.

As these proceedings were taking place, Eichmann was working as a lumberjack in Lower Saxony under the assumed name of Otto Heninger. However, no doubt acutely aware of his new position in the conscience of the world community, in 1950, Eichmann successfully (but obviously fraudulently) obtained an International Committee of the Red Cross passport under the name Riccardo Klement, and made his way to the Axis refuge that was Argentina. He remained there until his abduction by agents of the state of Israel in May 1960. During his 10 or so years in Argentina, Eichmann, whose family joined him in 1952, worked variously at a Mercedes-Benz manufacturing plant in Buenos Aires and—quite bizarrely—as a commercial rabbit farmer.

Eichmann was abducted in Buenos Aires by Israeli agents on 11 May 1960, an act clearly in violation of Argentinean sovereignty, which unsurprisingly gave rise to a very real diplomatic incident between the two states culminating in the passing of a ‘scolding’ United Nations Security Council Resolution. He was detained for 1 week, interrogated and transported (via a commercial flight) to Tel Aviv. On 23 May, Israeli Prime Minister David Ben-Gurion informed the Knesset that, ‘a short time ago one of the greatest of the Nazi war criminals, Adolf Eichmann . . . was found by the Israeli security services’. He commented further that he would ‘shortly be placed on trial in Israel under the law for the trial of the Nazis and their collaborators’.

The law Ben-Gurion was referring to was the Nazi and Nazi Collaborators (Punishment) Law, 1950. Eichmann was charged with 15 counts falling under three headings: (i) crimes against the Jewish people as defined under Section 1(a); (ii) crimes against humanity as defined under Section 1(b); and (iii) membership in a criminal enemy organization contrary to Section 3 of the law. The definitions of the offences under the law were broadly derived from existing instruments relevant to international criminal law. ‘Crimes against the Jewish people’, which on the face of it appears to be an entirely new and unique offence, is in fact a particularization of Article II of the Genocide Convention of 1948: ““crime against the Jewish people” means any of the
following acts, committed with intent to destroy the Jewish people in whole or in part . . .'. 21 However, it did develop the definition somewhat to include a reference to cultural genocide: Section 1(b)(6) refers to 'destroying or desecrating Jewish religious or cultural assets or values'. 22 The definition of crimes against humanity under Section 1(b) of the law was closely modeled on Article 6(c) of the Charter of the IMT and Article 5(c) of Control Council Law No. 10, with a couple of exceptions: (i) it was not necessary to establish a nexus between the impugned acts and the armed conflict or other crimes committed under the law; and (ii) in terms of temporal jurisdiction, the law applied to acts committed during the entirety of the Nazi reign, i.e. stretching back to 1933. 23 The definition of war crimes under Section 1 was likewise derived from the Charter of the IMT and the Control Council Law, with the narrowing exception that it did not extend beyond the enumerated categories of conduct to other violations of the law and customs of war. 24 There are a host of issues which make the law somewhat irregular and apparently troubling from a human rights and rule of law perspective: namely, the law is retrospective, extra-territorial, has a flexible approach to the principle of double jeopardy or ne bis in idem, and carries the death penalty. These issues were raised by Eichmann and dealt with by both the District and the Supreme Court.

The proceedings—defence strategy

Eichmann was arraigned before the District Court of Jerusalem on 11 April 1961. However, given the enormous national and international interest in the case, the proceedings did not take place in their normal setting, but rather were housed in the Beit Ha’am community centre and theatre which had a capacity audience of over 1,000 persons. While Beit Ha’am was renovated to accommodate the requirements of a modern trial, the proceedings took on an essentially theatrical or dramatic context. 25 The theatrical spectacle of the proceedings was only enhanced by the presence of the accused, who, flanked by two court guards, sat stage left, housed in a bulletproof glass booth throughout the proceedings. 26 In response to each of the 15 charges, Eichmann stated rather ambiguously, ‘Not guilty in the sense of the indictment’. 27 His lawyer, Dr. Robert Servatius, 28 chosen by Eichmann and paid for by the state of Israel, attempted to clarify any ambiguity by stating, ‘Eichmann feels guilty before God, not before the law’. 29 Over the course of the 14 weeks of the trial, the courtroom rarely descended into the condition of a ‘citadel of boredom’, characteristic of the Nuremberg proceedings. This was due in large measure to the pedagogic role assumed by the prosecution. It soon became clear through the extensive use of witness testimony—which had been something of a rarity at Nuremberg—that the process was to be as much about the sharing of individual survivor memory as it was about a clinical prosecution of the accused. Witness upon witness poured forth their personal stories of loss and survival, the details or circumstances of which, on the majority of occasions, were of little specific evidentiary value. 30

Eichmann’s defence strategy was composed of a number of interweaving strands including, inter alia: (i) challenges to the compatibility of the 1950 Law and the proceedings in general with the principle of legality, or nullem crimen sine lege, i.e. its retrospective nature; (ii) the ability of the state of Israel to exercise jurisdiction over the alleged crimes given that they were not committed on its territory or against its citizens and which indeed were being prosecuted by a state that did not exist at the time of their commission; (iii) the impossibility for the three-judge bench of the District Court to remain impartial and ensure a fair trial; (iv) his illegal detention and transport into the custody of the state of Israel in violation of basic principles of public international law; (v) the conduct with which he was charged should be considered as acts of state; and (vi) irrespective of issues surrounding the legality of the proceedings, at a fundamental level he
should be found not guilty on the charges as in all aspects of his conduct he had been merely faithfully and patriotically carrying out the orders of his superiors. Eichmann claimed repeatedly during the three weeks of his testimony that he was simply an ‘official preparing timetables for the trains which carried the deportees to the East from their various countries’, 31 that he was but a ‘“small cog” in the extermination machine’. 32

