

## Mr. S. LIPIETZ et al. v. the Prefect of the Haute-Garonne Department and the SNCF (Advisory Opinion)

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ADMINISTRATIVE COURT OF TOULOUSE  
SECOND CHAMBER  
PETITION NUMBER 0104248

Mr. S. LIPIETZ et al. v. the Prefect of the  
Haute-Garonne Department and the SNCF\*

ADVISORY OPINION BY:  
JEAN-CHRISTOPHE TRUILHÉ, GOVERNMENT COMMISSIONER<sup>†</sup>

*May 16, 2006 Hearing*  
*June 6, 2006 Reading*

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The October 4, 1940 “law”<sup>1</sup> on “foreign nationals of the Jewish race,” was applicable until the August 9, 1944 executive order, concerning the restoration of republican legality on the French

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\* Translator’s note: the SNCF, an acronym for “*Société nationale des chemins de fer*,” is the French National Railway Company.

<sup>†</sup> For an explanation of the now-extinct position of Government Commissioner or *commissaire du gouvernement*, see Vivian Grosswald Curran, *Recent French Legal Developments Concerning a War-Time Arrest and Imprisonment Case*, 25 MD. J. INT’L L. 264, 265 n.3 (2010).

1. Translator’s note: the expression, *acte dit loi*, was used in the original French document to refer to laws enacted during the Vichy régime but which were later rendered void by the August 9, 1944 Order restoring republican legality. (VGC). The French expression connotes a governmental action that pretends to be law without in fact being so and has been used by others to express the idea that Vichy’s so-called laws were not law. See, e.g., DOMINIQUE REMY, LES LOIS DE VICHY: ACTES DITS “LOIS” DE L’AUTORITE DE FAIT SE PRETENDANT «GOUVERNEMENT DE L’ÉTAT FRANÇAIS» (1992).

mainland, went into effect. Article 1 of the October 4, 1940 “law” provided that “foreign nationals of the Jewish race may, from the date of the currently promulgated law, be interned in special camps by decision of the prefect of the “*département*”<sup>2</sup> in which they reside.”

The implementation of these provisions was to be combined, in particular, with those provisions found in the July 22, 1940 “law” regarding the review of naturalizations (those which had occurred pursuant to the law of August 10, 1927)<sup>3</sup> as well as the October 3, 1940 and June 2, 1941 “laws” on the status of Jews.<sup>4</sup>

The August 9, 1944 order of the Provisional Government of the French Republic regarding the restoration of republican legality on the mainland, after providing in Article 1 that “the Republic . . . by law . . . did not cease to exist” provides in Article 2 that “all legislative acts . . . and the orders issued in implementation thereof on the continental territory after June 16, 1940, and until the establishment of the Provisional Government of the French Republic [in 1944] are null and void and of no effect,” but “this nullity must be expressly specified.”<sup>5</sup> The order further provides in Article 3 that “the following acts are hereby declared to be null and void: . . . all those laws establishing any discrimination whatsoever on the basis of an individual’s status as a Jew . . . .”

In this case, Mr. Georges Lipietz, age twenty-one at the time, his half-brother, Mr. Guidéon S., age fifteen at the time, their mother, Mrs. Stéphanie O.-H., Mrs. S., age fifty at the time, and her second husband, father of Mr. Guidéon S., Mr. Jacques S., age forty-two, were arrested by the Gestapo on the morning of May 8, 1944 at Pau on the basis of their real or assumed Jewish origins. It is important to note that Mr. and Mrs. S., of Polish origin, had acquired French citizenship prior to the July 22, 1940 “law,” on the basis of the

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2. A *département* is a territorial and administrative division. (VGC).

3. This law had facilitated the naturalization process. See Rémi Rouquette, *The French Administrative Court’s Rulings on Compensation Claims Brought by Jewish Survivors of World War II*, 25 MD. J. INT’L. L. 304, 307 n.5 (2010). (VGC).

4. Both of these laws defined who was to be deemed a Jew and limited the professions which Jews were entitled to exercise. The second of these laws, harsher than the first, replaced the first. For the text of the laws and commentary on them, see REMY, *supra* note 1, at 87–91, 116–27. (VGC).

5. It had to be expressly specified in post-war legislation nullifying exactly which statutes and regulations of Vichy were to be revoked because the Vichy regime had carried on normal governmental functions and enacted innumerable laws and regulations that did not need to be revoked. (VGC).

August 10, 1927 law.<sup>6</sup>

On the afternoon of May 8, 1944, under the supervision of German soldiers, the parties were transferred to Toulouse where they then were turned over to the Haute-Garonne administration.

Mr. Lipietz and the S. family members then were subjected to administrative detainment in the premises of the penal administration until the morning of May 10, 1944 on the decision of the services of the Haute-Garonne administration and based on the aforementioned provisions of Article 1 of the “law” of October 4, 1940.

On the morning of May 10, 1944, again on the decision of the services of the Haute-Garonne administrative services, they were turned over to the SNCF with the goal of transporting them to the Paris-Austerlitz train station. Their transportation from the Haute-Garonne to Paris-Austerlitz took place via cattle car, which was ventilated by a single opening and contained fifty-two people. The journey, which did not end until the evening of May 11, 1944, lasted more than thirty hours, during which time they received water only once, at the Red Cross’s initiative at the Limoges train station.

On the evening of May 11, 1944, the *Société de Transport en Commun de la Région Parisienne* (STCRP)<sup>7</sup> transported them in buses from the Paris-Austerlitz train station to the Drancy internment camp.

From May 11, 1944 to the evening of August 17, 1944, Mr. Lipietz and the S. family were interned at the Drancy camp, which was run by the German Occupation authorities yet guarded by French police. There, they were classified as “deportable persons.” However, the advancement of the allied troops towards the Parisian region ultimately saved them from deportation. Nonetheless, on August 17, 1944, after the Germans had departed, the French guards continued to enforce the internment measures until the Swedish Consul, Raoul Nordling, intervened that same day, leading to the camp’s liberation.

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Through two prior claims to the Administration of the Haute-Garonne and the regional director of the SNCF Midi-Pyrénées respectively on September 6, 2001, Mr. Georges Lipietz and Mr.

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6. *See supra* note 5. (VGC).

7. Translator’s note: the STCRP is the Parisian Regional Transit Company.

Guidéon S. sought joint and several liability from the State and from the SNCF for alleged wrongful acts committed by the services of the Haute-Garonne administration and the railway company.

Mr. Lipietz sought damages for the emotional harm and difficulties to which he and his mother were subjected—in the amount of € 100,000 for himself and € 50,000 for the successors in interest of his mother, sharing the damages with his brother, Mr. Guidéon S., for a total compensation of € 150,000.

Mr. S. sought damages for emotional harm and difficulties to which he and his parents were subjected—in the amount of € 100,000 for himself, € 100,000 for the successors in interest of his father, and € 50,000 for the successors in interest of his mother, sharing the damages with his brother, Mr. Georges Lipietz, for a total compensation of € 250,000.

Both prior compensation requests were rejected implicitly by the Services of the Haute-Garonne and expressly by the legal director of the SNCF on October 5, 2001.

In their complaint filed on November 14, 2001, Mr. Lipietz and Mr. S. request this Court to grant judgment jointly and severally against the State and the SNCF and order them to pay € 150,000 and € 250,000 respectively for the aforementioned damages.

The successors of Mr. Georges Lipietz, who passed away in the course of the proceedings, are as follows: his widow, Mrs. Colette Lipietz, and his children, Mr. Alain Lipietz, Mrs. Catherine Lipietz-Ott, and Mrs. Hélène Lipietz.

In the latest of their submissions, Messrs. Guidéon S. and the Lipietz parties also request that this Court add the interest that has accrued to the damages requested since the date of receipt of the two prior claims on September 6, 2001 and that such interest be capitalized annually.

In a memorandum of law filed on May 8, 2006, the plaintiffs also ask this Court: first, to void the two decisions dated April 24, 2006, by which the Secretary of Defense invoked the four-year statute of limitations against Mr. Georges Lipietz and Mr. Guidéon S., and second, to find the government liable to pay to each of Mr. George Lipietz's successors in interest the sum of € 1 in redress for the moral wrongs they suffered due to their deceased spouse and father's

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having received notice of the unfavorable decision against him.

