

INTERNATIONAL CUSTOM AND THE EXPERIENCE OF NUREMBERG

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INTRODUCTION

The subject matter of the following notes, devoted to the memory of Professor Karol Wolfke, is obviously inspired by the scholarly specialism of the author of *Custom in Present International Law*¹; and their Nuremberg context, by the events concerning the Russian action against Ukraine.

The name of the Bavarian town, Nuremberg, has of course acquired symbolic meaning and points generally to the post-war trials of war criminals. The shape of that trials was determined by the Moscow Declaration On German Atrocities, issued by "the Big Three" – the USA, the USSR and Great Britain – on 1 November 1943. Following the principle established in the Declaration, the defendants were to be tried in courts of the countries where they had committed their "abominable deeds" and "according to the laws of these liberated countries"². This also included courts in France and the USSR.

As it transpired, defendants were also tried by military tribunals set up by the USA and Great Britain within their respective occupied zones in Germany – as the occupying powers were entitled to do both under the Hague Convention and the common law. Subsequently the tribunals obtained the territorial and material jurisdiction of courts "of these liberated countries", because – as stated by Franciszek Ryszka - the principle of the Moscow Declaration was formally extended to include both of the Anglo-Saxon occupying powers³. Thus that

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¹ K Wolfke, *Custom in Present International Law* (2nd ed 1993) passim.

² 'The Moscow Conference; October 1943' <http://avalon.law.yale.edu/wwii/moscow.asp> [hereinafter: 'Moscow Conference'].

³ F Ryszka, *Norymberga. Prehistoria i ciąg dalszy* [Nuremberg. Prehistory and Continuation] (1982) 206-207.

principle initiated the scale of action, which involved thousands of trials and tens of thousands of convictions.

And yet the historic significance of the Nuremburg precedent derives from an exception to that principle. The so-called major criminals, “whose offences have no particular geographical localisation”, were to be punished on the basis of “the joint decision of the Governments of the Allies”⁴. This decision was taken by the powers alone (by then including France) who, by force of the London Agreement of 8 August 1945, created the International Military Tribunal. At the same time – in the Charter annexed to the Agreement – they accomplished a momentous act of codification of international law. Bert V. A. Röling, the Dutch lawyer and judge at the Tokyo Tribunal, called the resolutions of the Statute “a revolution in legal thought” and a “turning point” in the development of law⁵.

The judgement of the IMT could indeed herald a breakthrough in international practice. For the very first time, high officers of state were brought to justice for policy carried out by that state. They were convicted not only for war crimes *sensu stricto*, but also for initiating a war of aggression (crime against peace) as well as for acts against their own citizens (crimes against humanity⁶). This was – in the words of the Tribunal – “the expression of international law existing at the time of its creation”. And “crimes against international law” – as was advanced at another point – “are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced”. Finally – and the Tribunal considered this “the very essence of the Charter” – “individuals have international duties which transcend the national obligations of obedience imposed by the individual State”⁷.

In the motives of the judgement, the Tribunal devoted most space to the basis of the conviction for crime against peace. It found this necessary “in view of the great importance of the questions of law involved”. Widely cited examples of international agreements and declarations, in which states condemned war, served in this case as proof of the existence not of a custom but of a treaty norm. For in effect it was found that, as expressed in the Kellogg-Briand Pact, “the solemn renunciation of war as an instrument of national policy necessarily involves the proposition that such a war is illegal in international law; and that those who plan and wage such a war... are committing a crime in so doing”. On

⁴ Moscow Conference (n 2).

⁵ BVA Röling, ‘The Nuremberg and the Tokyo Trials in Retrospect’, in ChM Bassiouni, VP Nanda, *A Treatise on International Criminal Law, Vol. I Crimes and Punishment* (1973) 603.

⁶ This term appeared in the declaration of the governments of France, Great Britain and Russia “regrading the massacres of the Armenian population in Turkey”. (Cf E Schwelb, ‘Crimes Against Humanity’ (1946) 23 *British Yearbook of International Law* 181). It is worth noting that it had been used before, though in an entirely different sense, by Joseph Conrad. Cf J Conrad, *Under Western Eyes* (1911).

⁷ *Judgement of the International Military Tribunal for the Trial of German Major War Criminals*, The Avalon Project. William C. Fray and Lisa A. Spar, Co-Directors. [hereinafter: “IMT Judgement”].

www.yale.edu/lawweb/avalon/imt/proc/judgen.htm

the other hand, custom was clearly linked by the Tribunal with war crimes *sensu stricto*, i.e. with the actual course of combat. “The law of war – we read - is to be found not only in treaties, but in the customs and practices of states which gradually obtained universal recognition”⁸. However, since the crimes were perpetrated so widely and in such an obviously planned manner that they did not require extensive evidence, the Tribunal decided to treat them “quite generally”⁹.

In fact the comments on custom were forced by the defence. While questioning the point that initiating a war of aggression should be subject to criminal law, the defence claimed that the Kellogg-Briand Pact “does not expressly enact that such wars are crimes, or set up courts to try those who make such wars”. However – as we read in the judgment – “the same is true with regard to the laws of war contained in the Hague Convention”. At no point are acts which contravene its regulations defined there as crimes. And yet – we read further on – for many years “military tribunals have tried and punished individuals guilty of violating the rules of land warfare laid down by this Convention”¹⁰. Thus the Tribunal reminded us that “international law is not the product of an international legislature, and that such international agreements as the Pact have to deal with general principles of law, and not with administrative matters of procedure”¹¹.

The *de facto* declaratory character of the Hague Convention was confirmed at another point, where the Tribunal refuted the argument that the Convention could not be applied due to the requirement of “general participation” included in Article 23. With regard to this the Tribunal quoted a fragment of the Preamble, which “expressly stated that it was an attempt ‘to revise the general laws and customs of war’, which it thus recognised to be then existing”. Yet, as we read further on, “by 1939 these rules laid down in the Convention were recognised by all civilised nations, and were regarded as being declaratory of the laws and customs of war”. The Tribunal then added: “That violations of these provisions constituted crimes for which the guilty individuals were punishable is too well settled to admit of argument”¹².

The statement that “since 1907 they have certainly been crimes, punishable as offences against the laws of war”¹³, seems to suggest that, for the Tribunal, custom was the material source - and the Convention the formal basis for punishment – as with the Charter and the so-called Law No. 10 which was passed on 20 December 1945 by the Allied Control Council in Germany. In fact they did not have the character of law-making acts. While listing punishable crimes, they pointed only to laws which were already in place and to enforcement procedures. Indeed this was obvious from their nomenclature. Nor did the “Convention on the Prevention and Punishment of the Crime of Genocide”,

⁸ IMT Judgement (n 7).

⁹ Reserving the possibility of returning to it while deciding on the individual responsibility of the defendants. IMT Judgement (n 7).

¹⁰ IMT Judgement (n 7).

¹¹ IMT Judgement (n 7).

¹² IMT Judgement (n 7).

¹³ IMT Judgement (n 7).

passed by the UN General Assembly, have a law-making character. The notice provision (Article XV) refers solely to procedure. The opposite conclusion would consequently denote the legalisation of genocide.

As we know, the IMT did not hear another trial. But in the years 1946-1949 - in the same courtroom, No. 600 of the Nuremberg Palace of Justice, where Göring and others were tried - twelve other trials did take place. This time in front of six American Military Tribunals. Despite the name, they were in fact civil criminal courts with professional judges holding the highest legal qualifications¹⁴. They were set up for a single purpose: to hear the cases of those major criminals who had avoided the IMT trial and who were in the hands of Americans. While the Tribunals were created by an act of internal law - by order of the Military Government American Zone of Occupation - their jurisdiction was defined by international agreement, i.e. by Law No. 10 of the Allied Control Council. In the material-legal respect this corresponded to the Charter - except that to the three categories of crime it added a fourth: "Membership in categories of a criminal group or organization declared criminal by the International Military Tribunal"¹⁵.

The judicature of the American Tribunals was basically in agreement with the legal position of the IMT. When refuting the argument of lack of jurisdiction, the Tribunals invoked Law No. 10, which - like the Charter - is "the expression of international law existing at the time of its creation". The Tribunal in the Hostages case described the crimes defined in it (with, it will be seen, one exception) as "crimes under pre-existing rules of International Law - some by conventional law and some by customary law"¹⁶. In the *Krupp* case - referring to the IMT statement that the Hague Regulations had by 1939 become customary law - the Tribunal added that they were, "therefore, binding on Germany not only as Treaty Law but also as Customary Law"¹⁷. The Tribunal also expressed the belief that the so-called Martens Clause, included in the Preamble to the Hague Convention (IV) of 1907, "is much more than a pious declaration. It is a general clause, making the usages established among civilised nations, the laws of humanity and the dictates of public conscience into the legal yardstick to be applied if and when the provisions of the Convention and the Regulations annexed to it do not cover specific cases occurring in warfare, or concomitant to warfare"¹⁸.

¹⁴ See Art. II, p. "b" of Military Government - Germany United States Zone Ordinance no 7. Quoted from from: Moscow Conference.

¹⁵ Art. II, p. 1, „d". Quoted in IMT Judgement (n 7).