Legal findings—their contribution to international law

The District Court found Eichmann guilty on all counts. However, it should be noted that with respect to counts 1–4 of the indictment relating to crimes against the Jewish people, the court ruled that he should be only found guilty of those acts committed after October 1941, the date on which they determined he became fully and explicitly aware of the plan to exterminate the Jews. He was sentenced to death by hanging. Eichmann appealed the conviction and sentence of the court on a number of grounds that had already been brought to the attention of court during the trial proceedings: 33 namely, the court’s lack of jurisdiction, the inability of the bench to guarantee a fair and impartial process and the fact that he played only a minor role in the implementation of the final solution.

The legal challenges that Eichmann, or more accurately Servatius, made to the prosecuting law and process were based on questions of fundamental importance to the rule of law. It should be clear that they were not frivolous or deliberately disruptive, as is characteristic of a certain proportion of defence motions in contemporary international criminal trials. However, they were all ultimately unsuccessful.

Eichmann’s argument that the 1950 Law constituted retroactive criminal punishment in violation of the principle of legality and other international legal principles was roundly rejected by both the District and Supreme Court. Building on the findings of the IMT, the District Court stated, ‘. . . all of the above mentioned crimes constituted crimes under the laws of all civilized nations, including the German people, before and after the Nazi régime . . . [a] law which enables the punishment of Nazis and their collaborators does not “conflict”, by reason of its retroactive application, “with the rules of natural justice” . . . on the contrary, it gives reality to the dictates of elementary justice’. 34 The Supreme Court commented further that in any event, the principle _nullum crimen sine lege_ had not ‘yet become a rule of customary international law’. 35

At a fundamental level, the Eichmann trial and the law on which it was based was an expression of Israel’s desire to exercise its right to **universal jurisdiction** over the crimes of the Holocaust:

The abhorrent crimes defined in this law are not crimes under Israeli law alone. These crimes, which struck at the whole of mankind and shocked the conscience of nations, are grave offences against the law of nations itself (_delicta juris gentium_). Therefore, so far from international law negating or limiting the jurisdiction of countries with respect to such crimes, international law is, in the absence of an International Court, in need of the judicial and legislative organs of every country to give effect to its criminal interdictions and to bring the criminals to trial. The jurisdiction to try crimes under international law is **universal**. 36

This finding was affirmed by the Supreme Court which stated:

Not only do all of the crimes attributed to the appellant bear an international character, but their harmful and murderous effects were so embracing and widespread as to shake the
international community to its very foundations. The State of Israel therefore was entitled, pursuant to the principle of universal jurisdiction and in the capacity of a guardian of international law and an agent for its enforcement, to try the appellant. That being the case, no importance attaches to the fact that the State of Israel did not exist when the offences were committed.\textsuperscript{37}

As the Supreme Court asserted, it was of no significance that the state of Israel did not exist at the time, nor that the crimes were not committed on the territory of the (at that point) future state. The Supreme Court noted the judgment of the Permanent Court of International Justice in the \textit{Lotus} case in concluding that, ‘as yet no international accord exists on the question of the jurisdiction of a State to punish persons who are not its nationals for acts committed beyond its borders’.\textsuperscript{38} Both courts however, insisted that there was a very real link between the victims of the crimes charged and the state.\textsuperscript{39} Such an irrefutable link satisfied the protective principle relevant to jurisdiction under international law. While Eichmann may have asserted that there were 18 other states with a more concrete claim to jurisdiction, none of these states had objected to, or were unsupportive of the proceedings.\textsuperscript{40}

The reliance of both courts on the doctrine of universal jurisdiction as the basis for the proceedings represents the true international legal legacy of the case. However, it is worth mentioning a number of issues which continue to be the source of significant debate. As noted above, the definition of ‘crimes against the Jewish people’ under the 1950 Law was closely derived from the Genocide Convention of 1948. If it was not obvious enough from the text, the District Court explicitly acknowledged that the provision was ‘defined on the pattern of the crime of genocide’,\textsuperscript{41} as provided for in the Genocide Convention. With the prosecution’s reliance on universal jurisdiction, certain questions had be asked as to the applicability of this principle to the crime of genocide. Eichmann argued that Article VI of the Genocide Convention specifically precluded the exercise of universal jurisdiction over acts of genocide, stating as it does that, ‘[p]ersons charged with genocide or any of the other acts enumerated under Article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction’.\textsuperscript{42} The District Court disagreed. Citing General Assembly Resolution 96(1) and the Advisory Opinion of the International Court of Justice on the question of \textit{Reservations to the Convention on Genocide}, it found rather that the absence of a provision establishing universal jurisdiction was a ‘grave defect in the Convention’, likely ‘to weaken the joint effort for the prevention of the commission of this abhorrent crime’.\textsuperscript{43} Furthermore, this defect could not result in the conclusion that universal jurisdiction could not be exercised over the crime of genocide.\textsuperscript{44} This conclusion largely ignored the fact that, during the drafting of Article VI, the issue of universal jurisdiction was discussed at length and specifically rejected.\textsuperscript{45} Whether this interpretation is compatible with the object and purpose of the Convention is in significant doubt; however, what is clear is that it is not in accordance with the ordinary meaning of Article VI.\textsuperscript{46}