Finally, the petitioners further request that this Court require the State and the SNCF to jointly pay € 6,000 to Mr. Guidéon S. and € 1,500 to each of the Lipietz petitioners, pursuant to Article L. 761-1 of the CJA.<sup>8</sup>

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The administrator of the Haute-Garonne and the SNCF request that the claims be dismissed.

Concerning the government's defense in this case, it should be emphasized that, under the provisions of Article R. 431-10 of the CJA, the defense lies solely with the administrator of the Haute-Garonne, since it is undisputed that the litigation "arose from the government's civil administration activities in the aforementioned *département*."<sup>9</sup> The Secretary of Defense would be unable effectively to invoke the provisions of Article R. 431-9 of the same Code to demonstrate his status as "relevant minister" within the meaning of that article, since Article R. 431-9 of the CJA is only relevant "subject to the provisions of Article R. 431-10" of the same Code. As for the decision resulting from the October 23, 2003 inter-ministerial meeting—the summary of which was provided to you by the Minister of Internal Affairs and Planning<sup>10</sup>—declaring that the government would be represented and defended by the Secretary of Defense in the event of any claims for damages based on the enforcement of anti-Semitic legislation by the government of the so-called French State,<sup>11</sup> this decision is devoid of any normative character.

Following a formal notice to present his defense, addresses on March 13, 2006 by the president of the Second Chamber of this Court and pursuant to Article R. 612-3 of the CJA, the administrator of the Haute-Garonne nevertheless produced a seven-line memorandum on March 28, 2006, by which he incorporated, as an alternative, the submissions of the Secretary of Defense.

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8. Translator's note: CJA means the Code of Administrative Justice.

9. *See supra* note 2. (VGC).

10. Translator's note: *Ministre de l'intérieur et de l'aménagement du territoire*.

11. The reference here to the "French State" is to the '*Etat français*, the name Vichy gave itself to distinguish itself from the *Républiques françaises*, the republican form of government that had been France's form of government since the time of the French Revolution except for its short spurts of empire and renewal of Bourbon monarchy. (VGC).

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In light of the extreme gravity of the events, the advisory opinion that we shall present is based on references to case law that may seem abstract to the victims of the events in question and to their family members who have not been formally trained in public law; we apologize in advance to the parties involved.

In another sense, we are forced to apply legal reasoning devoid of any complacency regarding the past actions of the Haute-Garonne administrator and of the SNCF, or of the administrative judge. It should be clear, as Robert Paxton observed in the conclusion of his work, *La France de Vichy, 1940–1944*, quoted by Jean Massot in the *Revue administrative*, that we are incapable of knowing what we would have done under the same circumstances. In another vein, in a conversation reported by Josy Eisenberg, Adin Steinsaltz remarked that, despite considerable progress made since biblical times and regardless of the various circumstances and customs of the times, humanity has never succeeded in inventing new sins.

The subject matter jurisdiction of this Court to rule on the government's noncontractual liability in the case at hand is not contested by any party to the litigation. Indeed, whatever the gravity of the infringement to individual freedoms that the measures taken by the authorities of the Haute-Garonne caused to Mr. Georges Lipietz and the S. family, these measures are based on the aforementioned provisions of Article 1 of the October 4, 1940 "law,"<sup>12</sup> and therefore it cannot be said that they may not be linked to the enforcement of a legislative text or regulation within the meaning of the Jurisdictional Court's<sup>13</sup> case law on the definition of *voie de fait*.<sup>14</sup> On that topic, see the TC,<sup>15</sup> June 20, 1994, *Madaci and Youbi* case (advisory opinion by

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12. Pursuant to this law, foreign Jews could be assigned forced residences and interned in special camps. For the text of the law and commentary, see REMY, *supra* note 1, at 91–92. (VGC).

13. Translator's note: the Jurisdictional Court is known as the *Tribunal des conflits* ("TC").

14. Translator's note: under French administrative law, the *voie de fait*, which does not appear to have an American English legal equivalent, is an egregious illegal act by the administration constituting an assault on an individual's personal liberty or property rights. When an act falls under the definition of *voie de fait*, French administrative law considers the administrative nature of the act to be lost. Therefore, that act can no longer be an administrative act subject to the administrative law judge's jurisdiction but has to be subject to a civil jurisdiction.

15. *See supra* note 13. (VGC).

Abraham) on the absence of *voie de fait* in the enforcement of a deportation order that may have violated the provisions of the ECtHR. Concerning the jurisdiction of this Court to rule on possible misconduct committed by the civil administrations of the government due to the application of anti-Semitic legislation of the so-called French State,<sup>16</sup> and regardless of the gravity of the attack against individual liberty, see also implicitly the CE,<sup>17</sup> April 12, 2002, *Papon* case (advisory opinion by Sophie Boissard).

More delicate is the issue of this Court's jurisdiction over a noncontractual liability action brought against the SNCF. The rail company asserts lack of jurisdiction as its principal defense.

It is clear that, at the time of the facts in dispute, the SNCF was governed by the agreement of August 31, 1937 which had been approved by executive decree of the same date and by the October 10, 1943 "law" that served to reorganize the SNCF's board of directors, under the terms of which the SNCF—notwithstanding the fact that the government owned the majority of its capital and half of the seats on its board—became a limited liability company, subject to certain exemptions from the common law, thus as a corporation under private law. It is also worth noting that, in a similar noncontractual liability action brought against the SNCF by Mr. Schaechter, whose parents had also been transported by the railway company from the Haute-Garonne for purposes of deportation, the Paris Court of First Instance, in a judgment dated May 14, 2003, and the Paris Court of Appeals, in a judgment dated June 8, 2004, implicitly deemed themselves to have jurisdiction over the case.

The criteria under which this Court recognizes its jurisdiction over a noncontractual liability action against a private individual were specified by the CE in the March 23, 1983 case of *SA Bureau Veritas* (advisory opinion by Denoix de Saint-Marc), concerning harm attributed to a limited company active in the governmental service administration of aviation safety. These criteria are three-fold: first, the institution of private law must participate in the "delivery of government service; second, to this end, the institution of private law must be vested with governmental power prerogatives; and finally, the harm for which compensation is sought must have been caused

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16. *See supra* note 11. (VGC).

17. Translator's note: CE stands for *Conseil d'Etat*, the highest administrative law court in France.

“in conduct within the scope of government power prerogatives conferred to it for the enforcement of the government service mission” with which it is vested.

In the case at hand, as regards the criteria of participation in the fulfillment of a mission of administrative government service, even if it is clear that the SNCF had preserved as its principal activity at the time of the facts in dispute the provision of industrial and commercial passenger transport by rail, it is nevertheless also clear that the individuals interned on racial grounds, who were transported by the railway company from the internment premises of the so-called free zone<sup>18</sup> to the Drancy camp, were not traveling as passengers of this commercial and industrial government service, since they were transported against their will. It is also clear from the pretrial judicial investigation, particularly the report entitled *La SNCF sous l'occupation allemande, 1940–1944*,<sup>19</sup> written at the request of the SNCF by Christian Bachelier, a researcher at the CNRS,<sup>20</sup> and made public in September 1996, that the transportation of individuals interned on racial grounds was not organized by the German Occupation authorities, who either would have reserved train cars on pre-existing convoys or commandeered them from the national company; rather, it was organized by the SNCF under orders given by the administrative services of the Ministry of the Interior of the so-called French State.<sup>21</sup> The above-referenced transfers were subject to a specific SNCF accounting system designated as either “Ministry of the Interior transfers” or “transfers of Hebrews,” and billed to the Ministry of the Interior, each bill specifying the administrative division that had requested the transport.

Under these conditions, having transported Mr. Lipietz and the S. family, along with tens of thousands of other individuals interned on racial grounds, from the Haute-Garonne to Paris-Austerlitz, it appears

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18. The “free zone” is another way of referring to the part of France that originally was not occupied by the German military. After invading the north of France in June 1940 and France’s formal capitulation by an armistice on June 22, 1940, the German army found it more cost-effective to remain in the north. They invaded the rest of France in November, 1942, following the Allied landing in North Africa. See generally ROBERT O. PAXTON & MICHAEL MARRUS, *VICHY FRANCE AND THE JEWS* (1981). (VGC).