¹⁶ 'Trial of Wilhelm List and others', VIII *Law Reports of Trials of War Criminals*. Selected and prepared by The United Nations War Crimes Commission [hereinafter: *Law Reports*] (1949) 53. https://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-8.pdf [hereinafter: "*Hostages case*"].

¹⁷ 'Trial of Alfred Felix Alwyn Krupp von Bohlen und Halbach and eleven others', X *Law Reports* (1949) 133. https://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-10.pdf [hereinafter: the "*Krupp case*"]

¹⁸ *Krupp case* (n 17).

Even so, certain characteristic differences of opinion were noticeable. For example, while in the *Einsatzgruppen* case the Tribunal took Law No. 10 as the basis for its jurisdiction because it was "in conformity with international law"¹⁹, another Tribunal, (the *Flick* case), to some extent reversed the thinking. While stating that Law No. 10 constitutes "a statement of international law, which previously - the Tribunal added - was at least partly uncodified", at the same time found it necessary to qualify this with the following stipulation: "No act is adjudged criminal by the Tribunal which was not criminal under international law as it existed when the act was committed"²⁰. A similar yet rather different position was taken by Tribunal in the *IG-Farben* case. "Control Council Law No. 10 - we read - cannot be made [the] basis of a determination of guilt for acts or conduct that would not have been criminal under the law as it existed at the time - and here lay the difference - of the rendition of the judgment by the IMT"²¹.

In the *Hostages* case the Tribunal went a step further, however, and in fact questioned the judgement of the IMT with regard to the firing squad execution of hostages and collective reprisals against the civil population. In the light of both the Charter and the Law No. 10, both actions constituted war crimes. The same position was also taken by the IMT in its judgement. Without entering into an open debate, the American Tribunal expressed the view that within some strictly defined limits the rules of customary law allowed such practices: namely in circumstances when their goal was thereby to achieve law enforcement in the occupied territory. Hostage taking and even reprisal killings - we read in this judgement - might constitute an allowed line of action against guerilla attacks. Certainly the American Tribunal treated this as a last resort and defined the detailed conditions which should have been met beforehand. It granted that the idea of killing "an innocent person [...] for the criminal act of another is abhorrent to every natural law", and called any norm that allows for it "a barbarous relic of ancient times". However - this Tribunal distinctly stated - "it is not our province to write International Law as we would have it - we must apply it as we find it"²².

The theses of this Tribunal, which had by no means mitigated the severity of its sentence, gave rise to much criticism in both scholarship and public opinion - particularly in Yugoslavia, which it concerned, as well as the Soviet Union and Poland. Indeed, the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, signed in 1949, prohibited both the taking of hostages

¹⁹ 'United States of America vs. Otto Ohlendorf, et al.' in *IV Trials of War Criminals before the Nürnberg Military Tribunals under: Control Council Law No. 10, Nürnberg 1946-1949*, [hereinafter: "Trials of War Criminals"] 460, https://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-IV.pdf [hereinafter: the "*Einsatzgruppen* case"].

²⁰ 'Trial of Friedrich Flick and five others', *X Law Reports* (1949) 17. https://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-9.pdf [hereinafter: "*Flick* case"].

²¹ Wyrok norymberski w sprawie IG Farben, w opracowaniu Janusza Deresiewicza, Ministerstwo Sprawiedliwości, GKBZHWP, Informacja wewnętrzna nr 40 [The Nuremberg Judgment in the case of IG Farben, edited by Janusz Deresiewicz, The Ministry Of Justice, GKBZHWP, Internal Information] (1976) 229 [hereinafter: "*IG-Farben* case"].

²² *Hostages* case (n 16) 61.

(Article 34) and the application of collective reprisals (Article 33). However, the fact that in June 1945 the Soviet authorities warned residents of Berlin that every incident of violence against Soviet soldiers would result in the firing-squad execution of 50 ex-members of the NSDAP²³ apparently supported the interpretation of this Tribunal.

The IMT did not make a clear distinction between "war crimes *sensu stricto*" and "crimes against humanity". Besides, to a large extent their characteristics overlapped²⁴. The judgement states only that "insofar as the inhumane acts charged in the Indictment, and committed after the beginning of the war, did not constitute war crimes, they were [...] crimes against humanity"²⁵. And since the war crimes are by definition perpetrated against an enemy population, simple logic points to the *differentia specifica* of crimes against humanity: their victims must have included the perpetrator's own civil population²⁶.

The position of the American Tribunals left no doubts in this respect. In their judgements they clearly isolated criminal acts of the Nazi authorities against their own citizens²⁷. According to the Tribunal in the *Jurist* case the provisions of Article II p. 1 c of Law No. 10 (like Article 6 p. c of the Charter) clearly allows it. "The intent of the statute on crimes against humanity – we read – is to punish for persecutions and the like, whether in accord with or in violation of the domestic laws of the country where perpetrated, to wit: Germany". Whilst elsewhere it added that Art. III "clearly demonstrates that acts by Germans against German nationals may constitute crimes against humanity within the jurisdiction of this Tribunal to punish"²⁸.

Article 6 p. c of the Charter caused fierce disputes during the London negotiations. Initially the USSR's delegates tried to reduce crimes against humanity to acts of a fascist and racist nature, i.e., to divert blame solely towards the crimes of the Third Reich²⁹. This was prevented by the objections of the USA. In effect the USSR managed to achieve their goal indirectly. They managed to impose an additional condition which limited the criminality of such acts to those committed "in execution of or in connection with any crime within the jurisdiction of the Tribunal"³⁰. The final stage of the disputes had an almost comic

²³ See: The Declaration of the Mayor of Berlin, Dr. Werner, to the citizens in: *Berliner Zeitung*, 1 June 1945.

²⁴ Schwelb (n 6) 189.

²⁵ IMT Judgment (n 7).

²⁶ See Schwelb (n 6) 190.

²⁷ See for example *IG-Farben* case (n 21) 206 and 328 in connection with 337 and 353.

²⁸ Trial of Josef Altstotter and others, VI *Law Reports* (1948) 39-40

http://www.hawaiiankingdom.org/pdf/Trial_of_Altstotter.pdf [hereinafter: „The Justice case”].

²⁹ They also tried to impart a similar meaning later – while working on the UN Convention – to the notion of genocide. Cf. A Basak, 'Zagadnienie ludobójstwa "kulturalnego" w pracach przygotowawczych do Konwencji z 9 grudnia 1948' [The Issue of "Cultural" Genocide in the Preliminary Works to the Convention of 9 December 1948], (1995) XVIII *Studia nad Faszyzmem i Zbrodniami Hitlerowskimi* [Studies on Fascism And The Nazi Crimes] [hereinafter: "Studies"] 178.

³⁰ G Ginsburgs, *Moscow's Road to Nuremberg. The Soviet Background to the Trial* (1996) 105.

quality. Moscow became worried that a semi-colon used in the English and French texts³¹ could still extend liability into peacetime and demanded a last-minute rectification. Thanks to a special protocol - *de facto* an additional agreement - signed in Berlin on 6 October 1945, the semi-colon was replaced by a comma, which was applied in the Russian version by the extra-cautious USSR delegates³². This seems to have been the first agreement in history made because of a comma.

The condition imposed by the USSR restricted IMT jurisdiction to time of war; essentially the war whose crimes were the subject of those proceedings. The Tribunal judgement altered this by also including preparations for war within the liability³³. However, the judgement did not cover all those crimes perpetrated before the War against the citizens of the Third Reich - including political opponents and the Jewish population. "The Tribunal is of the opinion - it states - that revolting and horrible as many of these crimes were, it has not been satisfactorily proved that they were done in execution of, or in connection with, any crime within the jurisdiction of the Tribunal. The Tribunal therefore cannot make a general declaration that the acts before 1939 were crimes against humanity within the meaning of the Charter"³⁴.

This quotation, and particularly the expression, "within the meaning of the Charter", may suggest that in the Tribunal's view these acts did qualify as crimes against humanity: i.e. that in this case the scope of the law went beyond this court's powers of execution as prescribed by the Charter. For it is proper - as was emphasised in the *Jurist* case - "to distinguish between the rules of common international law which are of universal and superior authority on the one hand, and the provisions for enforcement of those rules which are by no means universal on the other"³⁵.

Anyway, the IMT used the term "crime" - a strictly defined legal term - with regard to those acts; this could not be accidental. And while stating that in the Third Reich "political opponents were murdered", and that it operated a "policy of terror", a "policy of persecution, repression and murder of civilians", the Tribunal simply stated the facts of the case, which was within the remit of Article 6, p. c of the Charter³⁶. Indeed this whole passage was preceded by the phrase: "With regard to crimes against humanity", which clearly indicated the crimes the IMT referred to³⁷. It did not, however, indicate the legal basis which would make the crimes punishable when committed not in connection with war.

³¹ Art. 6 (c) "CRIMES AGAINST HUMANITY: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated". Qtd. in: Moscow Conference.

³² See Schwelb (n 6) 192-193.

³³ IMT Judgement (n 7).

³⁴ IMT Judgement (n 7).

³⁵ *Justice* case (n 28) 37.

³⁶ See Schwelb (n 6) 189-195.

³⁷ IMT Judgment (n 7).

For although the Tribunal referred (in the excerpt quoted earlier) to "the general principles of justice applied by jurists and practiced by military courts"³⁸, this, as can be seen, was only in the context of war.