With respect to Eichmann’s contention that his actions should be considered acts of state, the District Court determined that, ‘[i]t is true that under international law Germany bears not only moral, but also legal, responsibility for all the crimes that were committed as its own “acts of State”, including the crimes attributed to the accused. But that responsibility does not detract one iota from the personal responsibility of the accused for his acts’.\textsuperscript{47} On the related contention that the acts were merely carried out in obedience to the orders of his superiors, the Supreme Court noted that Section 8 of the 1950 Law specifically removed the applicability of this argument as a complete defence to the charges and could only be considered as possible grounds
for mitigation of punishment. This provision was entirely compatible with Nuremberg Principles.48

Neither the District Court nor the Supreme Court attached any importance to the manner in which Eichmann was brought into the custody of the state. At the commencement of proceedings, Israeli–Argentinian relations had been restored following the passing of United Nations Security Council Resolution 138 noting the infringement of Argentinian sovereignty and the issuance of a joint communiqué declaring the matter resolved. Argentinian sovereignty was the victim not the accused; in this respect the District Court noted that, ‘it is an established rule of law that a person being tried for an offence against the laws of a State may not oppose his trial by reason of the illegality of his arrest or of the means whereby he was brought within the jurisdiction of that State’.49

In supporting Eichmann’s conviction by the District Court in its judgment of 29 May 1962, the Supreme Court also confirmed the sentence of death. Eichmann, as well as a number of diverse interest groups who opposed the proceedings from the start, pleaded to Itzhak Ben-Zvi, the President of Israel, for mercy.50 On the evening of 31 May, Ben–Zvi formally rejected all pleas and Eichmann was hanged two hours later, his body was cremated and the ashes scattered in the Mediterranean. Eichmann remains the only person in Israeli history to be put to death on order of the state.51 The legal legacy of the trial is vast and continues to be frequently cited in both domestic and international decisions relevant to international criminal law. However, perhaps more important is the didactic role that the proceedings have played in the preservation of Holocaust memory.

The trial of Klaus Barbie

As a member of the Allies and signatory of the IMT Charter, France played a central role in the Trial of the Major War Criminals at Nuremberg. Indeed, in this respect, it is worth noting the contribution of the primary French Judge at the IMT, Henri Donnedieu de Vabres, who was extremely outspoken on issues such as conspiracy, individual criminal responsibility and the principle of legality.52 On the domestic plane, however, France’s immediate post–World War II record with respect to the prosecution of international crimes, specifically crimes against humanity, left much to be desired until the prosecutions of Paul Touvier, Klaus Barbie and Maurice Papon in the 1970s, 1980s and 1990s.53 The failure to pursue successful prosecutions was a consequence of statutory ambiguity as to the interpretation to be given to the applicable law, but also involved a certain political reluctance to potentially reopen the historical record with regard to the acts committed during the Vichy and colonial Algerian periods. Focusing on this issue of statutory ambiguity, the relevant piece of legislation in this respect is Law Number 64–1326 of 26 December 1964 (‘1964 Law’), which in just one sentence aims to incorporate the Nuremberg conception of crimes against humanity into the domestic penal code:

Crimes against humanity as defined in the Resolution of the United Nations of 13 February 1946, that took note of the definition of crimes against humanity as set forth in the Charter of international tribunal of 8 August 1945, are not subject to any statute of limitations by their nature.

The first opportunity to formulate an interpretation of the law, and thus to the scope of the meaning of crimes against humanity, did not arise until the Touvier case in 1975.54 In this instance, the Criminal Chamber of the Court of Cassation stated that ‘crimes against humanity are ordinary crimes committed under certain circumstances and for certain motives specified in the text
that defines them'. In ‘defining’ the offence in this way the Court was attempting to distinguish crimes against humanity from war crimes; however, the effect of the description of crimes against humanity as ordinary criminal acts was essentially to trivialize or ‘banalize’ their true character. Furthermore, the decision failed in an elemental sense to clearly lay down the distinguishing characteristics of war crimes and crimes against humanity. It neglected to comment on whether the law was applicable to acts committed by French citizens and, crucially from a practical prosecutorial perspective, it did not resolve the question of whether the law’s express abolition of the statute of limitations for crimes against humanity was of retroactive applicability, a process viewed with deep unease in the French legal tradition. When the question came before the Criminal Chamber of the Court of Cassation in October 1975, it was decided that the answer was dependent on the interpretation of Article 6 of the IMT Charter and Article 7 of the European Convention on Human Rights.

As the interpretation of international treaties was a matter for the executive branch, the question was referred to the Minister for Foreign Affairs, who did not issue a formal response until 15 July 1979—some four years later. When it was finally issued, the interpretation was unpublished and sent only to the parties in the case, making it difficult for practitioners to be fully aware of the state of the applicable law. The essential finding of the Minister, as noted by the Court of Cassation (Criminal Chamber) in Barbie, was as follows:

[T]he only principle with regard to the statutory limitation of prosecution for crimes against humanity which is to be deducible from the text [of the IMT Charter] is that the prosecution of such crimes is not subject to statutory limitation . . . the prosecution of crimes against humanity is in accordance with the general principles of law recognized by civilized nations and, on this account, such crimes are not subject to the operation of the principle of the non-retroactivity of criminal laws.