19. *The SNCF under German Occupation, 1940–1944*.

20. *Centre national de la recherche scientifique* (National Center for Scientific Research).

21. See *supra* note 11. (VGC).

to us that the SNCF must be considered to have executed not an industrial and commercial service of transporting passengers but rather an administrative government service mission, in the sense that the government of the so-called French State<sup>22</sup> conceived of the notion of government service; namely, the transportation of individuals interned on racial grounds with a view to their future deportation.

Having identified the existence of an administrative government service mission, the two other criteria for jurisdiction do not present much difficulty. The SNCF's exercise of governmental power prerogatives in carrying out its transportation services can in fact be deduced from the ever-present duress that clouded these transports, since not only were the parties transported against their will, but they also did not want to be transported under the aforementioned conditions that were contrary to human dignity.

Finally, the harms for which the petitioners seek compensation from the SNCF are inherent in the exercise of these governmental power prerogatives; namely, in the duress that was imposed on them or their successors in interest both in being transported to Paris-Austerlitz for deportation and in having been transported under such conditions.

Given the combination of the execution of an administrative government service mission, the exercise of governmental power prerogatives and the attribution of the harm to the exercise of these prerogatives, the noncontractual liability action brought by Messrs. S. and the Lipietz parties against the SNCF, in our view, notwithstanding the contrary opinion held by the Paris Court of Appeals in the *Schaechter* case, falls within the purview of the subject matter jurisdiction of this Court. This Court will thus reject the lack of jurisdiction defense raised by the SNCF.

The geographical jurisdiction of this Court to hear the present action for noncontractual liability has not been disputed by any party to this litigation. Indeed, Article R. 312-14 of the CJA provides that "liability actions based on a cause of action other than breach of contract or quasi-contract and filed against the government . . . or . . . private institutions managing a governmental service are subject to: 1. the jurisdiction of the administrative court when the alleged tort is

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22. *See supra* note 11. (VGC).

attributable to a decision . . . , which could have been subject to an action for annulment before that court; 2. the jurisdiction of the administrative court in the location or where the cause of the injury has occurred, where the alleged harm . . . is attributable to . . . a fact or an administrative reaction . . . .” In this case, on the one hand, regarding the injury attributed to the services of the Haute-Garonne administration, the administrative internment measure taken against Mr. Lipietz and the S. family could have been subject to an action for annulment before this Court, if it had existed under its current denomination and more importantly if it had possessed its current jurisdictional powers at the time of the measure in question; on the other hand, regarding the injury attributed to the SNCF, the cause originated with the transfer of the parties over to the railway company by the administrative services of the Haute-Garonne administration for transport to Drancy and subsequent deportation.

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The admissibility of claims for damages made primarily by the petitioners does not raise any difficulties.

First, the litigation is linked to the rejection, whether implicit or explicit, of the prior requests made on September 6, 2001 by Messrs. Georges Lipietz and Guidéon S. and addressed respectively to the administrator of the Haute-Garonne and to the SNCF.

Second, although it is undisputed that Mrs. Stéphanie S., mother of the two petitioners, and Mr. Jacques S., father of Mr. Guidéon S., died prior to the commencement of this action for damages, Mr. and Mrs. Jacques and Stéphanie S.’ potential right to compensation began upon the occurrence of the facts that could have proximately caused the harm and before their death created patrimony rights in their respective successors in interest: see in this regard CE March 29, 2000, *Assistance Publique – Hôpitaux de Paris*, No. 195662 (advisory opinion by Chauvaux). The potential right to compensation of Mr. Georges Lipietz, who died during the proceedings, was also transmitted to his successors in interest.

The memorandum of law presented on May 8, 2006 by Messrs. S. and Lipietz et al. presents a different pleading than the above.

Indeed, with respect first to the arguments for voiding the two decisions of the Secretary of Defense dated April 24, 2006 that involved the four-year period for extinguishing claims, the latter

constitute, despite the petitioners' arguments to the contrary, opinions about abuse of power : see the CE May 2, 1973 *Sieur Guyot* case (advisory opinion by Gentot) that revisited the case law derived from the CE *Maigret* judgment of May 26, 1937 and which was recently confirmed by the CE June 25, 2004 *Feind* case (advisory opinion by Piveteau). Certainly, when the arguments for voiding a decision that applied the four-year claim extinction or limitations period are combined in the same claim, with the primary argument being for damages, the CE finds it is a proper administration of justice that the litigation against the statute of limitations defense be examined as part of the main case: see in this respect the Piveteau opinion in the aforementioned June 25, 2004 CE *Feind* case. But, in the present case, not only were the findings regarding the abuse of power in the decisions of April 24, 2006 not addressed in the initial petition, recorded November 14, 2001, but they also were not introduced in a separate petition that this Court could have, if time permitted, joined with the first, notwithstanding the rules of geographical jurisdiction, given its connection within the meaning of Article R. 342-1 of the CJA. Presented in reverse order in a later supplementary memorandum, dated November 14, 2001, these arguments take on the appearance of new arguments.

Second, the claims for damages made in the same memorandum also take on the characteristics of new claims, since the legal theory on which compensation is sought, namely the nonpecuniary harm allegedly committed against the successors in interest to Georges Lipietz by the notification of a decision applying the four-year statute of limitations against their deceased husband and father is separate from the principal legal theory of injury on which compensation is claimed. Furthermore, it does not appear that a prior request<sup>23</sup> preceded this petition for compensation.

We therefore can only conclude that a denial is in order for the latter claims on the basis of their inadmissibility.

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Regarding the merits of the action for damages brought by the petitioners, the administrator of the Haute-Garonne and the SNCF

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23. Such a prior request, in the form of a letter written to the alleged wrongdoer, is required in certain situations before a claim may be brought in an administrative court. (VGC).

both enter a defense based on the expiration of the statute of limitations.

This, in our opinion, is the most delicate issue of the litigation. This Court in effect will have two sets of issues to decide successively; namely, first, the identification of the applicable statute of limitations with respect to both the petitioners' claim against the government and against the SNCF, and secondly, once this has been identified, this Court must determine the point at which said limitation period started to run with respect to both the government and the SNCF.

Regarding the applicable statute of limitations, the administrator of the Haute-Garonne, who, as has been stated, adopts the written arguments of the Secretary of Defense, intends to rely primarily on the four-year statute of limitations provided by Article 9 of the amended January 29, 1831 law regarding . . . the expiration of the rights of creditors of the government and, in the alternative, shall rely on the ten-year statute of limitation mentioned in Article 2270-1 of the Civil Code. For its part, the SNCF relies primarily on the four-year statute of limitation provided by Article 1 of law No. 68-1250 of December 31, 1968 on the limitation of claims against the national government, the *départements*,<sup>24</sup> the *communes*,<sup>25</sup> and public institutions and, in the alternative, relies on the aforementioned ten-year statute of limitations in Article 2270-1 of the Civil Code.

Mr. S. and the Lipietz parties dispute the applicability of all of these statutes of limitation on the grounds that their liability action is not amenable to any limitations period under the provisions of the single article of law No. 64-1326 of December 26, 1964, which establishes that crimes against humanity are beyond the reach of any statute of limitations and according to which "crimes against humanity, as defined by the UN resolution of February 13, 1946, noting the definition of crimes against humanity as it appears in the Charter of the International Tribunal of August 8, 1945, are imprescriptible by their nature." The plaintiffs, who maintain that the wrongs attributed to the administrative services of the Haute-Garonne

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24. *See supra* note 2. (VGC).

25. A *commune* is the smallest French division of administration which has the dual attributes of being a local collectivity and a national administrative area. *See generally* GÉRARD CORNU, VOCABULAIRE JURIDIQUE 184, 292 (3d ed., 2009); REMI ROUQUETTE, DICTIONNAIRE DU DROIT ADMINISTRATIF 160 (2002). (VGC).