A significant pointer in this respect was contained in two judgements of the American Tribunals – in the *Hostages* case and in the *Einsatzgruppen* case. It should be noted here that the condition restricting the punishability of crimes against humanity to war events – the expression: "in execution of, or in connection with" – was removed from the regulations of Article II, p. 1 c of Law No. 10 by the Allied Control Council ("deliberately", as noted in the *Jurists* case³⁹). It proves the fact that this expression did not constitute an essential element of this regulation. The simultaneous omission of the words "before or during the war" must have meant that crimes against humanity are punishable in general, including times of peace.

The first of the two judgements contains a significant argument concerning the meaning of "the general principles of justice". This is because the Tribunal in the *Hostages* case found it "advisable to briefly state the general nature, of International Law and the sources from which its principles can be ascertained". As its starting point the Tribunal stated that the term "customs and practices accepted by civilised nations generally" used in the law of nations is not limited "to the laws of war only. It applies as well to fundamental principles of justice which have been accepted and adopted by civilised nations generally". Therefore, if they are accepted generally as such "by most nations in their municipal law, its declaration as a rule of International Law would seem to be fully justified. There is convincing evidence that this not only is but has been the rule"⁴⁰. Since the defendants in this trial were accused of committing war crimes and crimes against humanity, and since in the case of the former the Tribunal referred to the Hague rules, it can be assumed that "the rule" discussed in the final conclusion referred to crimes against humanity.

The Tribunal in the *Einsatzgruppen* case expressed its position in a more complex manner. First it pointed to custom. In refuting the argument concerning violations of the Latin maxim *nullum crimen sine lege*, the Tribunal pointed out that "the 'lex' referred to is not restricted to statutory law". This is because it evolves "effectively through custom and usage", as well as - it added - "through the application of 'Common law'". And that reason does not make it "less binding" than the codes, treaties and conventions⁴¹. Yet at another point it states: "an evaluation of international right and wrong, which heretofore existed only in the heart of mankind, has now been written into the books of men as the law of humanity"⁴².

Admittedly the words "written into the books of men" could mean that the material-legal basis of crimes against humanity was the London codification.

³⁸ IMT Judgement (n 7).

³⁹ *Justice* case (n 28) 41.

⁴⁰ *Hostages* Case (n 16), 49.

⁴¹ *Einsatzgruppen* Case (n 19) 458.

⁴² *Einsatzgruppen* Case (n 19) 497.

This, however, would clash with the belief that the Charter and Law No. 10 were an expression of the law that was already in force. This is also contradicted by the following statement by this Tribunal: “The specific enactments for the trial of war criminals, which have governed the Nuernberg trials, have only provided a machinery for the actual application of international law theretofore existing”⁴³. And, concluding the previously quoted thought, the Tribunal added that “the law of humanity... is not restricted to events of war. It envisages the protection of humanity at all times”⁴⁴. Since – as we further read – the Allied Control Council had removed the restriction connected to war, “the present Tribunal has jurisdiction to try all crimes against humanity **as long known and understood under the general principles of criminal law**” (emphasis by the present writer)⁴⁵. The underlined fragment proves that the position of both Tribunals coincided and that, to them, apart from custom, the source of crimes against humanity were also the “general principles of criminal law”.

The views of the two tribunals confirm the hypothesis that the criminal activities whose victims prior to 1939 were the Third Reich’s citizens - although excluded from the jurisdiction of the IMT - did qualify as crimes against humanity. The general character of the legal norm expressed in Article VI, p. c of the Charter confirmed the exclusion of this jurisdictional condition from the analogous regulation of Law No. 10. Thus the regulation became the basis for punishing any “inhuman acts” and “persecutions on political, racial or religious grounds” carried out against the civil population in different parts of the world after 1945; this included crimes which were defined by Polish legislation as “Stalinist”⁴⁶.

In the Polish judicature relating to these crimes there is an example which confirms the above conclusion as well as the reasoning leading to it. Let us add the fact that Poland included the Nuremberg norms in its legal system. It also ratified the Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity. Thus in 1998 the Regional Court in Warsaw referred, amongst others, to the Charter of the “International War[!] Tribunal in Nuremberg” when rejecting an argument concerning the statute of limitations in the appeal case of Adam Humer and others. True, in its judgement the Court did not specifically mention the regulation of Law No. 10 discussed here, but it clearly referred to its content when taking the view that “persecution for political reasons, which was the case here” is punishable under international law⁴⁷.

In May 1993 the Security Council passed the statute of an *ad hoc* international tribunal, the first since Nuremberg, for the purpose of trying war

⁴³ *Einsatzgruppen* Case (n 19) 459.

⁴⁴ *Einsatzgruppen* Case (n 19) 497.

⁴⁵ *Einsatzgruppen* Case (n 19) 499.

⁴⁶ Cf A Basak, ‘Norymberski precedens a problem odpowiedzialności za zbrodnie stalinowskie po 1945 r.’ [The Nuremberg Precedent and the Problem of Responsibility for Stalinist Crimes after 1945], (2000) XXIII *Studia nad Faszyzmem i Zbrodniami Hitlerowskimi* [Studies on Fascism and the Nazi Crimes] 337-362.

⁴⁷ Rzeczpospolita of 4-5 VII 1998 supplement “Prawo co dnia” [Everyday Law] 11. The author wishes to extend his thanks to Judge Leon Szpak for his help in this respect.

crimes and crimes against humanity committed in the territory of the former Yugoslavia. One and a half years later the Council passed the statute of a second tribunal *ad hoc*, which was to punish acts of genocide in the territory of Rwanda. The Statute of the Yugoslav tribunal still made the punishment of crimes against humanity dependent on their connection with war. The Rwandan Statute no longer bore this condition. The final "i" in this evolution was dotted by the Appeals Chamber of the Yugoslav tribunal in its sentence review in the case of Dusko Tadić. "It is by now a settled rule of customary international law - it states - that crimes against humanity do not require a connection to international armed conflict... and any conflict at all"⁴⁸. From the perspective of the hypothesis presented here, the significant question is: "Since when?"

The IMT judgement, as well as the judgements of the American Tribunals, have overshadowed the contributions of the National Courts and the Occupation Tribunals to the punishment of war criminals. Yet – to quote Mieczysław Szerer, the Polish delegate to the War Crimes Commission of the United Nations in London – every single trial, even that of the most wretched criminal and devoid of any "flavour of sensation", was a step towards "coining the new international criminal law"⁴⁹. A similar view was expressed by Lord Wright, the chairman of the Commission⁵⁰. But even in those cases decided by national courts on the basis of the domestic penal code, it was still essential to establish whether the perpetrator had contravened the regulations of the IV Convention; or strictly speaking of its annexe, the "Regulations concerning the Laws and Customs of War on Land". Thus a norm of international law had a decisive influence here.

In fact the National Courts also referred to international custom. The judgement passed in Poland by the Najwyższy Trybunał Narodowy (the Supreme National Tribunal), against Artur Greiser, states for example that the defendant's acts were also deliberately directed against "the laws and customs of war"⁵¹. In another judgement, passed against Joseph Bühler, the NTN referred to the Martens Clause. It should be noted that the Tribunal stated on this occasion that the Clause imposed a legal obligation on the parties at war to adhere to its letter⁵². The signatories of the Convention did not wish any unforeseen events to be left to the discretion of the military leaders, as was noted sarcastically by Józef Giebułtowicz, the author of a slim volume on the responsibility of war criminals.

⁴⁸ *Prosecutor v Tadić*, Case No. IT-94-1-AR 72. Quoted in Th Meron, 'The Continuing Role of Custom in the Formation of International Humanitarian Law' (1996) 90 AJIL 242.

⁴⁹ Cf. M Szerer, *Księga kar* [The Book of Punishments] (1948) 3 Państwo i Prawo [The State and the Law] 139-140.

⁵⁰ In the preface to the second volume of *Law Reports*, dedicated to the trial of the personnel of Belsen. Belsen, XI (cf n 68).

⁵¹ See T Cyprian, J Sawicki, 7 wyroków Najwyższego Trybunału Narodowego [Seven Judgments of the Supreme National Tribunal] (1962) 20-21.

⁵² T Cyprian, J Sawicki (n 51) 330.

Before World War II he was a Polish envoy in Oslo, and subsequently a prisoner in Majdanek Concentration Camp⁵³.

Szerer's words primarily seem to concern the Tribunals of the USA and Great Britain. Unlike the Nuremberg Tribunals, these acted on the narrower basis of the Hague Convention, meaning they tried war crimes *sensu stricto*, i.e., only those committed against the Allied Nationals. Using the few and rather imprecise⁵⁴ points of Section III ("Military authority over the territory of the hostile state") of the Regulations they had to establish by means of legal interpretation whether criminal phenomena - unknown to the authors of the Regulations - constituted war crimes in the light of those rules.

The incompatibility of those rules with the reality of the criminal politics of the Third Reich is best evidenced by Article 46 of the Regulations, which played a key role in the Nuremberg judicature: "Family honour and rights, individual life, and private property, as well as religious convictions and worship, must be respected"⁵⁵. Nonetheless this did serve as the basis for rulings against the perpetrators of all types of crimes that victimised residents of the occupied territories. And this was not a case of drastic innovation; as Hersch Lauterpacht wrote in his commentary on one of the judgements, "it is only the novelty and the enormity of the outrage which creates the impresion of novelty"⁵⁶.