With ministerial confirmation that the 1964 Law was retroactively applicable, the prosecution of alleged instances of crimes against humanity committed during the Vichy period could recommence with the case against Klaus Barbie. During the course of the proceedings a number of fundamental legal questions were addressed: most significantly, the exact contours of the definition of crimes against humanity for the purposes of the 1964 Law.

**The accused—biography, entry into custody and charges**

Nicholas ‘Klaus’ Barbie was born in Bad Godesberg, on the German–French border, in October 1913. An enthusiastic participant in the Nazi Youth movement, at the conclusion of his secondary education he carried this verve into the SS (Schutzstaffeln) and the Gestapo, which he joined in 1935. With the occupation of the Netherlands in May 1940, Barbie was appointed to Section IV of the security police (Sicherheitsdienst) and the Security Service of the SS (‘the SD’) in Amsterdam. His primary tasks were to weed out and destroy any Resistance forces and to identify Jews for deportation and execution. In November 1942, he became head of the Gestapo in Lyons (holding the rank of Lieutenant or Obersturmführer) and was charged with complete suppression of the flourishing Resistance movement in the city. It is estimated that between November 1942 and August 1944—when Barbie was promoted to the rank of Captain (Hauptsturmführer) in the SS—over 4,000 individuals had been executed on his express orders and almost 8,000 deported to death camps. Barbie’s reliance on torture in gathering information both on Jewish families and on the activities of the Resistance earned him the moniker ‘the Butcher of Lyons’, an alias revised years later by Alain Finkelkraut, who designated him the
The trials of Eichmann, Barbie and Finta

‘poor man’s Eichmann’. Heinous as these acts were, it was for the death of Resistance talisman Jean Moulin that Barbie was most notoriously remembered.

By the end of 1944, Barbie had appeared on the United Nations List of War Criminals as War Criminal No. 239. Barbie’s post-war activities are narratively extraordinary, not to say embarrassing for a number of states. Between 1947 and 1951, Barbie was employed by the United States Counter Intelligence Corps (CIC) in West Germany and was actively engaged in searching for communists and Soviet agents despite the fact that the French authorities were very actively seeking his prosecution. The CIC protected Barbie during this time, concealed his activities from the French authorities and in 1951 provided him (and his family) with funds, false documentation and transit to Bolivia. The full extent of American involvement in perpetuating Barbie’s impunity was revealed in the ‘Ryan Report’ commissioned by the then United States Attorney General. While Barbie remained elusive, in April 1952 and November 1954 he was charged and convicted in absentia for war crimes and sentenced to death by the Tribunal Permanent des Forces Armées de Lyon.

Barbie remained in Bolivia (and for certain periods in Peru) for more than 30 years, became a Bolivian citizen and a highly successful illegal arms trader or so-called Lord of War. He was a close confidant of successive Bolivian regimes and held the rank of honorary colonel in the Bolivian Army. The French authorities became aware of Barbie’s whereabouts during the 1960s and 1970s; however, due to the lack of an extradition agreement with Bolivia and the fact that Barbie had ingratiated himself with the Bolivian authorities, it was not possible to bring him into custody. The situation changed in 1982 with the election of socialist President Sile Zuazo, who, with the sweetener of a generous aid package from the Mitterrand government, agreed to deport—not extradite—Barbie. On 5 February 1983, Barbie was expelled from Bolivia on the grounds that he had entered the country under a false name. He was flown to Cayenne in French Guiana, whereupon he was arrested, spirited to France and imprisoned in Montluc prison in Lyons, the very site of his past brutalities. He was charged with 17 counts of crimes against humanity falling under the 1964 Law.

The proceedings—defence strategy

Barbie was defended during the trial proceedings by Jacques Vergès, a highly controversial French lawyer and veteran Marxist revolutionary, who transformed the proceedings into a public attack on French actions in Algeria and on his perception of Western Imperialism generally. Leaving Vergès’ politicization of the process to one side, Barbie’s legal defence centered on two arguments: (i) he was the victim of an illegal extradition procedure and had been effectively kidnapped by the French authorities (in much the same way as Eichmann); and (ii) the proceedings were in violation of the principle of double jeopardy (ne bis in idem) as his activities during the period 1942–1944 had already been the subject of in absentia war crimes proceedings in 1952 and 1954, the convictions from which were statute barred as of November 1984 (citing the 20-year prescription rule for war crimes).

Barbie was in custody in Lyon for over four years before substantive proceedings against him commenced before the Cour d’assises du Rhône in May 1987 (these of course are distinguishable from proceedings addressing procedural and jurisdictional matters that had been ongoing since 1983). The 36 days of the trial dominated the French media; the Barbie trial was in effect to France what Eichmann had been to Israel in that the proceedings played an important role in the revival of Holocaust, Vichy and Resistance memory. Barbie, however, was not the willing participant that Eichmann had been. On the third day of the trial, Barbie addressed the court stating:
Mr. Prosecutor, I would like to say that I am a Bolivian citizen and that if I am present here it is because I have been deported illegally . . . I place it fully in the hands of my lawyer to defend my honour in front of justice, despite the climate of vengeance [and] the lynching campaign set forth by the French media.74

Barbie’s waiver of his right to be present throughout the proceedings was accepted by the court.