Prefecture and the SNCF should be classified as crimes against humanity or as complicity in crimes against humanity, rely in this regard on the advisory opinion by Stéphane Austray in the *Pelletier* case in the CE dated April 6, 2001, according to which “the jurisprudence of the Criminal Chamber of the Court of Cassation on the imprescriptibility of the civil suit for damages resulting from crimes against humanity . . . necessarily (would extend to) suits aimed at triggering the government’s liability for such damages, whether liability is sought before a judge of the judicial branch or through an administrative proceeding.”

It should be noted that this interpretation of the Criminal Chamber of the Court of Cassation’s decisions was contested by Sophie Boissard in her advisory opinion in the *Papon* case, CE, dated April 5, 2002, above.

In order to settle the debate, it is appropriate to refer to those decisions. Article 10 of the Code of Criminal Procedure provides that “the civil action is subject to limitations periods as stipulated by the rules of the Civil Code. In any event, such an action no longer can be brought before the criminal court after the expiration of the statute of limitations applicable to the public law [i.e., criminal law] action . . . .” On the basis of these provisions, the Criminal Chamber of the Court of Cassation held in the *Touvier* case dated June 1, 1995 that “when brought before the criminal court, a civil action finds itself, based on Article 10 of the Code of Criminal Procedure, bound by the same statute of limitations as would apply in a criminal suit (and) that, therefore, the absence of any statute of limitations for crimes against humanity applies both to the criminal and civil actions that may result from such crimes.”<sup>26</sup>

As the SNCF argues in its defense, it appears clear to us from the terms of the above judgment that it is only in the event that a civil action is brought before a criminal court, by way of a civil party, that such an action [i.e., for a crime against humanity] is imprescriptible. Moreover, it cannot be otherwise without overstepping the authority of this Court’s jurisdiction, since it is not for this Court, any more than for the civil law courts, to decide whether the actions of the administrator of the Haute-Garonne and the SNCF potentially

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26. Civil actions generally are brought in France as part of criminal prosecutions under a procedure in which the victim is constituted as a “civil party” in the criminal action (*partie civile*). (VGC).

constituted a crime against humanity or complicity in crimes against humanity against Mr. Georges Lipietz and the S. family.

As for the actions brought before courts having different jurisdictions, the plaintiffs cannot successfully argue, in our view, that the enactment by the legislature of distinct statutes of limitations before the criminal court and before the administrative judge disregards the provisions of Article 6, Sections 1 and 14 of the European Convention of Human Rights.

Therefore, Mr. . S. and the Lipietz parties do not appear to us to be entitled to argue that their action for liability would lie beyond the reach of any statute of limitations.

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The basis for imprescriptibility having been rejected, what remains is to define the statute of limitations applicable to this litigation.

Regarding the claim of the petitioners against the government, Article 2227 of the Civil Code provides in its original wording based on the March 15, 1804 law, which remains in force to this day, that the “government . . . (is) subject to the same limitations periods as private individuals and also (may) invoke them.”

Nevertheless, Article 9 of the January 29, 1831 law cited above provides, in the form adopted based on Article 1 of the executive decree of October 30, 1935 concerning the extension of the four-year statute of limitations loss of rights defense to the *départements*<sup>27</sup> and *communes*,<sup>28</sup> effective until December 31, 1945, that “lapsed in time and definitively extinguished to the benefit of the government . . . without prejudice with respect to statutory limitations provided for by prior laws are all claims which, not having been paid before the end of the fiscal period to which they belong, could not . . . for want of sufficient justification have been settled, approved for payment, and paid within a period of four years starting from the opening of the fiscal year . . . .”

The same Article 9 of the January 29, 1831 law provides in its text, based on Article 148 of law No. 45-0195 of December 31, 1945, setting the general budget (civil services) for the year 1946, effective until December 31, 1968, that “lapsed in time and permanently

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27. See *supra* note 2. (VGC).

28. See *supra* note 25. (VGC).

extinguished to the benefit of the government . . . without prejudice with respect to statutory limitations provided for by prior laws . . . are all claims which, not having been paid before the end of the fiscal period to which they belong, could not have been settled, approved for payment, and paid within a period of four years starting from the opening of the fiscal period for creditors domiciled in Europe . . . .”

To implement the aforementioned provisions of Article 9 of the January 29, 1831 law in its successive drafts, the minister ordering the payment need only invoke the four-year statute of limitations on behalf of the government: see in this regard CE, October 11, 1961, *Ministre des travaux publics et des transports c./ sieur Seveyras* (advisory opinion by Bernard).

Article 1 of the previously cited law No. 68-1250 of December 31, 1968, effective from January 1, 1969, provides in its first paragraph that “extinguished due to time-lapse to the benefit of the government . . . without prejudice with respect to particular statutory limitations mandated by law and without prejudice with respect to the provisions of the present law are all claims that have not been paid within a period of four years commencing from the first day of the year following the year during which the rights were acquired.”

Article 9 of the same law provides that “the provisions of this law shall apply to claims arising prior to the date of its entry into force and which have not yet lapsed at that date . . . .”

Article 10 of the same law provides that “all provisions contrary to the provisions of this law are repealed, specifically Articles 9 . . . and 10 of the amended law of January 29, 1831.”

To implement these provisions, Article 2 of executive decree No. 98-81 of February 11, 1998 . . . regarding the decisions made by the government concerning the four-year statute of limitations specifies that “the primary or secondary *ordonnateurs*<sup>29</sup> have the authority to invoke the four-year statute of limitations as far as claims against the government are related to the expenditures that the *ordonnateurs* have authorized.”

In our view, from the above provisions of Article 9 of the January 29, 1831 law and Article 1 of the December 31, 1968 law,

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29. Translator’s note: in French administrative terms, *ordonnateur* is used to describe the individual authorized to mandate a public expenditure.

successively in force, it follows that these laws imposed, with respect to claims against the government, a four-year period for the extinction of the government's debt,<sup>30</sup> and subsequently a four-year statute of limitations, which explicitly derogates from the principle stated in Article 2227 of the Civil Code, whereby the State would be subject to the same statutory limitations periods as individuals and is absolutely general in scope, except in cases where an explicit statutory provision to the contrary applies and provides for a shorter or longer statute of limitations: see in this regard with respect to the earlier law for the extinction of the government's debt,<sup>31</sup> CE October 20, 1943 *Sieur Panhard* (advisory opinion by Leonard) and CE November 29, 1963 *URSSAF Loiret* (advisory opinion by Chardeau), as relates implicitly to the implementation of the four-year lapse under Article 9 of the January 29, 1831 law; as relates explicitly, see CE November 29, 1963, *URSSAF du Loiret* (advisory opinion by Chardeau).

In the absence of any express statutory provision to the contrary, the claim that the petitioners assert against the government, based on the noncontractual liability of the collectivity with respect to the alleged wrongs committed by the administrative services of the Haute-Garonne, can be subject only to either the four-year law for the extinction of claims against the government under Article 9 of the January 29, 1831 law or the four-year limitations period referred to in Article 1 of the December 31, 1968 law.

The applicability of either one these two statutory limitations schemes depends, under the above provisions of Article 9 of the December 31, 1968 law, on the possible acquisition of the four-year time lapse of January 1, 1969, the date on which the December 31, 1968 law entered into force and, thus, the starting point of the statute of limitations that has been chosen for this present litigation. Thus, in a noncontractual liability action brought against the government for enforcing the "law" of the government of the so-called French State<sup>32</sup> by requiring forced labor on behalf of the enemy, the Administrative Court of Nice, in a judgment dated April 4, 2006, *Mr. Louis Rouge*, selected May 1945 as the starting point of the running of the

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30. The reference to this period is to the more rigorous limitations law that preceded the current one. See *déchéance quadriennale* in ROUQUETTE, *supra* note 25, at 226. (VGC).

31. See *supra* note 20. (VGC).

32. See *supra*, note 11. (VGC).

limitations period and, subsequently, applied only the provisions of Article 9 of the January 29, 1831 law, such that, given this starting point of the running of the statute of limitations, the four-year lapse was attained as of January 1, 1969, according to that jurisdiction.