The tribunals of the two Anglo-Saxon occupying powers did not give reasons for their judgements. However the adversarial process allowed for their legal position (i.e. whose arguments they accepted, prosecution or defence) to be inferred from the rulings themselves. In the American procedure other indicators of the tribunal's position were the comments - extremely important, because objective - formulated during the process of the verification of the judgement. In the British procedure a similar significance was assumed by the Summing up of the Judge Advocate, who from an "entirely impartial position" advised the tribunal "on matters of substantive and procedural law. He must also, unless both he and the court think it unnecessary, sum up the evidence before the Court deliberated on its findings"⁵⁷.

The significance of custom was already demonstrated in the first widely publicised postwar trial in Western Europe, that of seven employees of a sanatorium in Hadamar. They were accused of murdering some 400 Polish and

⁵³ J Giebułtowicz, *Odpowiedzialność przestępców wojennych w świetle prawa narodów* [The Responsibility of War Criminals in the Light of the Law Of Nations](1945) 12. The author wishes to extend his thanks to the late Dr Maciej Lis, who drew the author's attention to the book and was so kind as to give it to him. The biographical details are quoted from: J Putrament, *Pół wieku. Wojna* [Half a century. War] (1963) 294.

⁵⁴ R Bierzanek, *Wojna a prawo międzynarodowe* [War and International Law] (1982) 228.

⁵⁵ Quoted in IMT Judgement (n 7).

⁵⁶ The Velpke Baby Home Trial, edited by Georg Brand, in *VII War Crimes Trials* (1950) XIII-XIV [hereinafter: "Velpke"].

⁵⁷ See British Law Concerning Trials of War Criminals by Military Courts, in *I Law Reports* (1947) 107 (Annex I).

Russian forced labourers who were incapable of work⁵⁸. The trial was heard by the US Military Commission in Wiesbaden (8 - 15 October 1945) and was the first in which the American Tribunal⁵⁹ applied the notion of War Crime to acts committed not only against civilians but also exclusively by civilians⁶⁰. The prosecutor, a Texan lawyer with a Polish name, Colonel Leon Jaworski, called for the sentence. The defence was proving the innocence of the defendants, stating that international law lacked a norm that would justify their conviction. "It would be an anomalous situation - Jaworski retorted - in fact a tragic one, if our network of international law were so inherently defective as to be powerless to bring to justice the murders of over 400 victims"⁶¹.

Giebułtowicz, quoted above, put it in similar terms. It must not be assumed, he wrote, that the law of nations cannot find "a solution of a given problem within the strict scope of the law"⁶², i.e., the basis for the punishment of evident crimes. Both prosecutor and author were pointing here to custom. Continuing his striking speech, Jaworski immediately added: "Maybe my distinguished adversaries have not given consideration to the fact that there is a great body, a great part of international law that is based entirely on unwritten law... that has grown up because of custom and usages among nations"⁶³. Giebułtowicz completed this line of reasoning by citing the Martens Clause⁶⁴.

It seems that both opinions expressed the way of thinking which formed the basis of Nuremberg. At least within the meaning indicated by Professor Wolfke in his comments on the subjective elements of custom. While discussing the various meanings ascribed in theory to the Latin maxim *opinio iuris sive necessitatis*, he also mentions those interpretations – most, in his view, general – which refer "to a general sense of law, social needs, morality, etc"⁶⁵. In the *Justice* case such motifs were presented in a very interesting way with reference to just one – but extremely significant – aspect of crimes against humanity. "The force of circumstance – we read in the judgment – the grim fact of worldwide interdependence, and the moral pressure of public opinion – have resulted in an international recognition that certain crimes against humanity committed under

⁵⁸ Bundesarchiv Koblenz, unit: "AllProz. 7 F, ref. No. FC 6215P – pre-trial documents [hereinafter: "Hadamard-Documents"], FC 6216P – the transcript of the trial [hereinafter: "Hadamard-Transcript"].

⁵⁹ Their jurisdictions did not differ substantially. "The fact that the court was entitled a General Military Court rather than a Military Commission appears to be merely a matter of name" – we read in the report of the Judge Advocate of the Staff of the Third Army. & The Archives of the IPN GK, Materials in the trial of the personnel of KL Dachau, Ref. No.: 153/2-7 140, [hereinafter: "Dachau"].

⁶⁰ Cf. T Taylor, *Die Nürnberger Prozesse. Hintergründe, Analysen und Erkenntnisse aus heutiger Sicht* (1996) 321-322.

⁶¹ Hadamard-Transcript (n 58) 6.

⁶² Giebułtowicz (n 53) 11-12.

⁶³ Hadamard-Transcript (n 58) 6.

⁶⁴ Giebułtowicz (n 53) 12.

⁶⁵ Wolfke (n 1) 44-46.

Nazi authority against German nationals constituted violations not solely of statute law but also of common international law”⁶⁶.

Stating that the Hague Convention had already applied before World War II as common law, Jaworski was about a year ahead of the IMT opinion quoted earlier. Thus he refuted another argument of the defence, who maintained that the Regulations provided no basis for charging the defendants with committing war crimes against Polish citizens, because Poland was not party to the Convention. True, some countries – Jaworski stated, mentioning Bulgaria and Italy – had not accepted the Convention via a sufficiently formal procedure. “But on through the years all of those nations began to invoke the Hague Convention, they acquiesced in it, they lived by it, they used it, they referred to it and it has been a recognized convention binding as between all nations”.

Therefore he took it for granted that Poland was party to the Convention, and he found Article 46 of the Regulations “most apropos, strikingly so, to the very charge that has been leveled against the accused in this case”. There could, he concluded, be no doubt that according to international law the crimes levelled against the defendants were punishable⁶⁷. His adversary in the trial maintained his position and even expressed the belief that the prosecution had merely managed to demonstrate “how inadequate the network of international law is and how defective”. But the verdict fully confirmed the position of the prosecution - including the precedential argument that the requirement included in Article 46 to protect the lives of the residents of an occupied country also applies to those who have been deported by the occupying force to its own territory.

The challenge that the Hague Convention did not apply to Poland - additionally supported by reference to the doctrine of subjugation - also appeared in the proceedings of the British Tribunals. In the trial (which was taking place at the same time) of 45 executioners from Auschwitz and Belsen-Bergen, the defence on points of law relating to international law was led by a controversial Professor from the University of London, H.A. Smith, an expert on the subject⁶⁸. He argued that part of Poland was annexed; the rest was transformed into the General Governorate; the German law was in place; the defendants had to implement their authorities’ decisions. “The Polish State and Polish nation had ceased to exist”, he stated ruthlessly, though carefully leaving out – as can be seen – the Eastern part of Poland, which at that time was annexed by the Soviet Union⁶⁹.

Admittedly this trial was a success for the defence in that 15 out of 45 defendants were acquitted by the Tribunal⁷⁰. However, the judgement fully confirmed the interpretation of the existing law as presented by the prosecutor, Colonel T. M. Backhouse: “The laws and usages of war provided for the proper treatment not only of the prisoners of war but of the civilian citizens of the

⁶⁶ *Justice* case (n 28) 45.

⁶⁷ *Hadamard-Transcript* (n 58) 6-7.

⁶⁸ See Case No. 10. *The Belsen Trial*, in *II Law Reports* (1947) 1-152 [hereinafter: “*Belsen*”].

⁶⁹ *Belsen* case (n 68) 75.

⁷⁰ *Belsen* case (n 68) 121.

countries occupied by a belligerent". In reference to the latter he mentioned Article 46, adding that in the days when the Article was formulated "a military body like the S.S. was not thought of". He dealt with the arguments concerning Poland by remarking that they did not constitute a defence, because the German authorities used the same treatment towards the residents of countries they did not intend to annexe. He stated that the very fact that both camps – Auschwitz and Belsen-Bergen - had imprisoned citizens of the allied countries was sufficient to establish that "the acts set out in the charges were undoubtedly war crimes"⁷¹.

We should add that the defence counsel (on this occasion a German) in another British trial developed the argument of subjugation further by stating that Poland had capitulated. "Poland never capitulated", he was interrupted by the Judge Advocate: "There was a Polish Government in London throughout the whole of the war, and therefore anything that was done by Germany in the way of occupation was imposed by force and not by any treaty rights". The defence counsel still tried to argue his point, suggesting that it was still an open matter and it would be better to wait and see the opinion of the Nuremberg Tribunal. "Doctor, I do not want to interrupt you, but I have indicated that I will advise the Court that they could not recognise in international law any laws that were imposed on Poland by Germany after the collapse of Poland"⁷².

The IMT definitively settled the question of subjugation. It found it unnecessary to consider the hypothesis of whether this doctrine could even apply, bearing in mind that the conquest had occurred as the result of a war of aggression. However – as we then read - "The doctrine **was never considered** to be applicable so long as there was an army in the field attempting to restore the occupied countries to their true owners" (emphasis by the present writer). The IMT stated further - sealing the defendants' guilt - that "the doctrine could not apply to any territories occupied after the 1st September, 1939"⁷³. There is no need to prove that the words "an army in the field" could also refer to an allied army. Whereas the phrase emphasised here can be understood as the expression of an opinion about practice considered as law, i.e., the second of the two elements constituting a customary legal norm⁷⁴.