**Legal findings—issues of relevance to international law**

The *Cour d’assises du Rhône* found Barbie guilty of all charges and sentenced him to life imprisonment. During the course of the proceedings several core aspects of the 1964 Law were subject to creative, highly innovative judicial interpretation. This was primarily the case with respect to the enumeration of the applicable definition of crimes against humanity. Of particular concern was whether or not acts committed against members of the Resistance were to be considered war crimes, crimes against humanity or (in certain circumstances) both. If they were designated as war crimes only, Barbie’s acts would be subject to the applicable statute of limitations, meaning, *inter alia*, that it would be not be possible to prosecute him for the death of Jean Moulin. A decision of the Indicting Chamber or *Chambre d’accusation* held just this on 4 October 1985.75 Based on an interpretation of Article 6(c) of the IMT Charter, it was determined that the Resistance was to be considered an organized fighting force not part of the civilian population.76 This interpretation, however, was overturned on appeal by the Court of Cassation, which stated that

Neither the driving force which motivated the victims, nor their possible membership of the Resistance, excludes the possibility that the accused acted with the element of intent necessary for the commission of crimes against humanity. In pronouncing as it did and excluding from the category of crimes against humanity all the acts imputed to the accused committed against members or possible members of the Resistance, the *Chambre d’accusation* misconstrued the meaning and the scope of the provisions listed in these grounds of appeal.77

The crucial element distinguishing war crimes from crimes against humanity, therefore, was not the identity or status of the victim as such, but rather the specific intent and ideological motivation of the perpetrator. This was expressed in more detail in the unique definition of crimes against humanity forwarded by the Court of Cassation:

The following acts constitute crimes against humanity within the meaning of Article 6(c) of the Charter of the Nuremberg International Military Tribunal annexed to the London Agreement of 8 August 1945, which are not subject to statutory limitation of the right of prosecution, even if they are crimes which can also be classified as war crimes within the meaning of Article 6(b) of the Charter: inhumane acts and persecution committed in a systematic manner in the name of a State practicing a policy of ideological hegemony, not only against persons by reason of their membership of a racial or religious community, but also against the opponents of that policy whatever the form of their opposition.78

This formulation of crimes against humanity does not have any basis in the text of Article 6(c). The bizarre implication of the requirement that the acts be committed in the name of a state in
pursuit of ideological hegemony means that, in the absence of such an express policy, crimes against humanity cannot be committed. In addition, the Court of Cassation had, perhaps unconsciously, designated all those who lost their lives opposing Nazism, by whatever means, victims of crimes against humanity.79

Despite the weak foundations of the definition, the decision of the Court is noteworthy for the clear qualitative distinction it draws between war crimes and crimes against humanity:

[I]n contrast to crimes against humanity, war crimes are directly connected with the existence of a situation of hostilities declared between the respective States to which the perpetrators and the victims of the acts in question belong. Following the termination of hostilities, it is necessary that the passage of time should be allowed to blur acts of brutality which may have been committed in the course of armed conflict, even if those acts constituted violations of the laws and customs of war or were not justified by military necessity, provided that those acts were not of such a nature as to deserve the qualification of crimes against humanity.80

In so doing, the Court effectively rejected its own characterisation of crimes against humanity as ‘ordinary crimes’ as laid down in the *Touvier* case.81

Addressing Barbie’s contention that he was illegally brought before the court, the Court of Appeal of Lyons made perhaps an inadvertent, but valuable statement that continues to be cited, relating to the applicability of the principle of universal jurisdiction to crimes against humanity. It stated:

[B]y reason of their nature, the crimes against humanity with which Barbie is indicted do not simply fall within the scope of French municipal criminal law, but are subject to an international criminal order to which notions of frontiers and extradition rules arising therefrom are completely foreign.82

This statement was modestly endorsed by the Court of Cassation, who added that there ‘is no obstacle to the bringing of a prosecution against the accused on national territory provided that the rights of the defence are fully and freely ensured before both the examining magistrate and the trial court’.83

Barbie appealed the judgment and sentence of the *Cour d’assises du Rhône* on some 14 grounds, all of which were rejected by the Court. He thus became the first person in French legal history to be convicted of crimes against humanity. He died in his cell in Montluc prison on 25 September 1991.

**The trial of Imre Finta**

The absence from the Canadian Criminal Code of a jurisdictional basis for the prosecution of war crimes and crimes against humanity committed outside of the territory of Canada was finally addressed by way of a legislative amendment in 1987, which gave rise to Section 6(1.91).84

It provided:

[E]very person who, either before or after the coming into force of this subsection, commits an act or omission outside Canada that constitutes a war crime or a crime against humanity and that, if committed in Canada, would constitute an offence against the laws of Canada in force at the time of the act or omission shall be deemed to commit that act or omission in Canada at that time if . . . (a)(i) that person is a Canadian citizen or is employed by Canada
in a civilian or military capacity, (ii) that person is a citizen of, or is employed in a civilian or military capacity by, a state that is engaged in an armed conflict against Canada, or (iii) the victim of the act or omission is a Canadian citizen or a citizen of a state that is allied with Canada in an armed conflict.

The prosecution of Imre Finta within months of the entry into law of the amendment provided the Canadian criminal justice system with the initial opportunity to explore both the legislation’s efficacy from a prosecutorial perspective and its compatibility with the Canadian Charter of Rights and Freedoms. The issues encountered throughout the process by the High Court of Justice, the Ontario Court of Appeal and the Supreme Court closely mirror those raised in the prosecutions of Eichmann and Barbie, insofar as all three prosecutions explored issues relating to the principle of legality (retroactivity), extraterritoriality (universal jurisdiction), and the interpretation of the definition of war crimes and crimes against humanity as derived from Article 6(b) and (c) of the IMT Charter.