In this case, we believe that the statute of limitations defense invoked by the administrator of the Haute-Garonne, based primarily on the earlier four-year limitations period provided for in the January 29, 1831 law, should be rectified and examined as it related to both the four-year lapse mechanism of the law of 1831 and the four-year statute of limitations of the December 31, 1968 law. It should be noted, however, that although the administrator of the Haute-Garonne has the authority, under the above provisions of Article 2 of the executive decree of February 11, 1998 as a secondary *ordonnateur*<sup>33</sup> of public expenditures, to invoke on behalf of the government the four-year limitation period of the 1968 law against a claim based on wrongdoing committed by its services, he is not authorized, according to the previously analyzed provisions of Article 9 of the January 29, 1831 law, to invoke on behalf of the government the four-year extinction of debt mechanism under that Article: see in this regard the above-cited ruling of the CE, October 11, 1961, *Ministre des travaux publics et des transports c./ sieur Seveyras*.

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Regarding the plaintiffs' reparations claim against the SNCF, Article 1, Paragraph 2, of law No. 68-1250 of December 31, 1968, cited earlier, provides in its second paragraph that "claims against public institutions having a government accountant are limited to the same statutory period (four years from the first day of the year following that during which the rights were acquired) and under the same reservation (of the provisions of this law)."

Under the provisions of amended Article 18 of the law No. 82-1153 of December 30, 1982 regarding national transport, the SNCF is endowed with the status of commercial and industrial public establishment commencing from January 1, 1983. Nevertheless, under the provisions of Article 25 of the same law, the rail industry "is subject, in matters of accounting and financial management, to the rules applicable to commercial companies," that is to say to the accounting rules of private law, and is thus not provided with a public

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33. See *supra* note 29. (VGC).

accountant. It ensues from this that, in application the above-cited provisions of Article 1, Paragraph 2 of the law of December 31, 1968, the SNCF is not entitled to invoke in its defense the four-year statute of limitations provided by this article.

On the other hand, Article 2227 of the Civil Code provides that “public establishments . . . are subject to the same limitations as individuals and may also invoke them.” Article 2270-1 of this same Code provides that “noncontractual civil liability actions are barred ten years from the manifestation of the harm . . . .”

Finally, Article 2262 of the above-cited Code provides that “all actions, whether in rem or in personam, are limited to thirty years before the individual alleging the prescription is obligated to adduce a title . . . .”

It follows in our view from the combination of the above-cited provisions of Articles 2227 and 2270-1 of the Civil Code that the reparations claim filed by the plaintiffs against the SNCF, based on the noncontractual liability of the company for its acts of misconduct, is subject to the ten-year statute of limitations provided in Article 2270-1, as the thirty-year statute of limitations found in Article 2262 of the Code has an ancillary nature.

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Having thus defined the applicable statute of limitations for the claim of Mr. S. and the LIPIETZ parties, against both the government and the SNCF, we now shall determine the point at which the said statute of limitations began to run, with respect to both the government and the SNCF.

Regarding the petitioners’ claim against the government, Article 10 of the law of January 29, 1831, amended and cited above, provides, in the draft derived from Article 2 of the executive decree of October 30, 1935 which was in force until December 31, 1968, that “the provisions of the article (9 of the same law that prescribed the four-year statute extinguishing claims against the government) are not applicable to claims whose order to pay and payment could not have been completed within the time limit that was started by the administration’s action . . . .”

Article 3 of the above-cited law No. 68-1250 of December 31 1968, in force commencing from January 1, 1969, provides that “the

statute of limitations (of four years for claims against the government found in Article 1 of the same law) runs neither against the creditor who cannot act . . . due to *force majeure*, nor against anyone who can be deemed legitimately in ignorance of the existence of his claim . . . .”

The above-cited provisions of Article 3 of the law of December 31 1968 have, in our view, primarily been aimed at incorporating into the law the court-based interpretation of the above-cited provisions found in Article 10 of the law of January 29, 1831. Indeed, on the basis of these latter provisions, the CE indicated that the four-year period for extinguishing claims would not begin to run when a public creditor was left in legitimate lack of awareness of a claim by his administration: see, in this regard, CE February 14, 1973, *Commune de Pastricciola* (advisory opinion by Boutet). This decision recently was confirmed by the CE, based on the provisions of Article 3 of the law of December 31, 1968 concerning the four-year statute of limitations, in a November 16, 2005 judgment, *MM. Auguste et commune de Nogent sur Marne* (advisory opinion by Didier Casas). The notion of legitimate lack of awareness assumes, however, that the state of positive law does not allow for the individual who is subject to the administration to be aware of the existence of the claim, meaning that a simple illegal legislative interpretation by the administration would not suffice, at least in terms of the 1968 law, to render the individual to be deemed legitimately unaware of the claim: see, in this regard, CE May 20, 1994, *Gouelo* (advisory opinion by Mrs. Denis-Linton).

In this case, the event causing the claim that the plaintiffs are filing against the government was the administrative internment measure taken on May 8, 1944 by the administration services of the Haute-Garonne against Mr. Lipietz and the S. family, followed by the transfer of the parties to the SNCF by the same services on May 10, 1944 with the goal of transporting them to the Drancy camp and ultimately deporting them. It seems clear to us that, given the conditions of their internment, both in the Haute-Garonne from May 8 to 10, 1944 and in Drancy from May 11 to August 17, 1944, Mr. Georges Lipietz and Mr. Guidéon S. were in any event until their liberation on August 17, 1944 rendered incapable by an act of the administration, within the meaning of Article 10 of the law of January 29, 1831, of filing a claim against the government. The “act of the administration,” in the preferred meaning of this term,

corresponds to the notion of *force majeure* within the context of Article 3 of the law of December 31, 1968.

The issue of *force majeure* does not arise, however, except to the extent that the state of positive law would have allowed the relevant parties to become aware of the existence of their claim against the government. Messrs. Lipietz and S. would not, in fact, have been able to file effectively a noncontractual liability claim against the government for wrongs committed by the administrative services of the Haute-Garonne except insofar as the administrative internment measure taken against them could have been subject effectively to an action for annulment; that is, so that it would have been deemed misconduct pursuant to the judicial interpretations of that time period.

However, nothing seems less likely.

It is undisputed that the internment measure at issue was taken based on the above-cited provisions of Article 1 of the “law” of October 4, 1940 on “foreign nationals of the Jewish race,” combined with the provisions of the “law” of October 22, 1940 on the review of naturalizations<sup>34</sup> and of the “law” of June 2, 1941 that replaced the “law” of October 3, 1940 on the status of Jews.<sup>35</sup>

First of all, at the time these provisions were implemented, the CE had transposed its *Arrighi* case law of November 6, 1936, first implicitly and then explicitly, via the *Vincent* judgment of March 22, 1944 (advisory opinion by Detton), declaring itself unqualified to rule on the content of the “laws” of the so-called French State.<sup>36</sup> The CE made this declaration even though the “laws” emanated from the sole executive of the so-called French State, that is to say from a governmental body possessing regulatory power, as Professor Julien Laferrière highlighted in his work, *Nouveau droit public de la France* (*New French Public Law*), published in 1941. Thus, Messrs. Lipietz and S. would not have been able to challenge effectively before an administrative judge the legality of the new legislation applied to

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34. The French courts were permitted to denaturalize French citizens who had obtained citizenship under the naturalization law of 1927. See Rouquette, *supra* note 3, at 305 n.3. (VGC).

35. It was the combination of these laws that made foreign-born Jews who were French citizens vulnerable to internment in French camps and, ultimately, deportation to Nazi concentration and death camps earlier during the war than were French-born Jews. (VGC).

36. See *supra*, note 11.

them by the administrative services of the Haute-Garonne until the entry into force of the executive order of August 9, 1944 pertaining to the reestablishment of republican legality on the continental territory. This would apply to “laws” implementing discrimination based on having the legal status of being Jewish as well as “laws” establishing measures that deprived individuals of their freedom.