Let us return to the quoted exchange of opinions. This took place during the first of two trials against 18 persons responsible for the deaths of c. 500 Polish and Russian infants⁷⁵. They were removed from their mothers – who were forced labourers - immediately after birth and were placed in premises entirely devoid of basic nursing facilities and equipment; in one case there was not even running water. Major G.L.D Draper, the prosecutor in both trials, accused all the

⁷¹ *Belsen* case (n 68) 8,104-105.

⁷² *Rühen* (n 75) 13th day of the trial 3-4.

⁷³ IMT Judgement (n 7).

⁷⁴ See Professor Wolfke's extensive commentary on the issue. Wolfke (n 1) *Belsen* case (n 68) 40-51.

⁷⁵ It took place from 20 March till 3 April 1946 in Brunswick and concerned the Velpke Centre [see above, footnote 56]. The second trial, concerning the centres in Wolfsburg and Rühen, took place between 20 May and 24 June in Helmstedt. Cf Bundesarchiv Koblenz, unit AllProz 8, Ref. No.: JAG 212 FC 2867 N [hereinafter: "Rühen" + another day of the trial].

defendants of “committing a war crime in that they... in violation of the laws and usages of war were concerned in killing by wilful neglect a number of children of Polish and Russian nationals”. He labelled this crime “peculiarly obnoxious and inhuman”⁷⁶.

Draper, pointing to Article 46 as the legal basis for a conviction, used the following interpretation: “It is considered as part of the argument for the prosecution that family life had come into Germany as a necessary consequence of the operation of war, namely that Germany having occupied the territory of Poland, and large areas of Russia, and then having brought female workers into Germany to work for Germany during the war, is equally bound to respect family life and new life born of workers, whether they are in their own country or whether they are brought into Germany”⁷⁷. On this basis both trials resulted in guilty verdicts. Thus the precedent-setting judgment in the *Hadamar* case, which found that Article 46 of the Regulations protected forced female labourers deported to German territory, also extended to their children born there.

As for the illegality of the deportations themselves, the prosecution deduced this clearly from custom - unlike the IMT and Tribunal in the *Krupp* case, which in this respect referred to Article 52 of the Hague Regulations. Admittedly this Article allowed for requisition and services on the part of the population, but only within the local needs of the occupying army and “in proportion to the resources of the country and of such a nature as not to involve the inhabitants in the obligation to take part in military operations against their own country”⁷⁸. “We refer - Draper said during the first trial - to the well-known custom and rule of international law that it is forbidden in time of war to deport slave labour from the country that you have occupied by your army to the country which is the occupying Power”⁷⁹. During the second trial he stated briefly that the deportations constituted “a breach of the customary rules of international law”⁸⁰. Thus this view was at the basis of both these documented rulings.

The US and British occupation tribunals usually heard criminal cases in which the victims were not nationals of the occupying powers. In the British trials the defence did not make use of this. Indeed, in the official commentary on one judgement we read: “the United Kingdom has a direct interest in punishing the perpetrators of crimes if the victim was a national of an ally engaged in common struggle against a common enemy”. Reference was made to the “general doctrine called Universality of Jurisdiction over War Crimes, under which every independent State has, in International Law, jurisdiction to punish pirates and war criminals in its custody regardless of the nationality of the victim or the place where the offence was committed”⁸¹.

However, the American defence lawyer in the *Hadamar* case made a submission at the very start of the trial that the Military Commission could only

⁷⁶ Velpke (n 58) 8, 338.

⁷⁷ Rühen (n 75) 2nd day of the trial 13.

⁷⁸ *Krupp* case (n 17) 145.

⁷⁹ Velpke (n 58) 8.

⁸⁰ Rühen (n 75) 2nd day of the trial 14.

⁸¹ The *Zyklon B* Case, Case No. 9, in *I Law Reports* (1947) 103.

try crimes committed against soldiers or nationals of the USA, or possibly against residents of territories subject to American rule, such as the Philippines. He justified this by means of the following nimbly phrased formula: "There is no rule of law in International Law which gives authority to one nation to try and punish nationals of another nation for committing offenses against nationals of other nations". On this occasion Jaworski also invoked custom: "it is a well established custom of the laws of war that the jurisdiction of the military commission is not territorial. The right to punish for such an offense proceeds upon the well established principle that allies or co-belligerents constitute but a single side of an armed struggle".

The fundamental issue, he said, is the fact of contravention of international law, which is an "offense against the laws of war". Contravention of international law constitutes "a matter of general interest and concern". Whether committed by their own forces or those of the enemy, "civilized co-belligerents have an interest in the punishment of offenders against the laws of war"⁸². At the same time Jaworski invoked the doctrine of the Universality of Jurisdiction over War Crimes; specifically the arguments put forward by Willard B. Cowles in an article on this subject recently published in the USA⁸³. Consequently the chair of the Commission ruled that the Commission did have the jurisdiction to hear criminal cases in which the victims were Polish and Russian labourers⁸⁴. We should add that Cowles' theses were frequently called on in the American war crimes case law. His views had a clearly directive value – to a degree which allows them to be treated as an almost integral part of that case law.

The ruling in the *Hadamar* case turned out to be final. It was confirmed definitively by the General Military Government Court in its judgement against Dachau concentration camp personnel. The authors of the opinion, which was prepared in the verification process, presented the motives of the Tribunal's decision in a way that linked both the material and the formal bases of the jurisdiction. "It was held in the *Hadamar* case that since the inhabitants of an occupied country are entitled to be respected in their persons, family, rights and lives, it is a violation of international law and a war crime to unlawfully kill such persons. It was further decided that criminals guilty of such offenses may be tried by a belligerent power into whose hands they come, whether that power be the one whose subjects were the victims, or an allied power. In that case - they stated towards the end - the United States was an ally of Poland and the Soviet Union"⁸⁵.

⁸² Hadamar-Documents and Hadamar-Transcript (n 58) 8-10.

⁸³ WB Cowles, 'Universality of Jurisdiction Over War Crimes' (1945) 33(2) California Law Review 177-218.

⁸⁴ Hadamar-Transcript (n 58) 12.

⁸⁵ Review of Proceedings of General Military Court in the Case of *United States vs: Martin Gottfried Weiss at al.*, 60. U.S. National Archives and Administration Record Group 238: National Archives Collection of World War II Crimes Records [hereinafter: "US NARA"]. Microfilm Publication M 1217.

The trial of the Dachau personnel was the first in a series of six main trials⁸⁶ - which took place in the years 1945-1947 within the actual location of the former Dachau concentration camp - against personnel from all the camps liberated by the Americans. In several trials that followed, and particularly in the trial of Buchenwald personnel (11 April – 17 August 1947)⁸⁷, in the course of which the jurisdiction dispute reached its climax, the defence replaced its former argument with two others, similar in substance. The first challenged the Tribunal's jurisdiction in relation to crimes committed prior to the USA joining the war. The second, solely concerning mass atrocities, tried to restrict the jurisdiction only to acts committed within the American Zone of Occupation.

According to the defence, the latter argument was based on a recently issued directive (14 October 1946) by the Military Government, which indeed indicated that the jurisdiction of the Military Government Courts generally only covered crimes committed against Americans. The defence lawyer, experienced in the Hadamar case, conceded that the tribunals were not "restricted in their jurisdiction by territorial limits". Therefore they could - after occupying a country - try cases of contravention of the laws of war which were committed prior to the occupation. However, the norm that determined this, he argued - clearly having in mind a customary norm - also assumes that the jurisdiction ends when the victorious army's occupation of the country ceases⁸⁸. The point of this argument lay in the fact that the Buchenwald camp, though liberated by American army units, was situated in the previously-demarcated USSR zone, and had been evacuated by the Americans in early July 1945⁸⁹.

The defence position did not succeed in challenging the jurisdiction, either with regard to time or place. The first argument was dismissed by the Tribunal on the basis of the principle of universality of jurisdiction. The explanation presented in this matter by the prosecutor, Colonel William Denson, concurred with Jaworski's arguments; this was understandable in that both lawyers relied on Cowles' theses. On this occasion Denson expressed a thought which is still relevant seventy years later: "The members of the family of nations cannot look with indifference upon violations of International Law, if peace in any form is to be preserved"⁹⁰.

The Tribunal dismissed the second argument too. True, Denson had to admit that the regulation cited from the Directive was "a little ambiguous". He stated, however, that even in that form it "does not deprive this court of the power to try a case arising in a zone other than that which is now accupied by the American authorities". He referred here to the view of the Deputy Theatre Judge

⁸⁶ Here were heard the trials of the members of the personnel of the 'parent' camps; those who were indicted with the most typical functions in the criminal mechanism of the camps and whose responsibility best characterised that mechanism.

⁸⁷ *United States vs Josias Prince zu Waldeck et al.*, Bureau of Provision and Archivization of Documents of the IPN [the Institute of National Remembrance], unit: "Military Government Court – Case *Buchenwald*", ref. No. 152/I-IX [hereinafter: "*Buchenwald*"].

⁸⁸ *Buchenwald* (n 87) 5-6.

⁸⁹ See J Krasuski, *Historia RFN* [History of FRG] (1981) 13.