The accused—biography, entry into custody and charges

Imre Finta was born in 1912 and, after studying law, he joined the Royal Hungarian Gendarmerie, an armed paramilitary police force. He rose through the ranks, ultimately being promoted to Captain, and in 1944, was transferred to Szeged as Division Commander of Gendarmerie Investigations. Following the passing of the ‘Baky decree’ by the German-installed Hungarian government in April 1944 and the ghettoisation of the Hungarian Jews, Finta was responsible for the forcible detention of 8,617 Jews in the Szeged brickyards, their interrogation and eventual deportation. After the war, Finta reportedly spent 18 months in an American POW camp in Germany; in 1951, he emigrated to Canada and opened a restaurant in Toronto. He became a Canadian citizen in 1956.

In 1948, Finta was tried in absentia and convicted of ‘crimes against the people’ by a Hungarian court. In 1970, a general amnesty was issued which covered Finta’s conviction. Finta’s wartime activities were brought to the attention of the Canadian authorities, in part, because of two civil libel suits launched by Finta in 1983 against the head of the Canadian Holocaust Remembrance Association and the television network CTV, both of whom had issued publications linking Finta to Nazi war crimes. He was to drop both suits shortly after the commencement of the respective legal hearings, but shortly afterwards—and only three months after the adoption of the Canadian war crime provisions—Finta was indicted in Ontario and charged with unlawful confinement, robbery, kidnapping and manslaughter as crimes against humanity and war crimes under the Canadian Criminal Code.

Proceedings—defence strategy

Finta was represented by Douglas Christie, who had also represented Ernst Zundel in his trial for Holocaust denial (during which he challenged the introduction of Nazi Concentration Camps on the grounds of hearsay since the unnamed narrators were not available for cross-examination). He launched a spirited (though not uncontroversial) defence on a number of legal grounds. Christie challenged the war crimes provisions of the Criminal Code as, inter alia, a violation of the guarantee of equality before the law as provided for in the Charter of Rights and Freedoms, on the basis that Finta’s involvement in the deportation of Hungarian Jews to Auschwitz was similar to the deportation of Japanese citizens in Canada during World War II, yet the Criminal Code only covers acts or omissions performed by individuals outside Canada. Christie also
The trials of Eichmann, Barbie and Finta

condemned the Criminal Code as unconstitutional on the basis that it amounted to retroactive criminal legislation. He argued that war crimes and crimes against humanity had not existed at the time relevant to the indictment, that the war crimes legislation violated the principle of extraterritoriality and that the evidence against Finta was of questionable value as it emanated from governments which were not regarded as free and democratic. During the jury trial itself, Christie chose not to call Finta to testify, at least in part ‘to avoid potentially damaging cross-examination’.93

In July 1989, Judge Callaghan of the Supreme Court of Ontario issued a decision on the pre-trial motions which upheld the constitutionality of the war crimes provisions of the Canadian Criminal Code and dismissed the defence objections.94 The decision stated that the effect of the war crimes provisions was retrospective, not retroactive; it ‘did not transform a formerly innocent act into a criminal offence, but changed the legal consequences of an existing offence’.95 Judge Callaghan rejected Christie’s argument that war crimes and crimes against humanity were not recognized as criminal offences prior to 1945, and quoted the IMT judgment in support of the finding that war crimes and crimes against humanity were offences under international law or general principles of law recognized by the community of nations by 1939.96 The argument that the Criminal Code was discriminatory and breached the equality provision of the Charter was also dismissed, on the basis that the treatment of Japanese citizens by the Canadian government, although unjust, was both distinguishable and ‘dramatically different’ from the treatment of Hungarian Jews.97 Judge Callaghan also invoked the principle of universal jurisdiction in rejecting the defence argument that the Criminal Code provisions constituted an unjustifiable exercise of extraterritorial jurisdiction.98

Legal findings—issues of relevance to international criminal law

There are a range of issues of import to international justice arising from the proceedings; however, this section will briefly focus on just one that had a direct bearing on Finta’s acquittal on all of the charges: the determination of the applicable mens rea or mental element for crimes against humanity. Supporting Presiding Judge Campbell’s instructions to the jury with respect to this issue, Supreme Court Justice Cory writing with the majority stated that ‘[t]he requisite mental element of a war crime or a crime against humanity should be based on a subjective test’. However, he added that ‘the mental element of crimes against humanity must involve awareness of the facts or circumstances which would bring the acts within the definition of a crime against humanity’.99 These elements are relatively uncontroversial, but significant concerns arose from the inclusion of the following additional requirement:

[T]he additional element is that the inhumane acts were based on discrimination against or the persecution of an identifiable group of people . . . . These elements must be established both in order for a Canadian court to have the jurisdiction to try the accused and in order to convict the accused of the offence.100

Thus, in order for an individual to be prosecuted for crimes against humanity, discriminatory or persecutory intent must be established. This finding was strongly criticized by Judge La Forest in his dissenting opinion, who held that ‘there [was] no need for the jury to be concerned with the mental element in relation to war crimes and crimes against humanity beyond those comprised in the underlying domestic offence’.101 The factual conditions required for war crimes and crimes against humanity, such as the existence of an armed conflict or presence of an occupying force, were relevant only in relation to jurisdiction over the offences and did not go to individual criminal responsibility.102
It is questionable whether the standard set by the majority was in conformity with customary international law at the time. Indeed, subsequent case law of the Yugoslavia Tribunal specifically rejected the requirement of proof of the presence of discriminatory intent for all crimes against humanity beyond that of the crime of persecution. 103