Secondly, the ability for Messrs. Lipietz and S. to challenge effectively before an administrative judge the Jewish status imposed upon them by the administrative services of the Haute-Garonne prior to the entry into force of this same executive order hardly seems any more likely. In their written submissions, the plaintiffs have indicated that, at the time of their administrative internment, Mr. S. and his parents were in possession of false baptismal certificates and Mr. Lipietz had not been circumcised. It is undeniable that during this time many French or foreign Jews managed to escape deportation by using baptismal certificates that were either counterfeit or created upon request, which some administrative authorities agreed to accept. However, such documents would not have convinced an administrative judge. Indeed, while Jewish status was based, pursuant both to the provisions of the “law” of October 3, 1940 and those of the “law” of June 2, 1941, on the grandparents’ having been Jewish, the CE, through two en banc cases of April 24, 1942 and April 2, 1943, *Sieur Bloch-Favier* (advisory opinion by Léonard) and *Dame Lang* (advisory opinion by Lagrange), interpreted these texts in the manner least favorable to the interested parties: first, according to these decisions, the administrative authority had the right to presume an individual to be Jewish based merely on his patronymic name, as in the *Bloch-Favier* case; secondly, this presumption could not effectively be rebutted except by affirmative proof to the contrary that the grandparents had not been Jewish. The fact that the grandparents had been married in an evangelical church would not suffice to establish their non-Jewishness in this regard, as in the *Dame Lang* case. Some CE cases did allow that the proof as to non-Jewishness had been satisfied by petitioners, the government commissioner Odent emphasizing along these lines in his advisory opinion in the *Michelson* case of December 31, 1943 that “a weak presumption may be destroyed by an equally weak proof.” Nevertheless, until the executive order of August 9, 1944 entered into force, the criteria laid out in principle by the jurisprudence concerning the application of anti-Semitic legislation enacted by the

so-called French State did not change: in a comment of the CE *Sieur Rosengart* case of January 12, 1944 (advisory opinion by Chénot), the commentator of the Lebon reports, published in 1946, was able to note laconically that “this jurisprudence places a burden of proof on the plaintiffs that is often difficult to establish, particularly when it concerns the grandparents’ religion.” In light of this jurisprudence, we believe that Messrs. Lipietz and S. would not have been able to contest effectively in an administrative court the Jewish status that had been attributed to them by the administrative services of the Haute-Garonne.

Finally, regarding the legality of the liberty-depriving measure taken against the interested parties, the administrative judge’s control over the situation was at the time particularly constrained. In terms of outward legality, the CE deemed, in *Dame Koch*, May 16, 1941 (advisory opinion by Puget), that an administrative order of internment did not have to be explanatory or reasoned, in the absence of any legislative or regulatory provision requiring the same. In a decision that came after the reestablishment of republican law, *Sieur Bosquain*, on February 19, 1947 (advisory opinion by Barjot), the CE in addition specified that the fact that the administrative internment order had not been in writing, which seemed to have happened, was not an omission that could render the order null and void. In terms of internal legality, the CE, in the same *Dame Koch* case, explicitly affirmed by the same *Sieur Bosquain* case, deemed that “the appropriateness of the measure” could not be argued before it in litigation, meaning that the CE refused to review possible errors in judgment made by the administrative authority. On the same issue of internal legality, the CE accepted, in the above-referenced *Sieur Bosquain* case, the legality, based on a theory of exceptional circumstances, of an administrative internment order within penitentiary facilities, which was also the case in the instant situation. In light of such jurisprudence, it does not appear likely to us that a possible action for abuse of power begun by Messrs. Lipietz and S. regarding the liberty-depriving measure taken against them by the administrative services of the Haute-Garonne could have succeeded.

As a result, in the absence of illegal misconduct capable of being imputed to the aforementioned administrative services under the law prior to the reestablishment of republican legality, the plaintiffs were in legitimate ignorance, in our view, of the existence of any claim against the government before the entry into force of the August 9,

1944 executive order.

In terms of such a claim, therefore, and under the above-analyzed provisions of Article 10 of the Law of January 29, 1831, the four-year statute of limitation did not begin to run until the month of August 1944.

It remains to be determined, however, whether the plaintiffs could be considered to have remained legitimately unaware of their claim against the government following the entry into force of the order of the Provisional Government of the French Republic of August 9, 1944 on the reestablishment of republican legality on the continental territory.

The legal significance of this order is as extensive as it is complex. The orders of the Provisional Government of the French Republic, although emanating from the government—that is to say from a body exercising regulatory power—were given legislative value by the CE: see in this regard the *Botton* case of February 22, 1946 (advisory opinion by Detton) regarding an order of the French committee of national Liberation that transposed the solution established by the aforementioned *Vincent* judgment of March 22, 1944 for the so-called laws of the so-called French State.<sup>37</sup> The August 9, 1944 order, which had long been debated within the judicial bodies of Free France, had been drafted by René Cassin, president of the judicial committee of Free France and future vice-president of the Conseil d'Etat following the purging of that high body. As explained earlier, the executive order affirms, in the first paragraph of Article 2, the principle of *ab initio* nullity of the “laws” of the so-called French State but specifies in the second paragraph of the same Article that “such nullification must be expressly stated.” Although the above-cited provisions of Article 3 of the order specifically mention, among the “laws” for which nullity is expressly stated, “all those which establish or apply any discrimination whatsoever based on being Jewish,” it follows from the combination of provisions within the order that only the special legislation deriving from the so-called government of the French State is considered invalid, the remainder of the legislative or regulatory acts passed since June 16, 1940 having been retroactively validated. The order is, however, not limited to operating such a division among acts of the so-called French State’s

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37. See *supra* note 11. (VGC).

government; it affirms not only, in the first sentence of Article 1, that “the form of the French government is and remains a republic” but also, in the second sentence of the same Article, that “in law, (the Republic) has not ceased to exist”; in the same sense, the political regime that the order ends is defined not as the “previous regime” but, in Article 7 of the same order, as “the *de facto* authority calling itself the ‘Government of the French State.’” In our view, the normative value, which for a long time was conferred and then recently denied by courts to the provisions found in the second sentence of Article 1 of the August 9, 1944 Order, determined in the period following the order the applicable law on the public authority’s liability for the implementation of the special legislation of the so-called French State.

The consequences of the entry into force of the August 9, 1944 order on the outcome of actions for annulment against individual administrative acts based on anti-Semitic legislation of the said government were not surprising: in an initial judgment on October 11, 1944, called *Dame Wallerstein* (advisory opinion by Odent), the CE could only observe a failure to adjudicate. The commentator of the Lebon reports nonetheless expressed his regret that the CE had confined itself to such a “simplistic” account and had refrained from formulating a precedent-setting principle.

The leading case, following an initial case called *Dame Chpolansky* on November 30, 1945 (advisory opinion by Detton) with laconic reasoning, was a judgment of the en banc assembly, *Ganascia*, of June 14, 1946, regarding a compensatory action under the presidency of René Cassin (advisory opinion by Odent). Mr. Ganascia, a magistrate based in Algeria, sought to hold the government liable for several wrongs that had led to his dismissal by the Governor General of Algeria in December 1940, on the basis of the provisions of the so-called “law” of October 3, 1940 on Jewish status. In this case, to which the Sirey reports commentator attributed “great theoretical and practical significance,” while simultaneously formulating “reservations” regarding the solution adopted, the CE rejected the petitioner’s arguments, holding that the individuals to which the special legislation—retroactively annulled—had applied, had no right to any monetary reparations if the law did not expressly provide for any, as the retroactive voiding of the special legislation also applied, according to the judge, to the consequences of the harm caused by the legislation’s implementation. Mr. Ganascia thus could

not seek any monetary reparations beyond the restoration of the salary that he should have received, in conformity with the provisions of the order of the Provisional Government of the French Republic applicable to his case.

The rule adopted in the *Ganascia* decision concerning the harmful effects of the implementation of the anti-Semitic legislation of the so-called the French State<sup>38</sup> was affirmed repeatedly in other cases on the harmful effects of measures depriving or restricting individual freedom based on the special legislation of the same government, despite the reservations, even embarrassment, of certain government commissioners such as Raymond Odent: see in this regard the *Viénot* case (advisory opinion by Lefas) of April 23, 1947 on an administrative internment measure and the *Epoux Girard* case of January 3, 1952 under the presidency of René Cassin (advisory opinion by Barbet) on house arrest measures, or the *Vincent* case of February 11, 1959.