⁹⁰ *Buchenwald* (n 87) 10-11.

Advocate who – in order to clarify the ambiguity – officially confirmed such an interpretation⁹¹. In the course of the judgement verification, it was established that the directive invoked by the defence clearly allowed for the punishment of perpetrators of mass atrocities committed outside the American zone's boundaries⁹². Consequently, when in another trial (of the personnel of Mittelbau-"Dora") the defence advanced a similar argument, the Tribunal dismissed it without even waiting for an objection from the prosecutor⁹³.

In all the trials against the camps' SS personnel, the prosecution produced the same indictment: "Violation of the Laws and Usages of War". On many occasions the prosecution also invoked contents of Article 46. The prosecutor in the Flossenbürg trial, while presenting the cruel treatment of the prisoners, referred to this Article *expressis verbis* and stated that it constituted "a codification of a universally recognized rule"⁹⁴. Whereas the prosecutor in the above-mentioned Dachau case (again Colonel Denson), when called on to indicate the basis of the Tribunal's jurisdiction (the defence claimed the prosecution's position was confusing at this point), did not restrain his sarcasm. "I don't think - he began - that the court is particularly confused about that". Then, reminding the defence that the defendants in this trial were accused of violating international law, Denson quoted points (a) to (c) of Article 38 Statute of the International Court of Justice! So, he said, if the facts established in the trial fitted into the provisions of treaties or conventions, or into custom recognised by the USA or "the laws of the United States... they will be applied"⁹⁵.

The Tribunal supplemented this with the following statement, which had been made in the initial phase of the proceedings: "although appointed by a conquering nation as a military government court in a conquered land, it sits in judgement under international law and under such laws of humanity and customs of human behavior that is recognized commonly by civilized people"⁹⁶. The statement was cited as evidence that, when it came to issues of jurisdiction and the sources of law, the position of the tribunals trying war criminals was consistent⁹⁷. Additionally, the fact that the Tribunal placed both "international law" and the "customs and laws of humanity" (i.e., the resolutions of the Martens Clause) on the same level could lead to the conclusion that it found the obligations resulting from the resolutions legally binding *en par* with the Hague

⁹¹ *Buchenwald* (n 87) 9-10.

⁹² *United States v Josias Prince zu Waldeck et al* Review and Recommendations, US NARA 26-27.

⁹³ *United States v Kurt Andrae, et al*, Staatsarchiv Koblenz, All. Proz. 7 F, ref. No. 6225 P 4843.

⁹⁴ *United States v Friedrich Becker et al* Staatsarchiv Koblenz, All. Proz. 7 F, ref. No. 6289 P 9245.

⁹⁵ 5 Dachau 310-311.

⁹⁶ Dachau (n 95) 345-346.

⁹⁷ Cf. IA Lediakh, 'The Application of the Nuremberg Principles by other Military Tribunals and National Courts' in G Ginsburgs, VN Kudriavtsev (eds), *The Nuremberg Trial And International Law* (1990) 270-271.

Regulations. A similar position was taken by the Polish NTN and to a certain extent the Tribunal in the Jurists case⁹⁸.

Professor Wolfke writes that it “is out of the question” that courts are devoid of legislative competence. At the same time he adds that since “the formation of international custom is spontaneous”, the factual role in its development of the rulings made by the international tribunals “is undoubtedly considerable”⁹⁹. To what extent could the same be true with respect to the national courts or occupation tribunals, which were of lower rank than the international tribunals? The opinions of Szerer and Wright, quoted above, as well as the Tribunal’s statements in the Dachau trial, surely point to a positive answer. This is confirmed mainly by the hundreds of rulings and thousands of detailed decisions with which the tribunals were filling gaps in the provisions of the Hague Regulations. While their interpretations might seem somewhat obvious today, they derived from sharp arguments from the opposing sides in the trials. And the fact that they seem obvious today indicates the significance of the legal precedents they created. In this way expanding the scope of what is punishable (and also the extent of the legal protection provided in the Regulations), these precedents paved the way to further codification of the law of war, which would soon be extended onto all military conflicts.

There is no doubt that these examples of case law together confirm the significance of international custom as the basis for judgments in cases of war crimes. This is with respect to decisions concerning both jurisdiction and substantive law. In the case of the latter, the custom and statutory norms usually occurred in strict correlation, so much so that this gave it an organic character. Anyway, this has found its expression in the routinely used formulae, laws and customs of war. Thus it is possible to express the belief that custom was an intrinsic part of the law applied in the Nuremberg judicature, and - considering the unrelenting progress in the art of killing - that it will remain an intrinsic part of the law of military conflict at every step. In this context the IMT’s statement that the law of war “is not static, but by continual adaptation follows the needs of a changing world”¹⁰⁰, does not sound very optimistic.

However, the hopes aroused by the convictions of Göring and others mainly focused on the prospect of punishing state leaders for resorting to war and for committing crimes against the civil population. Since – as we read in the *Einsatzgruppen* case – Nuremberg has shown “how humanity can be defended in court”, it is hard to believe that it could prove “unable to maintain a tribunal”¹⁰¹. Certainly the tribunal would be a natural complement to the United Nations system – securing, on the grounds of criminal justice, the realisation of two goals in particular, indicated in the Preamble of the UN Charter: “to establish

⁹⁸ While questioning the claim that the Martens Clause had barely any moral significance and that the legal obligations resulted exclusively from the articles of the Regulations, R Bierzanek points out that it is contradictory with the will of the signatory states, which was clearly manifested in the Convention. Bierzanek (n 54) 44-45.

⁹⁹ Wolfke (n 1) 72.

¹⁰⁰ IMT Judgement (n7).

¹⁰¹ *Einsatzgruppen* Case (n19) 99.

conditions under which justice and respect for the obligations... can be maintained“, and, most importantly, “to save succeeding generations from the scourge of war“.

The widely publicised words of the American Nuremberg prosecutor, Robert Jackson, certainly reflected the mood of the moment: “The ultimate step - he said - in avoiding periodic wars, which are inevitable in a system of international lawlessness, is to make statesmen responsible to law”. And, considering the law applied in the trial, he added: “And let me make clear that while this law is first applied against German aggressors, the law includes, and if it is to serve a useful purpose it must condemn aggression by any other nations, including those which sit here now in judgment“¹⁰².

These words resonated not only because of the tragedies caused by the war that had just ended, but also because of the fear of another, which would in all probability involve the use of nuclear weapons. Further, the preventive value of the IMT judgement was highly prized. “The Nuremberg gallows - as the Oxford lawyer, A. L. Goodhard, wrote - have dispelled the myth of the glory of war”. Making war a crime would make it harder in the future for “dangerous fanatics to drag their nations into it”¹⁰³. Lord Wright seconded him: people of Hitler’s ilk would not be able to count on impunity¹⁰⁴.

In the Western world, Nuremberg inspired deliberations into the need to rebuild, fundamentally, the foundations on which the existing international order was based. For instance to Karl Jaspers this was, though still “faint” and “obscure”, a “beacon of a world order which is nowadays beginning to be a burning necessity for mankind” – or even, as he wrote, a “redemption”. For the only alternative might be the “terrifying threat of mankind’s self-destruction”¹⁰⁵. Meanwhile the celebrated American journalist Walter Lipmann was already talking distinctly of a step taken in the direction of a “global state”¹⁰⁶, a vision that was vehemently contested in Soviet scholarship and propaganda.

Moscow’s attitude towards Nuremberg was ambiguous. On the one hand Moscow aimed to broaden and sharpen the basis for the punishment of Nazi criminals, especially those of the highest rank. In the literature on the subject the USSR was even granted “an important, if not a dominant, role in the formulation of the principle of the criminality of aggressive war”¹⁰⁷. On the other hand, as was seen in the battle over the “safe” wording of the regulation on crimes against

¹⁰² Opening Statement before the IMT, <https://www.roberthjackson.org/speech-and-writing/opening-statement-before-the-international-military-tribunal/>

¹⁰³ AL Goodhard, ‘Uwagi o procesach norymberskich’ [Comments on the Nuremberg Trials] (1948) Państwo i Prawo 28.

¹⁰⁴ Lord Wright, ‘Hitlerowska okupacja Polski w świetle prawa narodów’ [Hitler’s occupation of Poland in the light of the Law of Nations](1948) Państwo i Prawo 95.

¹⁰⁵ K Jaspers, ‘Zróżnicowanie niemieckiej winy’ [Differentiation of German Guilt], in W Borejsza, SH Kaszyński (eds), *Po upadku III Rzeszy. Niemieccy intelektualiści a tradycja narodowa* [After the Fall of the Third Reich. German Intellectuals and the National Tradition (1981) 125.

¹⁰⁶ O Stahmer, ‘Closing Speech on Behalf of Göring’. Nürnberger Staatsarchiv, ref. No. KV Prozesse, Rep. 501/I IMT K 22, 86-87.

¹⁰⁷ Ginsburgs (n 30) 26.

humanity, Moscow wished to restrict the precedent value of Nuremberg to the minimum. (Incidentally, the fact that it agreed to ratify Law No. 10, which contained an analogical regulation, was not effectively threatening, because this was to be realised within its own occupation zone). Besides it was certain that the USSR would block any initiative attempting to establish a permanent mechanism for punishing international crimes.