Conclusion

Each of the cases discussed above highlights a number of challenges inherent in retrospective domestic prosecutions of international crimes. The apprehension and trial of Adolf Eichmann were legally problematic, but provided a vital pedagogical function for a young state still trying to comprehend the horrors of the Holocaust. The legacy of the Klaus Barbie trial encompasses both an attempt to expansively interpret the category of victims of crimes against humanity in World War II, and was a painful and politically sensitive examination of the previously suppressed crimes of Vichy France. The failed prosecution of Imre Finta arose as a result of Canada’s commendable enthusiasm for vigorously pursuing justice for international crimes, but ultimately illustrated the pitfalls of attempting to create a workable definition for such crimes within domestic criminal law.

Each of these cases were pioneering in their own way; each made their own modest contribution to the evolution of international criminal law at a time when such case law was particularly sparse; and each, though initiated for essentially political reasons, managed to transcend the constraints of domestic jurisdiction to become a truly significant international precedent.

Notes

3 Specifically, Buchenwald, Dachau, Nordhausen, Ohdruf and Penig Concentration Camps.
5 Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, Volume II, 14 November 1945—1 October 1946, proceedings of 29 November 1945 at 431–2.
7 Ibid., p. 98.
8 Opening statement of Gideon Hausner, as quoted in Douglas, The Memory of Judgment, p. 98.
10 The statement of the District Court with respect to Eichmann’s basic biographical information (to 1945) can be found at: Eichmann District Court Judgment, pp. 84–5 and 86–93. See also, M. Lippman, ‘Genocide: The Trial of Adolf Eichmann and the Quest for Global Justice’, Buffalo Human Rights Law Review 8, 2002, 45–121, at pp. 47–53.
11 Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, Volume I, Official Documents, Judgment, pp. 250, 252 and 265. A number of secondary sources recount that during the drafting of the Final Judgment, American Judge Francis Biddle had to be reminded
of who exactly Eichmann was—e.g. D. Bloxham, *Genocide on Trial*, Oxford, Oxford University Press, 2001, p.107.

12 Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, Volume IV, 17 December 1945—8 January 1946, proceedings, 3 January 1946, p. 371.

13 Arendt writes in this regard, 'He was still cautious, but he now wrote to his wife in his own handwriting and told her that “her children’s uncle” was alive . . . in the summer of 1952 he had his wife and children join him’. H. Arendt, *Eichmann in Jerusalem: A Study in the Banality of Evil*, New York, Penguin, 1992 pp. 236–7.

14 The thought of Eichmann as a rabbit farmer throws forth bizarre images of a Jean de Florette bent on National Socialism.


16 A note verbale from the Embassy of Israel in Buenos Aires to the Ministry of Foreign Affairs and Religion of the Argentine Republic, included the text of a letter of consent submitted by Eichmann to his captors which stated, *inter alia*, that, 'I the undersigned, Adolf Eichmann, declare of my own free will, that since my true identity has been discovered, I realize that it is futile for me to attempt to go on evading justice . . .'. See, Letter Dated 21 June 1960 from the Permanent Representative of Israel to the President of the Security Council, United Nations Security Council, S/4342, (21 June 1960).


19 Statement of Prime Minster David Ben-Gurion to Knesset, 24 May 1960.

Ibid.


22 Ibid., s. I(a)(1).

23 Ibid., s. I(a)(2).

24 Ibid., s. I(a)(3).

25 Hannah Arendt commenting on the housing of the trial in the Beit Ha’am said that, ‘... Judge Landau [Presiding Judge of the District Court] . . . is doing his best, his very best, to prevent this trial from becoming a show trial under the influence of the prosecutor’s love of showmanship. Among the reasons he cannot always succeed is the simple fact that the proceedings happen on a stage before an audience, with the usher’s marvelous shout at the beginning of each session producing the effect of the rising curtain’, Arendt, *Eichmann in Jerusalem*, p. 4.

26 Simon Wiesenthal suggested to Gideon Hausner that Eichmann should be forced to wear his uniform. Hausner rejected this suggestion since ‘while emotionally right, it would give the whole event the theatrical aura of a show trial’. A. Levy, *Nazi Hunter: The Wiesenthal File*, Robinson, London, 2006, p.156.

27 Wiesenthal also proposed that he be forced to plead with respect to six million counts of murder. Ibid. pp. 156–7.


30 See Douglas, *The Memory of Judgment*, pp. 91–182. In such instances, Servatius frequently waived recourse to cross-examination.

31 Eichmann District Court Judgment, p. 225.

Ibid., p. 226.

33 Indeed, the Supreme Court commented that, ‘were it not for the grave outcome of the decision of the Court which constitutes the subject of the appeal, we would have seen no need whatever to give a reasoned opinion separately and in our language . . . since the conclusions of the District Court rest on solid foundations’. Attorney-General of the Government of Israel v. Adolf Eichmann (Supreme Court Judgment 29 May 1962) 36 ILR. 279 (1968) [hereinafter Eichmann Supreme Court Judgment].