Applying a limited temperament to this jurisprudence has only reinforced, in our view, its principal criteria. In the *Toprower* en banc judgment on January 30, 1948, under the presidency of René Cassin with dissenting opinion by Céliier, the CE effectively recognized the right of Mr. Toprower, a Romanian Jew severely crippled following his administrative internment in the Gurs camp, to obtain reparations. Nevertheless, the CE allowed for governmental liability only after noting, in conformity with the arguments of plaintiff's counsel, that the damages incurred by Mr. Toprower were caused by the "living conditions and ill-treatment to which he [had been] subjected by the personnel in charge of security and management" of the camp, which constituted "governmental service misconduct separate from the implementation of the internment measure taken against" the claimant. The judicial principle, according to which simply implementing special legislation passed by the so-called government of the French State would not automatically lead to liability on the part of the post-war government, had thus not been challenged by the *Toprower* case.

It is worth noting that in this case, by contrast, Messrs. Lipietz and S. did not raise any issue of excessive behavior on the part of the agents of the Haute-Garonne administration; rather, they contest the

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38. See *supra* note 11. (VGC).

very legality of the administrative internment measure taken against them. We believe that, in the same vein as the above-cited *Toprower* case, the CE implicitly concluded, in the *Dame Duez* case of February 22, 1950 (advisory opinion by Odent), that the fatal automobile accident caused by a vehicle belonging to the so-called French militia,<sup>39</sup> whose act of creation had been retroactively invalidated by the August 9, 1944 executive order, constituted governmental service misconduct separate from the mission of maintaining public order that had been conferred to this group by the government of the so-called French State,<sup>40</sup> in the sense that the said government defined public order. It is worth noting that, in a set of different circumstances, the CE held in the *Demoiselle Remise* case (advisory opinion by Guionin) of July 25, 1952 that a gunshot wound caused by a member of the so-called French militia did not constitute misconduct separate from the mission of this group and thus, in conformity with the *Ganascia* jurisprudence, due to the retroactive invalidation by the August 9, 1944 executive order of acts establishing special police forces, could not entail government liability.

The *Ganascia* case law stands for the principle that the retroactive invalidity of the special legislation enacted by the so-called French State, by means of the executive order of August 9, 1944, signifies that the effects of such legislation are not considered not to have occurred but rather may not be imputable to the current government. We believe that such an analysis has as its only judicial basis the provision in the second sentence of Article 1 of the executive order according to which “in law, (the Republic) has not ceased to exist.” Such a provision, once it is endowed with normative value, signifies that the government of the so-called French State, inasmuch as it enacted and implemented special legislation, was not acting as a continuity of the French government but was merely a *de facto* authority as defined by Article 7 of the same executive order. In the past, the CE had followed the same reasoning by holding that the government could not be held liable for acts of insurgency of the Paris Commune.<sup>41</sup> The paradox of the *Ganascia* jurisprudence is that

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39. The reference to a militia is to the *milice*, a paramilitary organization of Vichy France known for its Gestapo-like brutality. (VGC).

40. See *supra* note 11.

41. The Paris Commune was a brief government that arose in 1871 from an insurrection after France's defeat in the Franco-Prussian war. See generally

this reasoning has been applied only to the special legislation of the so-called French State, since the government has been held liable for all other legislative or regulatory acts passed by the said government, retroactively validated by the August 9, 1944 executive order, pursuant to common law. As Raymond Odent observed in his work, *Cours de contentieux administratifs*, we are thus dealing with a fiction. We must emphasize, however, that this fiction is at the source of Free France, of which President Cassin, drafter of the August 9, 1944 executive order and presiding judge in the *Ganascia* case, was the premier lawyer. In this regard, General de Gaulle remarked, in his *War Memoirs*, that René Cassin “all by himself a Conseil d’Etat, drafted, seated on a bench in Hyde Park for lack of an office, a memorandum of irrefutable and incontestable reasoning on the legal nonexistence of the French state and the Vichy government. The General would create, on November 16 1940, the legal foundation of Free France.”<sup>42</sup>

In any case, this legal fiction constituted the state of positive law for more than half a century. Consequently, we believe that, in this case, although Messrs. Lipietz and S. cannot be deemed to have been unaware of the existence of their claim against “the *de facto* government which called itself the French State” when the August 9, 1944 executive order entered into force, they were, by contrast, legitimately unaware of any claim they had against the post-war French government. Therefore, and contrary to the approach adopted by the Nice TA in the *Louis Rouge* case on the application of another special legislation by the so-called French State, it is our view that, under the above-analyzed provisions of Article 10 of the January 29, 1831 law, the four-year claim extinction period did not begin to run in the present litigation from the month of August 1944 and that the four-year statutory period did not begin on January 1, 1969, the date of the entry into force of the December 31, 1968 law. It follows from this, without needing to rule on the standing of the Haute-Garonne administrator to invoke the earlier four-year claim extinction period, that said administrator in any event does not seem to us to have a legal basis for invoking the provisions of the law of January 29, 1831.

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PROSPER-OLIVIER LISSAGARAY, *HISTORY OF THE PARIS COMMUNE OF 1871* (Eleanor Marx trans., 1976). (VGC).

42. René Cassin also wrote a passionate booklet on this subject. See RENE CASSIN, *UN COUP D’ETAT. LA SOI-DISANT CONSTITUTION DE VICHY* (1940).

In our opinion, the provision of the August 9, 1944 executive order, according to which “in law, (the Republic) has not ceased to exist” has been denied normative value only recently. The speech given by the President of the Republic on July 16, 1995 during the ceremonies commemorating the great round-up of July 16 and 17, 1942,<sup>43</sup> which declared that “France”—and no longer merely the *de facto* authority calling itself the government of the French State—”on that day, committed an irreparable act” and that it was now time to “recognize . . . the errors committed by the government,” that these words could be considered an invitation to allow positive law to evolve.

Although the August 9, 1944 executive order had not been amended by the legislature, the CE implicitly—through its en banc judgment in *Pelletier* of April 6, 2001 (advisory opinion by Stéphane Austry), cited earlier—and then explicitly through its en banc judgment in *Papon* of April 12, 2002 (advisory opinion by Boissard), also cited earlier, has since denied normative value to the above-analyzed provisions of Article 1 of the August 9, 1944 executive order. In the *Pelletier* case, the CE indicated that the July 13, 2000 executive decree establishing reparations measures for orphans whose parents had been victims of anti-Semitic persecutions, which the claimants challenged, “did not (change) the conditions under which individuals who believed themselves entitled could begin liability actions against the government.” In the *Papon* case, the CE specified that the provisions of Article 3 of the August 9, 1944 executive order “could not have the effect of creating a regime of lack of liability of the government for the acts committed by the French administration in the implementation of (the anti-Semitic legislation of the government of the so-called French State).” Stéphane Austry’s advisory opinion in the *Pelletier* case analyzed the provisions of the executive order in the same manner.

Consequently, we believe that, in the case at hand, Messrs. Lipietz and S. could not be legitimately considered to have been aware of the existence of their claim against the government within the meaning of the above-analyzed provisions of Article 3 of the December 31, 1968 law before the *Pelletier* judgment was rendered on April 6, 2001, such that the four-year statute of limitations did not begin to run until

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43. The reference here is to the round-up of Jews known as the *rafle du Vel d’Hiv*, discussed in Rouquette, *supra* note 3, at 305 n.2.

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the publication date of that case. We thus deem that, at the time the prior letter of request had been submitted by the plaintiffs on September 6, 2001 to the administrator of the Haute-Garonne, their noncontractual liability claim against the government had not violated the statute of limitations. The statute of limitations defense invoked by the Haute-Garonne administrator therefore should fail.

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Concerning the plaintiffs' claim against the SNCF, the first Civil Chamber of the Court of Cassation held in the *Dow Chemical France* case on October 27, 1982 that the ten-year statute of limitations does not run, in the case of a noncontractual liability claim, until the day on which the claimant "could truly act," that is to say, possessed sufficient information regarding the existence of his claim.