It does not seem, however, that the USSR's Western partners were really aiming for this, and Jackson's words should be taken at best as symptomatic of an American propensity for verbal idealism. We can pass over the fact that at some point the leaders of the "Big Three" quite seriously considered the possibility of simply executing Hitler and his assistants by firing squad¹⁰⁸. They finally decided on a judicial process, whatever Stalin understood by that. It is symptomatic of the three powers' attitude to the Nuremberg precedent that an attempt to apply the regulations of Law No. 10, as the "uniform legal basis" for the punishment of war criminals in occupied German territories, simply misfired.

Only the French introduced Law No. 10, for this purpose setting up the *Tribunal Général du Gouvernement Militaire pour la Zone Française d'Occupation en Allemagne*, with its seat in Rastat¹⁰⁹. Actually Moscow also chose to take this step by putting sixteen SS men from the Sachsenhausen camp before a military tribunal in Berlin (October 1947). But it was an isolated gesture, which – along with the unusual setting given to the trial – suggests a propagandistic motive. Meanwhile London clearly cut itself off from Nuremberg law. The British tribunals would continue to operate on the basis of the Royal Warrant of George VI, issued on 4 June 1945. The commentary on the regulations issued on the basis of the Warrant states that crimes which the IMT Charter "calls 'crimes against peace' and 'crimes against humanity'" are not covered¹¹⁰.

Although the American Tribunals in Nuremberg acted on the basis of regulations set out in the Law No. 10, this was not a matter of choice. It was forced by circumstances and fitted into the narrow frame of personal jurisdiction of the IMT. In their own practice the "Big Three" preferred to stick to the traditional notion of war crimes and to the Hague bases for punishment. The Soviet position, as Georg Ginsburgs, the author of *Moscow's Road to Nuremberg*, put it: "was *in principio*, quite orthodox, being based essentially on the postulates of the Hague and Geneva agreements"¹¹¹. Besides, the Soviet model of the war criminals processes was limited to its own state territory.

Even so, in December 1946 the General Assembly announced that it would start work towards creating a permanent criminal tribunal and enacting a "Code of Offenses against the Peace and Security of Mankind". The work began

¹⁰⁸ WT Kowalski, *I Wielka koalicja 1941-1945* [The Great Coalition] (1972) 559; F Ryszka (n 3) 218; R Sigel, *Im Interesse der Gerechtigkeit. Die Dachauer Kriegsverbrecherprozesse 1945-1948* (1992) 197, 3; Cf. A Ulam, *Expansion and Coexistence. Soviet Foreign Policy 1917-1973* (2nd ed. 1974) 350 and 559. Cf. H Kissinger, *Dyplomacja* [Diplomacy] (2nd ed 1996) 448.

¹⁰⁹ See *Tägliche Rundschau* of 21 April 1946, No 93.

¹¹⁰ 'British Law Concerning Trials of War Criminals by Military Courts', in *I Law Reports* (1947) 105 Annex I.

¹¹¹ Ginsburgs (n 30) 59.

soon after. However, the Korean War broke out and “the initial enthusiasm for an international code and court became a casualty of war”, to quote Benjamin B. Ferencz¹¹², the American prosecutor in the *Einsatzgruppen* case and a fervent advocate of the creation of the tribunal¹¹³. Thus in 1954, after discussing two prepared proposals, the General Assembly voted by a majority to adjourn their examination until such time as a definition of aggression was enacted. In fact such a definition was enacted twenty years later, but it did not become legally binding¹¹⁴.

The open hostility with which Moscow approached both projects made it possible to blame Moscow alone for their failure. However in Summer 1998, when the diplomatic conference in Rome decided to establish a permanent International Criminal Court, not only did Russia, the USSR’s legal successor, refuse to ratify its Statute, so did the USA. China failed even to sign the Statute, as did Pakistan and North Korea - both in possession of nuclear weapons - and Israel, which is suspected of possessing such weapons. It seems apparent that the states which command sufficient military force – by the nature of things, the greatest powers – would still rather rely on this than on the decision of an external factor, namely the court. In this respect little has changed since the First Hague Peace Conference and the Permanent Court of Arbitration established at that time. The fear of an unfavourable decision prevails over even a positive attitude to the idea of an international judiciary.

It is hard to find a better illustration of this than the position demonstrated by the USA in 1946 when they declared that in disputes with other states that have accepted a similar obligation, they will regard the jurisdiction of the International Court of Justice as obligatory. This is not only because they excluded from their scope of acceptance disputes “with regard to matters which are essentially within the domestic jurisdiction of the United States of America”; by adding the condition, “as determined by the United States of America”, they also ensured for themselves the possibility of arbitrary exclusion of new disputes in cases where there was a threat of being unsuccessful¹¹⁵.

The attitude towards the International Criminal Court (founded on 1 July 2002), lacks this kind of ambiguity. From the very beginning it has been perfectly clear that its jurisdiction, which - according to Article 1 of the Statute – covers the “most serious crimes of international concern”, in any case does not include the citizens of Russia, the USA and China. It is true that the two European nuclear states, France and Great Britain, have ratified the Rome Statute and have accepted such an eventuality. However, as permanent members of the Security Council they could be protected by Article 16: “No investigation or prosecution

¹¹² BB Ferencz, ‘The Draft Code of Offences Against the Peace and Security of Mankind’ (1981) 75(3) 674.

¹¹³ BB Ferencz, *An International Criminal Court. A Step Towards World Peace – A Documentary History and Analysis*, Vol. I: *Half a Century of Hope*, Vol. II: *The Beginning of Wisdom* (1980) 647.

¹¹⁴ See Ferencz (n 113) Vol II, 40-48, 75. The text of the definition in: United Nations General Assembly Resolution 3314 (XXIX).

¹¹⁵ (1960/1961) ICJ Yearbook 218, Chapter X.

may be commenced or proceeded with under this Statute for a period of 12 months after [the] Security Council, in a resolution adopted under Chapter VII of the Charter... has requested the Court to that effect". This is followed by the significant proviso: "that request may be renewed by the Council under the same conditions"¹¹⁶.

A commentary on this "blocking" Article by the author of a work on the authority of the Security Council within the international judiciary leaves no doubt. "As practice demonstrates - Bartłomiej Krzan writes - the proviso may be used at variance with the intentions of the authors of the Statute, leading not so much to postponing the proceedings in time as to complete removal of the Tribunal's jurisdiction"¹¹⁷. In fact it currently is removed with respect to the crime of aggression. It is true that the Statute states in Article 5 p. 1 (d) that this crime is subject to the ICC; however, it says in para. 2 that the Tribunal will start to exercise its jurisdiction "once a provision is adopted... defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime"¹¹⁸. And if this condition were fulfilled, in all probability the jurisdiction would not include persons protected by Article 16.

So at this point in time there is not even a formal possibility – not to mention an actual one – of putting before the ICC any person who, while acting "as a Head of State or Government... or a government official"¹¹⁹, has committed a crime of aggression. And, according to the IMT judgement, this is "the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole"¹²⁰. If the formal obstacles indicated above were to cease to exist, the leaders of one of the greatest powers - or perpetrators protected by them – could in fact be brought to stand before the ICC only after defeat in war – and assuming that the victory would be on the side of justice.

Thus George Finch, the editor of the *American Journal of International Law*, was correct when he asked in 1947 what actual "progress have we made in the suppression of aggressive war? Fear of death has never deterred warriors in the past; it will not deter them in the future". This proved realistic, and the case of Crimea and Ukraine serves as sufficiently strong evidence of it. Finch merely failed to foresee hybrid warfare. But he accurately presented the prospect of the punishment mechanism - assuming such a mechanism were to be created – being mobilised: "A sanction which cannot be applied until hostilities are brought to a successful end and the personal offenders are in the custody of the victors is not one adapted to the prevention of war. In fact, it anticipates the occurrence of war." Towards the close he added: "We must not lull the world into a false sense

¹¹⁶ Quoted in J Izydorezyk, P Wiliński, *International Criminal Court. Powstanie, organizacja, jurysdykcja, akty prawne* (2004) 157 [hereinafter: "ICC"].

¹¹⁷ B Krzan, *Kompetencje Rady Bezpieczeństwa ONZ w międzynarodowym sądownictwie karnym* [The Authority of the UN Security Council in The International Criminal Justice System] (2009) 217.

¹¹⁸ J Izydorezyk, P Wiliński (n 116) 129.

¹¹⁹ Art. 27 of the Statute. See J Izydorezyk, P Wiliński (n 116) 177.

¹²⁰ IMT Judgement (n 7).

of security by making exaggerated claims concerning the verdict of Nuremberg¹²¹.

The reaction of the international community to Moscow's open violation of Article 2 p. (4) of the UN Charter, indeed fell within the lines of the warning quoted here. This reaction was restricted to some extra-legal measures. It is difficult, therefore, not to conclude that as far as the area of crime against peace is concerned, Nuremberg did not lead to any breakthrough in international practice. It proved to be an isolated episode, possible only because of the complete defeat of the Third Reich. Furthermore the fact that the world avoided a global conflict was not the result of the deterrent force of the Nuremberg gallows, but of a peculiar nuclear stalemate caused by the prospect of mutually assured annihilation.