34 Eichmann, District Court Judgment, p. 23. Affirmed by the Supreme Court at 36 ILR. 283.
36 Eichmann, District Court Judgment, p. 27.
37 Eichmann, Supreme Court Judgment, p. 304.
38 Ibid., p. 285.
39 Eichmann, District Court Judgment, p. 50.
40 Ibid., p. 53.
41 Ibid., p. 30.
43 Eichmann, District Court Judgment, p. 25.
44 Ibid.
46 Ibid.
47 Eichmann, Supreme Court Judgment, pp. 255, 256
48 Eichmann, District Court Judgment, p. 59.
50 Servatius also made a last ditch attempt to have the West German Government demand Eichmann’s extradition. See Arendt, *Eichmann in Jerusalem*, p. 250.
51 Even though the death penalty for murder was formally abolished in Israel by the 1954 Law for the Amendment of the Criminal Law (Modes of Punishment), it was retained for convictions under the 1950 Nazi and Nazi Collaborators Law. See Green, ‘Nullum Crimen and the Eichmann Trial’, p. 462.
53 This not to suggest that there were no prosecutions for war crimes in the post-war period, ‘France, like many other countries tried enemy nationals and nonenemy nationals under different laws and in different courts’; however, ‘[n]o one was punished by a French court for “crimes against humanity”, strictly speaking’—L. S. Wexler, ‘The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again’, *Columbia Journal of Transnational Law* 32, 1995, 289–380, pp. 317–8.
54 The Touvier case is highly significant in the context of the development of French law on war crimes and crimes against humanity—in April 1994 he became the first French citizen to be convicted of crimes against humanity. The procedural course of the case is extremely complex (spanning five decades, and variously involving trial and sentence to death in absentia, the enforcement of a statute of limitations, Presidential Pardon, reinvestigation, trial and sentence) and is mired in controversial political maneuvering. For a full discussion of the case, see L.S. Wexler, ‘Reflections on the Trial of Vichy Collaborator Paul Touvier for Crimes Against Humanity in France’, *Law & Social Inquiry* 20, 1995, 191–221; Touvier Case, 100 ILR 337 (1995); and V. Thalmann, ‘Touvier’, in A. Cassese (ed.), *The Oxford Companion to International Criminal Justice*, Oxford, Oxford University Press, 2009, pp. 956–8.
57 As noted by Wexler, ‘[h]aving thus neatly shifted the problem from the courts to the executive branch, the interpretation of the 1964 law (not to mention the Touvier prosecution) was to stagnate for some time’—Wexler, ‘Touvier to Barbie and Back Again’, p. 331.
58 Wexler, ‘Touvier to Barbie and Back Again’, p. 331, fn. 188.
61 Binder, ‘Representing Nazism’, p. 1325.
62 Ibid.
The trials of Eichmann, Barbie and Finta


68 The impetus for Barbie’s prosecution was largely a result of the efforts of ‘Nazi Hunters’ Serge and Beate Klarsfeld, who traveled to Peru in 1971, publicly revealed Altmann’s true identity and demanded his extradition and prosecution before a French court.


71 Since Vergès did not have a right of audience before the Court of Cassation, Barbie was represented in appeal proceedings by Guy Lesourd and Benoît Baudin.

72 See Binder, ‘Representing Nazism’.

73 For a critical account of the process, see Finkielkraut, Remembering in Vain.

74 Quote taken from Beigbeder, Judging War Crimes and Torture, p. 207.

75 Barbie, France, Court of Cassation (Criminal Chamber), 20 December 1985, 78 ILR 125 (1988) [hereinafter Court of Cassation summary of findings], p. 139.

76 Barbie, France, Court of Cassation summary of findings, p. 139.

77 Ibid., p. 140.

78 Ibid., p. 137.

79 Binder, ‘Representing Nazism’, p. 1337.

80 Barbie, France, Court of Cassation summary of findings, p. 136.


83 Barbie, France, Court of Cassation (Criminal Chamber), 6 October 1983, 78 ILR 130 (1988).

84 Section 6(1.91) became Section 7(3.71) and has been referred to as the ‘Made in Canada Nuremberg Legislation’—see I. Cotler, ‘Bringing Nazi War Criminals in Canada to Justice: A Case Study’, American Society of International Law Proceedings 91 1997, 262–269, p. 262. It has since been replaced by the Crimes Against Humanity and War Crimes Act, S.C. 2000, c. 24.


88 Finta, Supreme Court, la Forest dissent, pp. 293–4.

89 Braham, ‘Canada and the Perpetrators of the Holocaust’, p. 299.

90 Finta, Supreme Court, la Forest dissent, pp. 293–4.


94 R. v. Finta, Canada, High Court of Justice, 10 July 1989, 82 ILR. (1990) 424.

95 Finta, Canada, High Court of Justice, p. 426. This finding was later supported by both the majority and dissenting judgments of the Supreme Court. See Finta, Supreme Court, pp. 306–8.

96 Finta, Canada, High Court of Justice, p. 439.

97 Ibid., p. 448.

98 Ibid., p. 444.

99 Finta, Supreme Court, Cory J., Opinion, pp. 360, 362.

100 Ibid., p. 358.

101 Finta, Supreme Court, la Forest dissent, p. 314.

102 Ibid., p. 316.

103 Tadić (IT-94-1-A), Appeals Chamber, 15 July 1999, paras. 283, 292 and 305; Blaškic (IT-95-14-T), Trial Chamber, 3 March 2000, paras. 244 and 260; Kordić et al. (IT-95-14/2-T), Trial Chamber, 26 February 2001, para. 186.