In this case, it is clear that Messrs. Lipietz and S. were never unaware that they had been transported by the SNCF from the Haute-Garonne to Paris-Austerlitz, from the morning of May 10, 1944 to the evening of May 11, 1944. However, the plaintiffs argue that they did not learn until recently, thanks specifically to the aforementioned report prepared by researcher Christian Bachelier and published in September 1996, that the railway transport of individuals who had been interned on racial grounds for future deportation had not been organized by the German Occupation authorities with requisitioned material but rather by the SNCF itself, based on orders placed by the administrative services of the government of the so-called French State, each transport being included in the accounts and billed by the railway industry to the Ministry of the Interior.

Confronted by these facts, the SNCF has relied merely on the *Schaechter* case of June 8, 2004, also cited earlier, in which the Paris Court of Appeals held in a similar case for which it deemed itself to have jurisdiction that information sufficient for filing an action for noncontractual liability against the rail industry had been made public well before the Bachelier report, by several works which it cited and had been published between 1946 and 1968. Nevertheless, neither the Paris Court of Appeals judgment nor the SNCF itself in its submissions to this Court have furnished any evidence of the nature of the information provided by these works with respect to the role played by the rail industry in the transportation of individuals interned on racial grounds for the purpose of deporting them.

Under these circumstances, it appears to us to result from the investigation phase of this case that sufficient information on the existence of the plaintiffs' claim against the SNCF had not been made accessible to the plaintiffs until September 1996, the date the Bachelier report was published. Consequently, at the time that Messrs. Lipietz and S. filed their initial request against the regional director of the SNCF Midi-Pyrénées on September 6, 2001, the ten-year statute of limitations provided by Article 2270-1 of the Civil Code had not yet expired. The SNCF's defense that the statute of limitations had expired therefore should fail.

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Regarding the liability of the State and the SNCF for their actions against Messrs. Lipietz and S., the administrative internment measure taken against the plaintiffs by the administrative services of the Haute-Garonne, followed by their transfer by the SNCF from the Haute-Garonne to Paris-Austerlitz under conditions contrary to human dignity, are acts attributable to different authorities which were, in addition, not carried out simultaneously. Under these circumstances, it is appropriate in our view to clearly identify the liability that may arise from the said acts in order to decide, if it is justified, that there be separate liability rather than the joint and several liability of both authorities as requested by the plaintiffs.

Regarding the government, the administrative internment measure discussed above that was applied against Messrs. Lipietz and S. by the Haute-Garonne administrative services, based on the above-cited provisions of Article 1 of the October 4, 1940 law on "foreign nationals of the Jewish race," followed by their transfer to the SNCF for the purposes of their subsequent transport to the Drancy camp and their ultimate deportation, can only constitute a wrongful act or omission capable of leading to liability on the part of the government: see in this regard the CE *Papon* case of April 12, 2002, analyzed earlier.

Regarding the SNCF, the rail industry contests its liability on the grounds that the Armistice Agreement of June 22, 1940 left it with no autonomy. They also argue that, although the Bachelier report notes that the orders to transport individuals interned on racial grounds for further deportation were given not by the German authorities but rather by the administrative service of the Ministry of the Interior of the so-called French government, the industry acted in any event on

orders.

A total lack of effective autonomy on the part of the SNCF from June 1940 to August 1944 does not, however, seem to us to emerge at all from the conclusions of the Bachelier report. On the contrary, the industry attempted to resist the demands of the German authorities, albeit with varying success, each time it felt that its fundamental economic interests were at stake, whether this was with respect to the replacement of restaurant cars from Mitropa with those of the International Restaurant Car Company or the repair of the railroad tracks destroyed due to the continuation of the war between Germany and Great Britain. By contrast, when it came to the transports of individuals interned on racial grounds for future deportation, the SNCF succeeded in imposing, on both the Occupation authorities as well as the government of the so-called French State, an initiative to label the transports of the internees as “Hebrew transfers” or “Ministry of the Interior transfers” in view of billing those transports to that ministry. However, the idea of these transfers engendered not one official protest from the rail industry and not one secret order of sabotage. The SNCF’s independence in the implementation of the transports of internees seems to us to be particularly clear given that: first, these transfers—although conducted in primitively built cattle cars—were being billed to the Ministry of the Interior of the government of the so-called French State at the rate of a third-class ticket for a seat per person, and secondly—given the discrepancy in these invoices—those related to the transfer of individuals interned on racial grounds from the Haute-Garonne during 1944 were drawn up by the rail industry after the restoration of republican legality and addressed to the post-war Ministry of the Interior of the French Republican provisional government. Finally, it is worth underscoring that the SNCF has never implied that it had been subjected to any coercion by the Occupation authorities or by the Ministry of the Interior of the government of the so-called French State that would have forced the SNCF to transport the individuals detained in the inhumane conditions described above.

In light of the totality of these factors, the transport by the SNCF of Messrs. Lipietz and S. from the Haute-Garonne to Paris-Austerlitz for further transfer to the Drancy camp and ultimately deportation, under the conditions described above, represents in our view misconduct and as such renders the SNCF liable.

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This Court would make a fair assessment of the emotional harm and the troubling living conditions that Messrs. Lipietz and S. were subjected to by setting the amount of compensation to be allocated at € 15,000 per victim.

In our view, there is no reason—contrary to the contention of the administrator of the Haute-Garonne—to deduct from the amount of compensation those payments made to the plaintiffs in 1964 under the Ministerial Order of August 14, 1962 that implemented executive decree 61-945 of August 24, 1961 (promulgating the July 15, 1960 agreement between France and Germany regarding compensation for French nationals who had been the subject of National-Socialist persecution measures). This is because the damages suffered by Messrs. Lipietz and S. were not imputable to the German Occupation authorities.

Under these circumstances, the compensation should be set at: € 37,500 for Mr. Guidéon S., € 15,000 for himself, € 15,000 for his father Mr. Jacques S., and € 7,500 for the claim of his mother Mrs. Stéphanie S.; and € 22,500 for all of the successors in interest of Mr. Georges Lipietz: specifically, € 15,000 for Mr. Georges Lipietz himself and € 7,500 for the mother of Mr. Georges Lipietz, Mrs. Stéphanie S.

Given the gravity of the misconduct committed by the administrative services of the Haute-Garonne and the SNCF respectively, we conclude that two-thirds of the aforementioned sums should be borne by the government and one-third should be borne by the SNCF.

The amounts due shall bear interest at the legal rate beginning from the day the Haute-Garonne administrator and the SNCF received the request for reparations dated September 6, 2001, addressed to both parties, the said amounts having been funded on September 14, 2002, the date on which the plaintiffs presented their request for funding, as well as at each annual renewal following this date.

Finally, given the circumstances of this case, it is appropriate to order the government and the SNCF to each pay to the plaintiffs the sum of € 500 according to the provisions of Article L.761-1 of the CJA.

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For these reasons, we conclude that:

The government must pay Mr. Guidéon S. and the successors in interest of Mr. Georges LIPIETZ the respective sums of € 25,000 and € 15,000, including interest commencing on the day when the administrator of Haute-Garonne received the letter of September 6, 2001 in which the government was requested to grant compensation, with accumulated interest as of September 14, 2002 as on each annual maturity date, with capitalization at each of these dates to continue to yield interest; the SNCF must pay Mr. Guidéon S. and the successors in interest of Mr. Georges LIPIETZ the respective sums of € 12,500 and € 7,500, including interest commencing on the day when the SNCF received the letter of September 6, 2001 in which it was requested to grant compensation, with accumulated interest as of September 14, 2002 as on each annual maturity date, with capitalization at each of these dates to continue to yield interest; the State and the SNCF each pay a lump sum of € 500 to Mr. Guidéon S. and to the successors in interest of Mr. Georges Lipietz, pursuant to Article L.761-1 of the CJA; and the other claims of the complaint be dismissed.

*Translated by Juliana Galan and Alisha L. Jacobsen,  
as revised by Vivian Grosswald Curran. All footnotes not  
designated as "Translator's note" were supplied  
by Vivian Grosswald Curran.*