But it would be deeply misleading to argue that matters thereby returned to their pre-Nuremberg position. Russia's actions by no means influenced the state of the law. To quote Ryszka: "A norm which is not observed, even in a majority of cases, does not cease to be law"¹²². And, according to Goodhard, nothing is changed by the fact that those "who are responsible for executing the law cannot cope with this duty"¹²³. It is true that some serious scholarly objections were prompted by the thesis of the Nuremberg judgment which stated that an aggressive war was a crime in the light of international law even before the enactment of the Charter¹²⁴. Currently, however, in the light of Article 5 of the Statute of the ICC, the objections would have no basis; and the fact that the execution of criminal responsibility for aggression has been suspended is irrelevant at this point. Therefore the conviction of Göring and the other leaders of the Third Reich will not cease to constitute a warning.

Secondly, and most importantly: in the 1990s the international criminal justice system came to be reinstated. By that time the number of victims of military conflicts, as well as of the "peace" initiatives practiced by various regimes, had reached probably 30 million¹²⁵, and the perpetrated crimes stood comparison with the Second World War in terms both of scale and cruelty. True, Nuremberg was present in the social consciousness. It was written about in the context of Biafra and Cambodia, as well as with reference to accusations made against Shah Reza Pahlavi and others. But the Nuremberg precedent remained mostly "dormant", to employ the term used by William V. O'Brien, referring to the years 1946-1991¹²⁶.

It could be said that the events in Yugoslavia and Rwanda were the final drops that made the vessel of criminality overflow, that something reached a

¹²¹ G Finch, 'The Nuremberg Trial and International Law' (1947) 41(1) AJIL 35.

¹²² Ryszka (n 3) 270.

¹²³ Goodhard (n 103) 30.

¹²⁴ WV O'Brien, 'The Nuremberg Precedent and the Gulf War' (1991) 31 Virginia Journal of International Law 394-395.

¹²⁵ See Z Cesarz, 'Źródła i obszary zagrożenia we współczesnym świecie' [The Sources and Areas of Threat in the Contemporary World] in K Fiedor (ed) *Idea pokoju i myśli politycznej* [The Idea of Peace and Political Thought] (1986) 138.

¹²⁶ O'Brien (n 124) 398.

critical mass. Yet in this respect the world's resilience has no limits. Therefore it would be appropriate to recall that those events coincided with the collapse of the USSR. In effect, a short-term opportunity arose for the UN Security Council to decide to appoint the *ad hoc* tribunals we have mentioned - the Yugoslav tribunal in the Hague (ICTY¹²⁷), and the Rwandan tribunal (ICTR¹²⁸) in Arusha, Tanzania. Facts were created thereby, which now it would be hard to erase. For they arose from a clearly emerging need and the best evidence of it can be the massive majority of states which voted in favour of the establishment of ICC (120 in support, 7 opposed and 21 abstentions). The significance of this need was expressed by Lord Wright in his own time, when he wrote in his commentary on Nuremberg that the lives of both a nation and the international community "would be impossible if there was not in place a law punishing those who offend it"¹²⁹.

Theodor Meron, the judge and in 2003-2005 the president of the Yugoslav tribunal, believes that the activities of both those tribunals are evidence "that international investigations and prosecutions of persons responsible for serious violations of international law are possible and credible". In an article from 1994 he pointed to the accompanying "rapid growth of the normative principles of the humanitarian law". He also emphasised the importance of "the rules of procedure and evidence each Tribunal has adopted", because they create "a positive environment for the establishment of a standing international criminal court". He even saw "some evidence, albeit anecdotal and uncertain, that the *ad hoc* tribunals... have had some deterrent effect on violations"¹³⁰.

If, therefore, we put the question regarding the significance of Nuremberg from this perspective, the answer should provoke no doubts. Within the scope of war crimes, and particularly crimes against humanity, the Nuremberg precedent, understood in its widest sense, has gained the form of permanent (as it seems now) international legal practice. Putting it in more general terms, one can express the belief that Nuremberg worked best within the area based on international custom (which, according to the position of two American tribunals, also includes the general principles of justice), i.e., the area that grew out of State Practice.

This conclusion is particularly worth highlighting in a publication dedicated to the memory of Professor Karol Wolfke, because he consistently saw State Practice as having a decisive significance in the process of creating custom. And he understood State Practice as "physical" or "material deeds" - that is as "acts of conduct", and not as "promises of such acts" which are clearly juxtaposed to them. In one of his last works he used the phrase "ripe accepted

¹²⁷ International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991.

¹²⁸ The International Criminal Tribunal for Rwanda.

¹²⁹ Wright (n 104) 95.

¹³⁰ T Meron, 'War Crimes Law Comes of Age' (1998) 92(3) AJIL 463.

practice”¹³¹. ”Promises” may become custom only when they are supported by Practice¹³². This was missing in the case of, what in the Nuremberg judgment was expressed as, crime against peace.

In the early 1970s Röling (cited earlier) expressed the view that Nuremberg ”introduced in international law the concept of individual criminal responsibility for the maintenance of a minimum standard of human behavior, as formulated in some essential rules of the law of nations”¹³³. At that time it was an expression of hope rather than a description of reality. Today, 40 years later, there are indeed many indications that this view has been realized. This is not only because of the dynamic development of the judicial system and the fact that criminal law is the most flourishing area of international public law¹³⁴. Although such an opinion already speaks for itself.

Meron stressed here the significance of the fact that the Security Council made the decision to appoint both tribunals as ”an enforcement measure under the binding authority of chapter VII” of the UN Charter. ”The singling out of violations of humanitarian law as a major factor in the determination of a threat to the peace creates an important precedent”, because it ”may foreshadow more effective international responses to violation of humanitarian law”¹³⁵. Krzan is more outspoken. He discusses the possibility of the Security Council forcing states to cooperate with the tribunals by ”ensuring the effectiveness of the decisions they issue”. In the case of the ICC such possibilities are much smaller from the formal point of view. The ICC was appointed by the states themselves, and its jurisdiction is limited by the principle that it is complementary to national jurisdiction. But in this case the author also allows for Council intervention based on its rights arising, both directly and *implicite*, from Chapter VII of the Charter¹³⁶. The only actual restriction here will be the permanent members of the Council’s lack of consent.

The apparently two-tier process of shaping the international judicial system might wound one’s sense of justice. Just as Nuremberg wounded it by ignoring the crimes of Communism. Here a sceptic would wish to recall the process of making the most important decisions which were to pave the way to Nuremberg. While the 1907 Hague Conventions had been enacted with the participation of all the interested states, the Moscow Declaration, the Charter of the IMT and Law No. 10, were enacted by the great powers themselves. They simply stated that they acted ”in the interests of the thirty-two United Nations”¹³⁷. The sceptic might draw attention to the fact that this arbitrary statement clearly

¹³¹ K Wolfke, ‘Some Reflections on Kinds of Rules and International Law-Making by Practice’ in J Makarczyk (ed), *Theory of International Law at the Threshold of the 21st Century. Essays in honour of Krzysztof Skubiszewski* (1996) 581.

¹³² Wolfke (n 1) 41-42.

¹³³ Bert van Röling (n 5) 603.

¹³⁴ Krzan (n 117) 13.

¹³⁵ T Meron, ‘War Crimes in Yugoslavia and the Development of International Law’ (1994) 88(1) *AJIL* 79.

¹³⁶ Krzan (n 117) 197 and 208. Cf. 55ff.

¹³⁷ Moscow Conference (n 2).

shows a relation to the reserve which today's powers display towards the international judicial system as it is being formed.

However, the privileged position which they have actually gained through this mechanism at the same time endows them with the power factor necessary to ensure the enforcement of the law. The fact that the power factor already has an institutional form – because the powers of the Security Council justify such a conclusion (i.e., in practice it functions as an external factor with regard to the states included in the mechanism) – suggests a rather unexpected reflection. As Jaspers (cited earlier) anticipated, under the influence of Nuremberg, this factor could indeed be associated with the prospect of a new world order – a remote prospect, yet perhaps not so very remote in a world changing with extraordinary rapidity.

CONCLUDING REMARKS

The excerpt below from the conclusions the late Professor reached years ago in his first book, *Great and Small Powers in International Law*, will allow us to restore a momentarily lost sense of distance into these deliberations. When properly read, this excerpt may also serve as their punchline. At least since the time of the anti-Napoleonic coalition "a group of great Powers, which was continually changing in its composition, exercised an actual hegemony over the remainder of European States, and following this over the world". Their role was shaping up under the influence on the one hand of the principle of the equality of states, to which the small powers were referring to, and on the other of the strength of those great powers and thus – according to them – of their greater responsibility.

It ended with the compromise in the form of the Covenant of the League of Nations. The great Powers "obtained formal acceptance of their leading role... for the relative insignificant price of the admission also to the discussion of the representatives of smaller States". In the present position of the great Powers in the UN Charter system the Author sees only "an extension" of this compromise¹³⁸. Profesor Wolfke describes it in his insightful, at the same time concise, form, which – while reconciling the fundamental premises of the legal order with the reality of the world – shows, without any illusions, how this order comes to be shaped.

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¹³⁸ K. Wolfke, *Great and Small Powers in International Law From 1814 to 1920. (From the Pre-History of the United Nations)* (1961) 126-129.

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